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THE
FEDERAL REPORTER.

VOLUME 73.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

MAY—JUNE, 1896.

WITH TABLES OF FEDERAL CASES PUBLISHED IN VOLS. 18, C. C. A. REPORTS; 15 AND
22, U. S. APPEALS REPORTS.

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IN THE INDEX.

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FEDERAL REPORTER, VOLUME 73.

JUDGES

OF THE

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² Commissioned January 21, 1895.

³ Commissioned March 1, 1895.

⁴ Resigned May 16, 1896.

⁵ Commissioned May 18, 1896. Confirmed same date.

⁶ Commissioned May 17, 1895. Confirmed and re-commissioned December 9, 1895.

⁷ Commissioned February 4, 1896.

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*Commissioned March 1, 1895.

*Commissioned Nov. 8, 1895. Confirmed and re-commissioned January 15, 1896.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

WATSON v. ASBURY PARK & B. ST. RY. CO. et al.

(Circuit Court, D. New Jersey. March 19, 1896.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

One W., a citizen of New Jersey, brought a suit in a court of that state against a railway company incorporated by that state, and against its officers and directors, to have the railway company declared insolvent, and a receiver appointed, under a state statute. About the same time one V., a citizen of New York, and trustee under a mortgage of the railroad, took possession of the road under the provisions of the mortgage. Thereupon he was made a party to the suit brought by W., and removed the cause to the federal court, on the ground that there was a separable controversy between complainant and himself. Complainant moved to remand. *Held*, that there was no such separable controversy, and that the suit should be remanded.

W. H. Vredenburg, John E. Lanning, and Acton C. Hartshorne,
for the motion.

Arthur Dudley Vinton and W. B. Guild, opposed.

GREEN, District Judge. This suit was originally begun in the court of chancery of the state of New Jersey. Its object, among others, was to have the Asbury Park & Belmar Street-Railway Company decreed to be an insolvent corporation, and to have appointed therefor a receiver, under the provisions of the act of the state of New Jersey concerning insolvent corporations. As was necessary, the railway company and its officers and directors were made parties defendant to the suit. The railway company is a corporation of the state of New Jersey, and the other original defendants, as well as the complainant, are also citizens of New Jersey. About the time of the filing of this bill of complaint, one Adrian Vanderveer, who is the trustee for certain bondholders of the railway company, under an indenture of mortgage made by the company to secure the said bonds, pursuant to its terms and conditions, entered upon and took possession of all the mortgaged premises and property, and is now in actual possession thereof, and is operating the railway. Upon learning of this the complainant obtained leave to amend the bill

of complaint by making Mr. Vanderveer a party defendant. And Mr. Vanderveer, in response to a formal notice, caused his appearance in the action to be entered. No amendment was made to the prayer of the bill for relief, and the only part of the pending controversy which can possibly affect Mr. Vanderveer, as trustee, is that which seeks a decree of insolvency against the railway company, and the appointment of a receiver. Mr. Vanderveer is a citizen of New York, and, under the third clause of the second section of the removal act of 1887, has removed the cause from the court of chancery of New Jersey to this court. A motion is now made on behalf of the complainant to remand the cause to that court. The justification for the removal of a cause from a state to a federal court under this section of the removal act is found solely in the fact that in the cause there exists a controversy separable in its nature from other controversies involved, which is wholly determined as between different states, and which can be fully determined as between them. This presupposes that there must be more than one controversy in the same suit, one of which is between the complainant and the defendant, only, who seeks to remove, and who is a citizen of a state other than the one in which the suit is brought, and that to the final determination of that separate controversy the other defendants are not necessary parties. *Barney v. Latham*, 103 U. S. 205. Or, as was said by the supreme court in *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171, "to entitle a party to removal under this clause, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other." Applying this test, it is clear that this cause has been improperly removed. Mr. Vanderveer, at whose instance the removal was made, is solely interested in the question of the actual possession of the mortgaged premises. A receiver has been asked for by the complainant, and if that prayer be granted the possession of the trustee may be threatened. But to such an application for a receiver the railroad company is a necessary party. No decree for a receiver, as against that company, could be made by this or any other court without its presence in court. Such decree in this cause depends largely, if not entirely, on the alleged insolvency of the railway company, and upon that issue the company is entitled to be heard. Otherwise the proceedings would be open to the objection that the company had been deprived of its property and rights without due process of law. It is apparent, therefore, that this controversy, in which Mr. Vanderveer is interested, likewise deeply and necessarily concerns the railroad company, and it must be a party to its final determination. But the railway company is a citizen of New Jersey, and its antagonist, the complainant, is, as well, a citizen of New Jersey. Hence all the parties on one side of the controversy are not citizens of different states from those on the other, and it is apparent that the state of facts has not arisen which is contemplated by the statute as justifying a removal. Let the cause be remanded.

CROSS et al. v. EVANS.

(Circuit Court of Appeals, Fifth Circuit. May 4, 1895.)

No. 15,891.

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—NEW PARTIES.

An action brought in a state court, against federal railroad receivers, to recover damages for personal injuries occasioned while they were operating the road, was removed by them to the circuit court for the Eastern district of Texas, on the ground of diverse citizenship. Thereafter, by order of the appointing court, the railroad property was transferred by the receivers to a new corporation organized under the laws of Texas, the court reserving jurisdiction over the litigation for the purpose of enforcing existing claims against the receivers and the railroad property. The plaintiffs then, by amended pleadings, made the Texas corporation a party defendant. Quære: Whether, on these facts, the Texas corporation was properly made a party defendant. (Question certified to supreme court.)

2. SAME—JURISDICTION OF FEDERAL COURT.

Quære: Whether, under such circumstances, the federal court for the Eastern district of Texas had jurisdiction and authority to try and determine the issues arising on the record between the plaintiff and the said Texas corporation, and give judgment accordingly. (Question certified to supreme court.)

3. JURISDICTION OF CIRCUIT COURT OF APPEALS—REVERSAL OF JUDGMENT.

Quære: Whether, in case said corporation was improperly made a party, and in case the said court had no jurisdiction to try such issues,—it having nevertheless rendered a judgment for money damages against the Texas corporation, and discharging the receiver from responsibility,—the circuit court of appeals would have jurisdiction and authority, on a writ of error sued out jointly by the receivers and the Texas corporation, to reverse such judgment in toto, and direct a dismissal of the case as against such corporation, and award a new trial against the receivers. (Question certified to supreme court.)

4. SAME.

Quære: Whether, in the case last above stated, if the circuit court of appeals is without such jurisdiction and authority, it would yet have authority to reverse the judgment and remand the cause, with instructions to remand the whole cause to the state court, from which it was removed.

Error to the Circuit Court of the United States for the Eastern District of Texas.

Certificate of questions upon which the decision of the supreme court of the United States is desired by the circuit court of appeals.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. This cause came on to be heard on the transcript of record, showing the following:

The suit was filed originally in the district court of Wood county, Tex., on the 5th day of March, 1891, against George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas Railway, by J. M. Evans, to recover damages on account of personal injuries alleged to have been inflicted on him on the 1st day of September, 1890, while said Cross and Eddy were operating said railway as receivers,

under the appointment of the United States circuit court for the Northern district of Texas. It was alleged that plaintiff, at the time he was injured, was employed on the Taylor, Bastrop & Houston Railway; that their road was a part of the system of the Missouri, Kansas & Texas Railway, and was operated by the receiver. The plaintiff, in his original petition, alleged that he received serious and permanent injuries; among others, the loss of a leg. He was working as a brakeman for said receivers, when a wreck occurred, derailing the train, inflicting upon him the injuries because of which he brought the suit. It was alleged in said original petition that the wrecking of said train was brought about by the drawhead of the fifth or sixth car, or other car in said train of cars, pulling out and dropping down on the track, catching on the ties, and jamming the cars back, and throwing them off the track and into a creek. It was charged that the drawhead was old, defective, out of repair, and in no fit condition to serve for the purpose for which it was intended; that by reason of the bad and defective drawhead the wreck occurred, and plaintiff was injured. This was the only ground of negligence alleged in plaintiff's original pleading. On the 20th day of April, 1891, Eddy and Cross filed their petition and bond for removal of said case in the district court of Wood county, Tex., on the grounds of diverse citizenship, Eddy and Cross alleging that they were citizens of Kansas, and on the further ground of federal question involved; and on the 4th day of May, 1891, the bond was approved, the petition granted, and the cause removed to the United States circuit court for the Eastern district of Texas, sitting at Tyler. On the 23d day of August, 1892, plaintiff filed his first amended original petition, complaining of Eddy and Cross, as receivers, and also of the Missouri, Kansas & Texas Railway Company incorporated under the laws of Texas, though he did not give it its full corporate name. He alleged that since the filing of the suit all properties in the hands of the receivers had passed into the hands of the railway company. In this petition, in addition to the grounds of negligence set out in the original petition, plaintiff, for the first time, alleged further grounds of negligence upon the part of the receivers, substantially as follows:

"That the track, at the point where the cars were derailed, was out of repair, and in an unsafe and dangerous condition. That the rails were old and worn; the fish plates without bolts, and partially unfastened; the spikes which should hold the rails in place were loose, and easily turned from their proper place; the ties decayed, in a rotten condition, and crumbled to pieces under the slightest pressure; the roadbed was soft, uneven, and beaten down so as to produce an unsafe track. And that said train of cars upon which plaintiff was riding was overturned by reason of said bad and defective condition of said roadbed, ties, fish plates, and rails."

On the 23d day of August, 1893, plaintiff filed his second amended original petition, complaining of the receivers and of the Missouri, Kansas & Texas Railway of Texas. He alleged the grounds of negligence as in his first amended original petition. While the railway company is styled in plaintiff's first amended original petition the "Missouri, Kansas & Texas Railway Company," it was in truth the Missouri, Kansas & Texas Railway Company of Texas of

which he was complaining, as the petition shows, and which, as hereinafter appears, was the company brought before the court. It further appears that on the 16th day of April, the legislature of the state of Texas enacted a law authorizing the sale and conveyance of the Missouri, Kansas & Texas Railway Company's lines of railroad, heretofore operated as the property of the Missouri, Kansas & Texas Railway, and to provide for and authorize the sale and transfer and conveyance of said lines of railway to, and the purchase and operation thereof by, a single corporation, to be incorporated under the laws of the state of Texas. This act of the legislature was pleaded at length. Among other clauses, it contained a provision by which the railway purchasing the property of the Missouri, Kansas & Texas Railway should be liable for debts and judgments against it and its receivers in the same way that the Missouri, Kansas & Texas Railway itself would have been liable. Under this authorization the pleadings and evidence both showed that a corporation known as the "Missouri, Kansas & Texas Railway Company of Texas" was formed, and about 1891 the lines of railway of the Missouri, Kansas & Texas Railway, including the Taylor, Bastrop & Houston Railway, were duly conveyed to the Texas company. On the 14th day of September, 1893, the Missouri, Kansas & Texas Railway Company of Texas, having been served, filed its original answer. It excepted to the maintenance of the suit against it because it appeared from plaintiff's petition that both it and plaintiff were citizens of the state of Texas, and that, therefore, the court did not have jurisdiction of the suit, as to it. It also raised the same question by answer in pleading to the merits. This defendant excepted to so much of said petition as sought to recover on account of any defects in the rails, ties, or track, because more than one year had elapsed between the receiving by plaintiff of his injuries, and the setting out of any cause of action based upon this ground. It further pleaded that plaintiff's injury was caused from accident in no way brought about by any negligence of the receivers; that, if there was any negligence upon the part of any one, it was upon the part of the plaintiff alone. It further pleaded that the drawheads were in good condition; that the car handled by it was a foreign car; that it had had the drawheads subjected, from time to time, to close inspection; and that such inspection failed to show any defect. It further pleaded that, if plaintiff had any cause of action, it arose against Eddy and Cross while they were operating the Missouri, Kansas & Texas Railway as receivers; that about the 9th day of June, 1888, in a suit in equity pending in the United States circuit court of Kansas, and by ancillary proceedings in the United States circuit court for the Northern district of Texas, George A. Eddy and H. C. Cross were appointed receivers of the Missouri, Kansas & Texas Railway, and all properties of the railway were turned into their hands; that about the 1st day of July, 1891, by virtue of an order of said United States circuit court, all property in the hands of said receivers was by them turned over to the Missouri, Kansas & Texas Railway Company (not the Missouri, Kansas & Texas Railway Company of Texas, but a corporation of that name formed under the

laws of Kansas), and that said George A. Eddy and H. C. Cross were then discharged as receivers of said property; that said courts retained jurisdiction of said properties and of said pending litigation, for the purpose of enforcing against said receivers and said property such claims as might be presented to and allowed by them; that it was further provided in the orders discharging said receivers that all persons having claims against them by reason of causes of action arising during the receivership should present the same on or before the 1st day of January, 1892, and, in event of their failure to do so, their rights should cease and determine. It was further pleaded that plaintiff well knew of such orders and decrees, but failed and refused to intervene. It further appeared from the pleading that Eddy and Cross had been fully and finally discharged as receivers on July 17, 1892, and that due notice by publication regarding persons having claims against the receivers and intervention had been given. On the 14th of September, 1893, Eddy and Cross adopted the answer of the Missouri, Kansas & Texas Railway Company of Texas, it and they for the first time pleading the discharge of the receivers. On the 8th day of January, 1894, the defendants' demurrers, both to the jurisdiction and to the merits, were overruled. The case was tried before a jury, and on the 11th day of January, 1894, resulted in a verdict and judgment for plaintiff, and against the Missouri, Kansas & Texas Railway Company of Texas, for \$7,500, but discharging Cross and Eddy, receivers. A motion was made and granted for an extension of time in which to prepare motion for a new trial and bill of exceptions. A motion for a new trial was filed on the 17th day of January, 1894, and was overruled on same day. On the 20th day of February, 1894, a bill of exceptions was duly filed and approved by the court, being within the time allowed by the extension granted by the court. On the 20th day of February, 1894, writ of error was allowed to Receivers Cross and Eddy, and to the Missouri, Kansas & Texas Railway Company of Texas. In the pleadings no allegations were made as to any betterments on the road, and in the proof no evidence was offered as to these. On the trial of the case it appeared that Eddy and Cross had been finally discharged as receivers on the 17th day of June, 1892, and the court directed a verdict for them.

The following is the assignment of errors for review in this court:

"Now come H. C. Cross and George A. Eddy, receivers of the Missouri, Kansas & Texas Railway Company of Texas, and say that in the record and proceedings in this cause there is manifest error, in this, to wit: First. The court erred in overruling defendants' general demurrer. Second. The court erred in overruling the first special exception of the Missouri, Kansas & Texas Railway Company of Texas, adopted by Eddy and Cross, to plaintiff's second amended original petition, because both plaintiff and the Missouri, Kansas & Texas Railway Company of Texas were citizens of the state of Texas, and the United States circuit court for the Eastern district of Texas could not take cognizance of the controversy between plaintiff and said defendant. Third. After inspection of the pleadings and record, and hearing the evidence, it appeared to the court that plaintiff and the Missouri, Kansas & Texas Railway Company of Texas were both citizens of the state of Texas, and the court should have declined to proceed with the case, and attempt to render a judgment in favor of the plaintiff against said railway, because, both being citizens of the same state,

this court was without jurisdiction as to the controversy between them; and, it appearing that the receivers had been discharged, said court should have dismissed the case, or, of his own action should have remanded it to the state court from which it came. Fourth. The court erred in overruling the second special exception of the Missouri, Kansas & Texas Railway Company of Texas, adopted by Eddy and Cross, to plaintiff's second amended original petition, because an inspection of the pleadings showed that plaintiff received his injuries on the 1st day of September, 1890, and the first day that any claim was made for damages against defendants on account of the defective condition of the rails, ties, or track, or in any other way than having a defective drawhead, was on the 23d day of August, 1892, so that plaintiff's cause of action was clearly barred by the statute of limitations. Fifth. The court erred in refusing to give the following instructions requested by defendants, 'In this case you are instructed to return a verdict for defendants,' because: (1) Defendant Missouri, Kansas & Texas Railway Company would be liable only in the event that the Missouri, Kansas & Texas Railway Company of Texas would be liable; and said last-mentioned company would be liable, if at all, only in case betterments were made upon the road by the receivers while it was in their hands, and returned to it with such betterments, and there was no pleading or evidence whatever of such betterments being made on the road, nor any pleading nor evidence showing the application of any earnings by the receivers to the betterments of the road. (2) The evidence showed that the wreck was caused by reason of a drawhead having pulled out; that the receivers had made a careful and proper inspection, and failed to find any defect in the drawhead; and the evidence failed to show any negligence upon the part of the receivers, causing the injury. (3) If plaintiff had a cause of action because of the defective condition of the track, the same was barred by the statute of limitations. Sixth. The court erred in this paragraph of his charge: 'You are instructed that it was the duty of Eddy and Cross, operating this road, to furnish the employes a reasonably safe roadbed, and reasonably safe appliances; and, if the injury occurred to plaintiff in consequence of neglect to do either of these two things, he would have a cause of action, unless defeated under the instructions that I hereafter give you,'—because there was no evidence that any defect in the roadbed had ought to do with bringing about the injury, but on the contrary the same was shown to have been caused by a drawhead pulling out, which was a matter of pure accident. Seventh. The court erred in the following paragraph of his charge, as hereinafter shown: 'Therefore the only question left for your consideration is whether the accident was the result of a defective track. If you believe from the evidence that the train was derailed, not in consequence of the drawhead pulling out, but in consequence of a defective track, plaintiff would be entitled to recover, unless you believe from the evidence that the general condition of the track was known to plaintiff before he entered the employment of the company. If you believe from the evidence that he did know the general condition of the track, or knew it was bad, and voluntarily entered into the service of the company, then he would assume the risks incident to such condition. If he knew that, he could not recover. If he did not know it, and entered into the service, and the wreck was caused by that condition of the track, he could recover under the measure of damages as I shall hereinafter instruct you.' Said charge was erroneous in this: that the evidence clearly showed that, even if the track was defective, such defect in no way brought about the injury, or the derailment of the train, but that such derailment was caused by a drawhead pulling out, and that this drawhead was in proper condition, and that the defendants, and none of them, were in any way negligent concerning it. Eighth. The court erred in the following charge, as hereinafter shown: 'And to recapitulate the matter: In your deliberations, determine whether the wreck was the result of the bad condition of the track, or the defective condition of the drawhead. If you find it was caused by a defective drawhead, find for the defendant. If you find that it was not that, but was the result of the defective condition of the track, in that case determine whether or not defendant used reasonable care to provide a reasonably safe roadbed. If you find that was done by the defendant, though you find the accident was caused by a defective track, you will find for the defendant. If you find that the master did not use that care, and the accident was the

result of the defective condition of the track, plaintiff would be entitled to recover, unless you find that he knew that the track was in bad condition.' Said charge was error, in this: that the evidence clearly showed that the track, if defective, in no way caused the derailment of the train, or brought about the injury, but that the same was caused by means of the drawhead pulling out, and that, as to this, defendants and none of them were in any way guilty of negligence. Ninth. The court, after having refused a peremptory instruction to find for the defendants, and having charged the jury as above shown, erred in refusing to give the following charge asked by defendants: 'In this case, it appearing that no claim of negligence, as to a bad track, was made until more than one year after plaintiff received his injuries, and that the only claim of liability against the defendants Eddy and Cross was on account of a defective drawhead and appliances, you are therefore to eliminate from your consideration all testimony as to the condition of the track; and though you should find said track to have been in bad condition, and the wreck caused thereby, you cannot therefore find for plaintiff,'—because it clearly appeared from the evidence that plaintiff received his injuries on the 1st day of September, 1890; that in his original petition, filed within one year, his only claim of a cause of action against defendants was on account of an alleged defect in the drawhead, and its pulling out and striking the track; that he made no claim on account of any defect in the track until the 23d day of August, 1892, more than one year after his injury, and the accrual of his right of action; and that, therefore, his cause of action because of any defect in the track was barred by the statute of limitations. Tenth. There was error in this: Because in this case it appears from the record that the judgment was given for the plaintiff, J. M. Evans, whereas, by the laws of the land, and under the facts in the case, it should have been given for defendants. Wherefore defendants pray that the judgment aforesaid may be reversed, annulled, and held for naught, and that they may be restored to all the rights and things they have lost by reason thereof."

All of the questions presented by the assignment of errors were duly made in the circuit court, and the adverse rulings thereon are duly shown by exceptions made and saved on the trial.

Whereupon, the court desiring the instructions of the honorable the supreme court of the United States for the proper decision of the questions arising herein, it is hereby ordered that the following questions and propositions of law be certified to the honorable the supreme court of the United States, in accordance with the provisions of section 6 of the act entitled "An act to establish circuit courts of appeals and define and regulate, in certain cases the jurisdiction of the circuit courts of the United States, and for other purposes," approved March 3, 1891, to wit:

1. Under the facts of the case, as shown by the pleadings and hereinbefore recited, was the Missouri, Kansas & Texas Railway Company of Texas properly made a co-defendant with the receivers, Cross and Eddy?

2. Under the facts of the case, as shown by the pleadings and hereinbefore recited, had the circuit court of the United States for the Eastern district of Texas jurisdiction and authority to try and determine the issues arising on the record between the plaintiff, Evans, and the defendant the Missouri, Kansas & Texas Railway Company of Texas, and give judgment accordingly?

3. If the first and second questions, or either of them, shall be answered in the negative, has this court, under the writ of error jointly sued out by the receivers, Cross and Eddy, and the Missouri, Kansas & Texas Railway Company of Texas, jurisdiction and authority

to reverse in toto the judgment of the circuit court, and direct a dismissal of the case as against the Missouri, Kansas & Texas Railway Company of Texas, and award a new trial as against Eddy and Cross, receivers?

4. In case this court is without authority to reverse the judgment of the circuit court in favor of Cross and Eddy, receivers, the same not having been complained of by the defendant in error, and in case the first two questions herein certified shall be answered in the negative, has this court authority to reverse the judgment of the circuit court, and remand the cause, with instructions to remand the whole cause back to the state court from which it was originally removed?

It is further ordered that certified copies of the printed record and briefs on file in this case be transmitted, with this certificate, to the honorable the supreme court of the United States.

CARVER et al. v. JARVIS-CONKLIN MORTGAGE TRUST CO. et al.

(Circuit Court, E. D. Tennessee, S. D. March 3, 1896.)

1. EQUITY—BILL TO ENJOIN FORECLOSURE SALE—FRAUD.

A cross bill in a state court to foreclose a mortgage was dismissed, but, on appeal, the state supreme court reversed the decree, entered a decree of foreclosure, and appointed its own clerk to make the sale. Thereupon the mortgagors filed in the state court, whose decree was reversed, a bill to enjoin the clerk from making the sale, alleging fraud in the foreclosure decree. *Held*, that this was not an original bill in the nature of a bill of review, nor was the suit in any sense a mere continuance of the former suit, but, on the contrary, was an independent original suit.

2. EQUITY JURISDICTION—RELIEF AGAINST FRAUDULENT DECREE.

Where an appellate court, after reversing a decree, itself enters a decree finally disposing of the case, and appoints its own officer to execute the same, it is still within the jurisdiction of the court below to entertain an original suit to enjoin the execution of the appellate court's decree, on the ground of fraud in procuring it.

3. REMOVAL OF CAUSES—FEDERAL JURISDICTION.

A federal circuit court, in a case otherwise within its jurisdiction, may take cognizance, on removal, of a suit brought in a state court, to impeach for fraud a decree rendered in the supreme court of the state.

4. SAME—DIVERSE CITIZENSHIP—FORMAL PARTIES.

In a suit to impeach for fraud a decree of a state supreme court, a defendant who was not a party to that decree, because he had been dropped from the case, as having no interest in it, before it reached the supreme court, is to be regarded as a mere formal party, whose presence will not defeat a removal, although he is a citizen of the same state with complainant.

5. SAME.

In a suit to impeach for fraud a decree of a state court, and to enjoin the officer appointed to execute it, the fact that he is a citizen of the same state with complainant will not prevent a removal of the cause; for he is a mere formal party, having no interest in the suit.

This was a suit in equity, brought in a state court of Tennessee, by Sarah E. Carver and another, against the Jarvis-Conklin Mortgage Trust Company and others, to enjoin, on the ground of fraud, the execution of a foreclosure decree rendered by the supreme court

of Tennessee, on an appeal. The cause was removed by defendants to this court, and complainants have now moved to remand it.

Shepherd & Frierson, for complainants.

Brown & Spurlock, for defendants.

SEVERENS, District Judge. The grounds on which this motion is founded by counsel for complainants are:

First. Because this court has not jurisdiction of the subject-matter of the case. It is urged that the case is of such a character that the court could not take original jurisdiction of it if it had been commenced here, and therefore it may not take jurisdiction by removal from the state court. The conclusion is sound if the premises are. To determine whether they are so it is necessary to take into view an outline of the bill. It appears from that, that the complainants, who are husband and wife, made a loan of money from the first-named defendant, and executed their bond to it for the payment of the same. To secure the payment of the money according to the terms of the bond, they executed a deed of trust of certain real estate in the city of Chattanooga, Tenn., to Samuel M. Jarvis, with a proviso that, in case of his death, absence, disability, or refusal to act, Stanley L. Conklin should succeed in the trust, or, in case of his disability, either Jarvis or Conklin might appoint a trustee. For some reason, not disclosed by the bill, Jarvis appointed one W. A. Smith to act as trustee under the mortgage. It is stated in the bill that this appointment was illegal and void, because the conditions upon which the power to make such appointment had not occurred. The special facts pertinent to this allegation are not stated. Default in payment having been made, Smith was proceeding to foreclose and sell under the deed of trust. Thereupon the complainants filed their bill in the state court of Tennessee against the above-named trust company, Jarvis, Conklin, and Smith, to enjoin the sale. The grounds on which that bill was filed were not stated in the present bill. The trust company and Smith answered; Conklin and Jarvis did not. The trust company filed a cross bill against the complainants, and none others, for the purpose, as is to be inferred, though not expressly stated, of foreclosing the mortgage. The complainants dismissed their original bill, and the litigation was continued upon the issues on the cross bill. The defendants in the cross bill (the complainants here) obtained a decree dismissing the cross bill, and the trust company appealed to the supreme court of the state, where the decree of the court below was reversed, and a decree entered for the foreclosure of the trust deed;¹ and McMillan, the clerk of that court, was appointed to make sale of the property to satisfy the complainants' debt. He was proceeding to make the sale when the complainants filed this bill in the same original state court to enjoin that sale. In their bill they characterize it as an "original bill, in the nature of a bill of review, to impeach, and set aside said former decree, for

¹ No opinion.

fraud." In the brief of the complainants' counsel upon this motion, it is said: "The complaint is of irregularity alleged to have occurred in the course of a proceeding in the state court, and the prayer is to enjoin the execution of a decree in the supreme court, and to set aside and reverse the decree." The parties made defendants by the bill are the trust company, Jarvis, Conklin, Smith, McMillan, and certain persons alleged to have been appointed receivers of the trust company in some circuit court of the United States, in some state other than Tennessee, but in what state or in what suit is not stated. The facts constituting the alleged fraud of the trust company in procuring the decree in the supreme court of the state, and such further facts as show the rights and interests of the complainants in the subject-matter of the suit entitling them to file their bill, are stated in the detail. The complainants are citizens of Tennessee. The defendants are citizens of other states, excepting Smith and McMillan, who are citizens of Tennessee. The defendant Smith appeared, and answered that he was acting as agent, with no interest in the subject-matter, and admitting that his appointment as trustee was illegal and void. Thereupon the defendants other than Smith and McMillan filed their petition in the state court for a removal of the cause into the United States circuit court for the proper district, and filed also a proper bond. The suit was removed in due form.

It is contended in support of the motion that this suit is to be treated as a mere continuance of the former suit, and, in substance and effect, a part of it, and not an independent original suit; and the cases of *Jackson v. Gould*, 74 Me. 564; *Ranlett v. Lead Co.*, 30 La. Ann. 56; *Manufacturing Co v. Sprague*, 76 Me. 53; *Mr. Justice Brown, in Wolcott v. Mining Co.*, 34 Fed. 821; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *American Ass'n v. Hurst*, 7 C. C. A. 602, 59 Fed. 1; and *Dill. Rem. Causes*, § 70,—are cited to show that in a proceeding which is a mere graft upon the principal litigation, or a continuance of it, having a thread of vital connection with the main case pending in a state court, a federal court has no jurisdiction to interfere by taking cognizance of it. That doctrine is admitted, but, in my opinion, this is not such a case. There is no remittitur of the first suit from the supreme court of Tennessee to the court of first instance for the purpose of further proceedings. The supreme court entered a final decree, and appointed its own official to execute it. The original court had entirely lost control of the case. It was no longer pending there. It had no power to review the decree. The only place where that could be done, if at all, was in the court which had rendered it. *Hurt v. Long*, 90 Tenn. 448, 16 S. W. 968. The only possible aspect of this bill upon which the state court had authority to entertain it was that of an original bill to impeach the decree of the supreme court for fraud in the party who obtained it. In such case there is no review, in the proper sense of the word, of the former proceeding. The decree in the new suit operates upon the conscience of the party who obtained the former decree, and prevents him from taking any fruit from the decree he has fraudu-

lently induced the court to make in his favor. It does not undo the decree. That stands unreversed, and there is no meddling with it. Undoubtedly, the state court in which this bill was filed had authority to entertain it. Nor can there be any doubt that the proper circuit court of the United States, having jurisdiction in other respects, would be competent to entertain such a suit. It does not matter in what court the fraudulent decree or judgment has been obtained, whether state or federal; suit may be brought in either of such courts to impeach it, provided, always, the suit is in other respects within its jurisdiction. *Barrow v. Hunton*, 99 U. S. 80; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62. The suit was therefore such a one as might properly be removed.

The second ground for the motion is that defendants Smith and McMillan were citizens of Tennessee, of which state the complainants are also citizens, and that for that reason the case should not be removed. As to Smith, it is to be observed that he was not a party to the decree sought to be impeached. He had been dropped out of the case before it reached the supreme court. He acquired nothing by the decree, and was deprived of nothing by it. He had no standing upon it to litigate with the complainants the question whether it was fraudulent or not. And the bill alleges the nullity of his appointment, and fails to show that he is asserting, or threatens to assert, any right or interest in the subject-matter of this litigation. It is not expressly stated, but it is necessarily implied, that the supreme court of the state held that, in the circumstances of the case, Smith was not a necessary party to the foreclosure of the trust deed. The object of this bill is to nullify the decree by disabling the party from enforcing it, and, by consequence, enjoin the sale. By granting such relief or refusing it, Smith will not be affected. If his presence in this litigation is proper at all, he must be regarded as a merely formal party. In regard to McMillan, it appears that he is the officer whom the supreme court designated to make the sale. He has no interest in the subject-matter of the controversy, and is simply the legal functionary provided by the court to execute its decree. The court whose officer he is has no interest in its decrees, nor in their execution, further than the mere official duty to see to it that the party shall be accorded his lawful remedy, if he pursues it. It is a well-established rule that in such a case the officer is a formal party, and some of the decisions are to the effect that he should not be enjoined as a party at all. *Montgomery v. Whitworth*, 1 Tenn. Ch. 175, and the Tennessee cases there cited; *Buckner v. Abrahams*, 3 Tenn. Ch. 346; *Blanton v. Hall*, 2 Heisk. 424; *Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 27 Fed. 770. No stress is laid upon the fact that Smith has answered the bill. Neither Smith nor McMillan having any legal interest in the suit or the decree which may be rendered therein, their presence in the record would not affect the right of the real parties to remove the suit. *Browne v. Strode*, 5 Cranch, 303; *Wormley v. Wormley*, 8 Wheat. 421; *Wood v. Davis*, 18 How. 467; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3; *New York Const. Co. v.*

Simon, 53 Fed. 1, 4; Shattuck v. Insurance Co., 7 C. C. A. 386, 58 Fed. 609.

Neither of the grounds taken for the motion being tenable, it must be overruled. It is so ordered.

BRIGEL et al. v. TUG RIVER COAL & SALT CO.

(Circuit Court, D. Kentucky. February 29, 1896.)

1. FEDERAL JURISDICTION—DIVERSE CITIZENSHIP—COMMENCEMENT OF SUIT—AMENDMENTS.

Diverse citizenship, to give jurisdiction, must exist at the commencement of the suit; and, if it exist then, subsequent changes are immaterial. Even if the allegations of the bill fail, in other respects, to state a case within the jurisdiction, and amendments are subsequently made which obviate these objections, the suit will still be deemed to have commenced with the original proceedings, and the court will have jurisdiction, although one of the complainants, before the amendments, became a citizen of the same state with defendant.

2. APPEAL—COSTS—INTERPRETATION OF MANDATE—JUDGMENT AGAINST TRUSTEES.

Where a judgment for complainants, who sued solely as trustees, was reversed, and the mandate directed that the costs of the appeal should be divided, "appellant to recover costs in the court below," *held*, that the appellate court was to be understood as intending that the judgment for costs should be against the appellees as trustees, and not as individuals.

This was a bill by Leo A. Brigel and Logan C. Murrey, trustees, against the Tug River Coal & Salt Company, the Kentucky & Cincinnati Natural Gas & Fuel Company, and several individuals, to foreclose a mortgage, and for other relief. The defendant the Tug River Coal & Salt Company was the mortgagor, and the other parties were made defendants because they, as judgment creditors or otherwise, claimed an interest in the property; the object being to sell a perfect title by cutting off all adverse rights and liens, and settling all questions of priority in the proceeds of sale. The suit resulted in a decree for complainants. On appeal to the circuit court of appeals the decree was reversed because it did not appear that all the defendants were citizens of different states from complainants, the court reserving the right to complainants to apply for leave to amend the bill so as to show a case within the jurisdiction. 14 C. C. A. 577, 67 Fed. 625. On the return of the case to this court, complainants accordingly amended their bill by dropping all the parties defendant except the mortgagor the Tug River Coal & Salt Company, as more fully appears in the opinion below.

Hollister & Hollister, and Walter A. De Camp, for complainants.
Thos. F. Hargis, and Baxter & Hutchison, for defendant.

BARR, District Judge. The court has heretofore, in June, 1895, allowed the complainants, Leo A. Brigel and Logan C. Murrey, trustees, to amend their bill herein. The effect of this amendment is to drop from the case all of the parties defendant who were originally in the case, except the Tug River Coal & Salt Company. The purpose of

this amendment is, as in the original bill, a foreclosure of the trust deed to Brigel and Murrey, and does not change the nature of the action, except the bill as amended is not for the purpose of marshaling the liens, whether judgment liens or others, which may be against the mortgaged property, but inferior to the mortgage, but simply a foreclosure and sale. The effect of the amendment, as it stands, is to give the court jurisdiction to foreclose the trust deed, as against the Tug River Coal & Salt Company. This amendment was allowed under the authority of the circuit court of appeals, given in the original case, which is reported in 14 C. C. A. 577, 67 Fed. 625. In this amendment it is stated that Leo. A. Brigel, trustee, is a citizen of the state of Ohio, and that Logan C. Murrey, trustee, is a citizen of the state of New York. In the original bill, which was filed March 26, 1892, the same allegation was made.

The defendant the Tug River Coal & Salt Company has filed a plea in which it is alleged that the complainant Logan C. Murrey, trustee, is not a citizen of the state of New York, as in the amended bill alleged, but that said Murrey is, and was at the time said amended bill was filed, and for many months prior to the time at which the judgment heretofore rendered was reversed in the circuit court of appeals, a citizen of the state of Kentucky, and a resident of the city of Louisville, and was a citizen and resident of the same state as the defendant the Tug River Coal & Salt Company at the time said amended bill was filed, and at the time said circuit court of appeals reversed said judgment, and for several months previous thereto. This plea has been set down for argument, and argued, and it must be assumed that the allegations of the plea are true. The plea does not deny the citizenship of Murrey in the state of New York, as alleged in the original bill. Therefore the plea presents the question of whether or not the court has jurisdiction, assuming that Brigel was a citizen of the state of Ohio, and Murrey a citizen of the state of New York, when the original bill was filed and the suit commenced, but is now a citizen of Kentucky, and that the defendant the Tug River Coal & Salt Company was at that time, and still is, a corporation incorporated and organized under the laws of the state of Kentucky. It is settled that if, at the commencement of the suit, the diverse citizenship exists and is alleged, no change of citizenship thereafter will divest the circuit court of jurisdiction. Thus, it is held in *Mullen v. Torrance*, 9 Wheat. 537, that a plea to the jurisdiction, stating that certain parties to the bill were citizens of the state of Mississippi at the time the plea was filed, was defective, because it did not allege that both were citizens of the same state at the time the action was brought. In *Conolly v. Taylor*, 2 Pet. 564, it is stated that if an alien should sue a citizen, and should omit to state the character of the parties to the bill, though the court could not exercise jurisdiction while the defect in the bill remained, yet it might be corrected at any time before the hearing, and the court could take jurisdiction. In that case Chief Justice Marshall said:

"The bill is filed in the court of the United States, sitting in Kentucky, by aliens and by a citizen of Pennsylvania. The defendants are citizens of Ken-

tucky, except one, who is a citizen of Ohio, on whom process was served in Ohio. The jurisdiction of the court cannot be questioned, so far as respects the alien plaintiffs. As between the citizen of Pennsylvania and of Ohio, neither of them being a citizen of the state in which the suit was brought, the court could exercise no jurisdiction. Had the cause come on for a hearing in this state of the parties, a decree could not have been made in it, for want of jurisdiction. The name of the citizen plaintiff, however, was struck out of the bill before the cause was brought before the court; and the question is whether the original defect was cured by this circumstance,—whether the court, having jurisdiction over all the parties then in the cause, could make a decree. The counsel for the defendants maintain the negative of this question. They contend that the jurisdiction depends on the state of the parties at the commencement of the suit, and that no subsequent change can give or take it away. They say that, if an alien becomes a citizen pending the suit, the jurisdiction which once vested is not divested by this circumstance. So, if a citizen sue a citizen of the same state, he cannot give jurisdiction by removing himself, and becoming a citizen of a different state. This is true, but the court does not understand the principle to be applicable to the case at bar. Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit. The court in the first place had complete original jurisdiction. In the last it had no jurisdiction, either in form or substance. But if an alien should sue a citizen, and should omit to state the character of the parties in the bill, though the court could not exercise its jurisdiction while this defect in the bill remained, yet it might, as in everyday practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause. So in this case. The substantial parties plaintiff—those for whom the benefit of the decree is sought—are aliens, and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction. Strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed, between the alien plaintiffs and all the citizen defendants. We can perceive no objection, founded in convenience or in law, to this course."

In the case of *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449, the supreme court, by Chief Justice Fuller, considered and applied the case of *Conolly v. Taylor*, 2 Pet. 564. In that case the suit was brought by Gustavus W. Faber and James S. Watt, describing themselves as both of the city and state of New York, and citizens of the state of New York, executors of the last will of James Symington, deceased, late of the state of New York, against J. C. Anderson, etc., a citizen of the state of Florida, and also against Sarah J. Davis, a citizen of the state of Florida, for the foreclosure by sale of the property of a mortgage given by E. J. Wilson to James Symington, deceased. One of the material questions in the case was whether or not Sarah J. Davis, who was a married woman, was a citizen of the state of New York, or a citizen of the state of Florida. The court decided that she was a citizen of the state of New York, and therefore of the same citizenship as the plaintiffs. This defect was attempted to be amended during the progress of the case by striking out from the address the words "Gustavus W. Faber and James S. Watt, both of the city and state of New York, and citizens of the state of New York," and inserting therein as follows:

"Gustavus W. Faber, of the city and state of New York, and James S. Watt, a subject of the kingdom of Great Britain, temporarily residing in the city of New York."

It was further ordered that:

"It appearing to the court that letters testamentary on the estate of James Symington, deceased, heretofore issued to Gustavus W. Faber, deceased, one of the complainants herein, suing as one of the executors of James Symington, deceased, have been revoked, as is shown by a duly-exemplified copy of the records of the surrogate court of the county of New York, state of New York, filed herein, it is therefore ordered, adjudged, and decreed, on motion of the complainants herein, that this cause proceed in the name of the said James S. Watt, sole surviving executor of James Symington, deceased, and that it be discontinued as to said Gustavus W. Faber, suing as co-executor."

And the exemplified copy referred to, which was filed, showed that Faber had previously filed a petition in the surrogate's office for a decree revoking the letters testamentary issued to him, and that the decree of revocation had been entered. It was insisted, therefore, that as the suit had progressed, and a decree had gone in favor of Watt, as the sole complainant, who was an alien, there was no jurisdictional defect. The court says on this subject:

"But the difficulty with this attempt to obviate the fatal defect in jurisdiction was that the record showed that Watt was not the sole surviving executor of James Symington when the bill was filed, but, on the contrary, when the application to amend was made, plaintiffs exhibited to the court, and filed in the case, exemplified copies of the records and files in the office of the surrogate of the county of New York in the matter of the application of Gustavus W. Faber for a revocation of the letters testamentary issued to him as one of the executors, by which it was shown that on the 4th of May, 1886, Faber filed his petition for the revocation of the letters as to him, and that the order of revocation was entered on that day. It therefore appeared that Watt could not have maintained the bill as amended on the 25th day of August, 1885, when the bill as originally framed was filed; and the jurisdiction could no more be given to the circuit court by the amendment than if a citizen of Florida had sued another in that court, and subsequently sought to give it jurisdiction by removing from the state."

In the case of *Hardenbergh v. Ray*, 151 U. S. 112, 14 Sup. Ct. 305, it was held that the jurisdiction once attached between citizens of different states is not defeated by the substitution of other parties who have the same citizenship of the plaintiff. This was a suit in ejectment brought by the claimant against the tenants in possession. Subsequently the landlords were substituted as defendants, who were citizens of the same state as the plaintiff, and the question of jurisdiction was made; and the court held that the test was the diverse citizenship of the original parties, and at the time of the commencement of the suit, and that, therefore, the jurisdiction continued notwithstanding the substituted defendants.

It is, however, insisted in this case that the filing of the amended bill is the commencement of the suit, and that, as this bill makes a defendant a party who is of the same citizenship as one of the complainants, the court has no jurisdiction, and cannot proceed.

In view of the decisions of the supreme court, I think this contention cannot be maintained. In the case of *Everhart v. Huntsville College*, 120 U. S. 223, 7 Sup. Ct. 555, in which the complainant did not allege citizenship in Wisconsin, but that he was a resident merely, the court, after saying that the suit must be dismissed for want of jurisdiction, as it did not affirmatively appear on the face of the record that there was a diverse citizenship, said:

"If, on the return of this case to the circuit court, it is made to appear that the citizenship necessary for the jurisdiction existed at the time the suit was

brought, it will be for that court to determine whether an amendment to the pleadings ought to be allowed, so as to cure the present defects."

In another case (*Insurance Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193) the suit was brought in the name of the administratrix of Rhoads. It was alleged that:

"Ann Eliza Rhoads, administratrix, etc., of Maris Rhoads, late a citizen of the state of Pennsylvania, deceased, complains of the Continental Life Insurance Company of Hartford, Connecticut, a foreign corporation, incorporated under the laws of the state of Connecticut, and a citizen thereof."

This was held not to be sufficient to give the court jurisdiction. The court say:

"It does appear that the defendant was at the commencement of the suit a citizen of Connecticut, and that the intestate, Maris Rhoads, was at the time of his death a citizen of Pennsylvania; but there is nothing to show the citizenship of the plaintiff, and the jurisdiction depends upon her citizenship, and not on that of her intestate."

The case was dismissed for want of jurisdiction, and the court say:

"If the plaintiff was actually a citizen of Pennsylvania when the suit was begun, the record cannot be amended here so as to show that fact; but the court below may, in its discretion, allow it to be done when the case gets back."

In the case of *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 873, which is one where the record did not show the requisite diverse citizenship, the court say:

"If the necessary citizenship actually existed at the time the suit was begun, it will be for the court below to determine when the case gets back whether the record shall be amended so as to show that fact, and thus make out the jurisdiction."

In these cases the court has assumed the suit was commenced when the original proceedings commenced, although the court had no jurisdiction as the record then stood, and required the diverse citizenship to be determined as of the commencement of the suit over which the court then had no jurisdiction.

It is true that I have heretofore decided that suits brought by the receiver, Baldwin, under the order of the court in the original case before amendment, when the court had no jurisdiction, were void, and dismissed those suits; yet this, we think, is a different question from the one now presented, which is as to when is the commencement of a suit, and when is the time when the diverse citizenship should exist. It seems from these and other authorities that the time of the diverse citizenship, to give jurisdiction, is at the commencement of the suit; and that without regard to whether or not the proceeding, on its face, has stated facts sufficient to give the court jurisdiction. If there are not sufficient facts stated to give the jurisdiction, or facts stated which show the court has no jurisdiction, orders made before these statements are amended or changed so as to show jurisdiction in the court would be void, but, when such amendments or changes are made, the question of jurisdiction, if it depends upon diverse citizenship, must relate back to the commencement of the proceeding; and that without regard to whether the original allegations have, or not, shown jurisdiction in the court. If this is not the correct rule, then the authorization of amendments

to proceedings such as in the cases cited, and others (see *Morgan's Ex'r v. Gay*, 19 Wall. 81; *Robertson v. Cease*, 97 U. S. 650; and *Johnson v. Christian*, 125 U. S. 644, 8 Sup. Ct. 989, 1135), is without meaning. If the court is without any jurisdiction, and without authority to allow pleadings to show the jurisdictional facts as existing at the commencement of the suit, or to strike out unnecessary parties which prevent the taking of jurisdiction, the authorizing of amendments is idle, and requiring diverse citizenship to exist at the commencement of void proceedings is without reason, since in that event the commencement of a suit must be when the diverse citizenship is first alleged, and the existence of the requisite citizenship should be as of that time, and not at the commencement of the original proceedings. In this case the complainants and the present defendant were the only necessary parties to a foreclosure proceeding, and all the other parties in the original proceeding were unnecessary. We therefore conclude that the plea is defective, and the facts therein stated, being conceded to be true, do not oust or prevent the court from taking jurisdiction.

The next matter to be disposed of is the motion entered by the complainants, Brigel and Murrey, to modify the judgment heretofore entered on the mandate of the circuit court of appeals so that it shall affirmatively appear that the judgment for costs rendered therein against said Brigel and Murrey be as trustees, and not in their individual capacity. On the return of the case there has been no special order,—only the mandate copied in the records of the court. The mandatory part of said mandate is as follows:

"In consideration whereof, it is now ordered, adjudged, and decreed that the case be, and the same is hereby, remanded to the court whence it came, with instructions to dismiss the bill unless, upon application for leave to amend the bill, leave to so amend it as to exhibit a case within the jurisdiction shall be granted by that court. The costs of the appeal to be equally divided. The appellant to recover costs in the court below. You are therefore hereby commanded that such proceedings be had in such case, in conformity with the opinion and decree of the court, as according to right and justice and the laws of the United States ought to be had, said appeal notwithstanding."

The opinion itself, at its conclusion, says:

"Appellant made no objection to the jurisdiction in the circuit court, and did not call the court's attention to the lack of jurisdiction. While the defendant and appellant must recover costs in the court below, we do not think it should be allowed full costs in this court. The costs of appeal will be equally divided. Reversed, and cause remanded to the circuit court of the United States for the district of Kentucky, with instructions to dismiss the bill unless, upon application for leave to amend the bill, leave to so amend it as to exhibit a case within the jurisdiction shall be granted by that court."

It will be seen from these quotations from the mandate and the opinion that the appellant, the Tug River Coal & Salt Co., was given its costs against the appellees; and the inquiry is whether the circuit court of appeals intended to have this a personal judgment against Murrey and Brigel, or as against them as trustees. As Murrey and Brigel sued alone as trustees under the deed of trust, and not in their individual capacity, it seems to us that the fair construction of the mandate and the opinion of the court is that the judgment for costs was to go against them as trustees, and not indi-

vidually. Their standing in the court was as trustees. Murrey, at least, had no other standing. And, while the court might have adjudged the costs against the complainants individually, we do not think that it has done so. The question is not how the costs should have been adjudged, but what the circuit court of appeals intended to be done. We therefore conclude that the true construction of the mandate and opinion is that the judgment for costs should go against Murrey and Brigel as trustees, and not individually. As we do not consider the judgment already entered to be other than as now indicated, the motion to modify the judgment should not be granted in terms; but the clerk, in issuing the execution, if one is requested, upon this judgment for costs, should issue it against Murrey and Brigel as trustees, and not individually. Their motion to modify the judgment so as to allow these costs which have been rendered against them as trustees to be set off against the mortgage debt due by the Tug River Company to the trustees in their representative capacity is not now disposed of, but reserved. The proper orders in pursuance of this opinion will be entered.

UNITED STATES v. BELKNAP et al.

(Circuit Court, S. D. California. March 23, 1896.)

No. 579.

1. LIMITATIONS—SUITS BY UNITED STATES.

Statutes of limitation of the several states do not apply to actions wherein the government of the United States is plaintiff.

2. CIRCUIT COURTS—JURISDICTION—SUITS ON OFFICIAL BONDS.

The United States circuit courts have jurisdiction under section 1 of the act of August 13, 1888 (25 Stat. 433), concurrent with the district courts, of suits by the government on the official bonds of officers chargeable with public moneys.

Theo. S. Shaw, for defendants.

WELLBORN, District Judge. This is an action at law, against Corington G. Belknap and others, to recover \$731.21 for a breach of the official bond of said Belknap as an Indian agent. The complaint, after setting forth the appointment of said Belknap as Indian agent, alleges, among other things, that the bond was made and delivered July 26, 1884, by said Belknap as principal, and the other defendants as sureties; that said Belknap held and exercised the agency to which said bond relates from July 26, 1884, until August 30, 1887, inclusive. The breach alleged in the bond is the failure of said Belknap to account for and pay over to the plaintiff certain moneys, received by Belknap in his capacity as Indian agent, and which belonged to said plaintiff.

Defendants have demurred to the complaint, on the following grounds: First, that the action is barred by the statutes of limitation; second, that the circuit court is without jurisdiction of the action; third, that the complaint fails to allege that said official

bond was approved by the secretary of the interior; fourth, that the complaint does not allege a demand before suit.

1. Defendants contend that the claim sued on is barred by section 337, Code Civ. Proc. Cal. To this I cannot agree. Statutes of limitation of the several states do not apply to actions wherein the government of the United States is plaintiff. *U. S. v. Thompson*, 98 U. S. 486; *U. S. v. Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 6 Sup. Ct. 1006; *U. S. v. Hoar*, 2 Mason, 312, Fed. Cas. No. 15,373.

In the case first above cited, the facts are thus stated by Mr. Justice Swayne, who delivered the opinion of the court:

"The United States sued upon the bond of the defendant in error Clark W. Thompson, as superintendent of Indian affairs in Minnesota. The other defendants in error were sued as his sureties. The breach alleged was that Thompson, as such officer, had received \$10,562.27 of the moneys of the United States, which he had neglected and refused to account for, and had converted to his own use. The defendants pleaded that the cause of action did not accrue within ten years next preceding the commencement of the suit. The United States demurred. The demurrer was overruled, and judgment rendered for the defendants. The United States has brought the judgment here for review. This case turns upon a statute of the state of Minnesota which bars actions *ex contractu*, like this, within a specified time, and the same limitation is applied by the statute to the state. The United States are not named in it. The court below held that the statute applied to the United States, and hence this judgment."

The syllabus of the case (25 U. S. [Lawy. Ed.] 194) is as follows:

"(1) A state statute of limitations cannot bar the United States. (2) The judiciary act of 1789, that the laws of the several states shall be regarded as rules of decisions in the courts of the United States, does not apply in such a case."

The argument of the defendants' counsel here that "federal courts will, in actions at common law, follow the statutes of limitation of the state where such courts are held, and the construction given to those statutes by the courts of the states which enacted them, so far as they apply," was also made in the case last cited, and is adverted to in the opinion of the court, at page 490, 98 U. S., as follows:

"The only argument suggested by the learned counsel for the defendants in error is that the judiciary act of 1789 (1 Stat. 92), re-enacted in the late revision of the statutes, declares 'that the laws of the several states, except where the constitution and treaties of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' It is insisted that the case in hand is within this statute. To this there are several answers. The United States, not being named in the statute of Minnesota, are not within its provisions. It does not and cannot 'apply' to them. If it did, it would be beyond the power of the state to pass it, a gross usurpation, and void. It is not to be presumed that such was the intention of the state legislature in passing the act, as it certainly was not of congress in enacting the law of 1789. *U. S. v. Hoar*, supra; *Field v. U. S.*, 9 Pet. 182. The federal courts are instruments competently created by the nation for national purposes. The states can exercise no power over them or their proceedings, except so far as congress shall allow. This subject was considered in *Bank v. Dearing*, 91 U. S. 29; and we need not pursue it further upon this occasion. The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them. If the states can pass statutes of limitation binding upon the federal government, they can, by like means, make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark."

From the foregoing extracts, it will be seen that the supreme court of the United States has expressly decided against defendants' contention. Since, then, the statutes of limitation of the several states do not apply to actions wherein the government of the United States is plaintiff, it follows that there cannot be any limitation of time as to said actions, other than those prescribed by congress. The defendants, in their brief, have not called my attention to any act of congress bearing upon this subject. The plaintiff, however, refers to an act of congress entitled "An act requiring notice of deficiency in accounts of principals to be given to sureties upon bonds of United States officials, and fixing a limitation of time within which suits shall be brought against said sureties upon said bonds," approved August 8, 1888, the second section of which is as follows:

"Sec. 2. That if, upon the statement of the account of any official of the United States, or of any officer disbursing or chargeable with public money, by the accounting officers of the treasury, it shall thereby appear that he is indebted to the United States, and suit therefor shall not be instituted within five years after such statement of said account, the sureties on his bond shall not be liable for such indebtedness."

It does not appear from the complaint, however, as suggested in the plaintiff's brief, that any statement, such as that described in said section, was made by the accounting officers of the treasury, five years or more before the commencement of the action. The only allegation bearing upon this point is that "the official accounts of the defendant Belknap have been heretofore, to wit, at various and stated times, prior to the 16th day of June, 1890, adjusted at the treasury department," etc. The complaint was filed November 7, 1893, and therefore, even if the allegation last quoted were equivalent to an allegation that the official accounts of said defendant had been stated at the treasury department, yet it does not appear affirmatively but that said statement was made within five years of the commencement of this action.

2. The next contention of the defendant is that the district, and not the circuit, court of the United States, has jurisdiction of this action. The plaintiff concedes that the district court has jurisdiction, by virtue of subdivision 4, § 563, Rev. St. U. S., but insists that the circuit court also has jurisdiction, by virtue of section 1 of the act of August 13, 1888 (25 Stat. 433), which last-named section, so far as applicable, reads as follows:

"That the circuit courts of the United States shall have original cognizance * * * of all suits of a civil nature, at common law or in equity, * * * in which controversy the United States are plaintiffs or petitioners."

This section has been critically analyzed at circuit in two cases, and the interpretation now contended for by the plaintiff approved in each case. *U. S. v. Kentucky River Mills*, 45 Fed. 273; *U. S. v. Shaw*, 39 Fed. 433. While the question is not free from difficulty, I am satisfied with, and shall adopt, the conclusion reached in said cases. See, also, *Fales v. Railway Co.*, 32 Fed. 673.

3. With reference to the third ground of demurrer, namely, that the complaint fails to allege that the bond was approved by the secretary of the interior, it is only necessary to say that there is

no statute requiring such approval. If, however, there were such a law, then the allegation of the complaint that the "defendants, and each of them, * * * did make, execute, and deliver to plaintiff their joint and several bond," necessarily implies approval of the bond. There could be no delivery by defendants without an acceptance by the plaintiff, and acceptance is approval.

4. Defendant further contends that the complaint is bad, because it fails to allege a demand upon the defendants before the suit was brought. If any demand was necessary, which I doubt, it is sufficiently alleged in the complaint, as follows: "That the said defendants, though often demanded, have severally neglected and refused * * * to pay said sum."

The objections to the complaint are not well taken, and the demurrer is overruled.

SCHENCK et al. v. DIAMOND MATCH CO.

(Circuit Court of Appeals, Third Circuit. March 14, 1896.)

APPEAL—DISMISSAL—DELAY IN FILING BOND.

A delay of about a month in filing bond for costs, after allowance of an appeal from a decree granting a perpetual injunction, *held* not so unreasonable as to require dismissal of the appeal, especially when it did not appear that appellee was prejudiced thereby.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Motion to dismiss the appeal. The following certificate of the clerk of the court below was produced before this court:

Circuit Court of the United States, Eastern District of Pennsylvania.

I, Samuel Bell, clerk of the circuit court of the United States in and for the Eastern district of Pennsylvania in the Third circuit, do hereby certify that in a cause lately pending in said court wherein the Diamond Match Company was complainant and Joseph H. Schenck and John M. Moore, co-partners doing business as Dr. J. H. Schenck and Son, and Binghamton Match Company, respondents, a decree for perpetual injunction was entered by said circuit court on the seventh day of January, A. D. 1896, in favor of complainant and against respondents, and that on the fourth day of February, A. D. 1896, the respondents prayed the allowance of an appeal to the United States circuit court of appeals for the third circuit, which was allowed by the court, and that on the third day of March, A. D. 1896, a bond in the sum of \$500 to secure costs on appeal was approved, and a citation duly issued. In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court at Philadelphia, this sixth day of March, A. D. 1896, and of the independence of these United States the 120th.

[Seal.]

Samuel Bell,
Clerk Circuit Court of U. S., East. Dist. of Penna.

Charles A. Brodek, for appellants.

Joshua Pusey, for appellee.

Before ACHESON, Circuit Judge, and WALES and GREEN, District Judges.

ACHESON, Circuit Judge. The certificate before us shows that within 30 days after the entry of the decree granting an injunction,

namely, on February 4, 1896, the appeal was applied for in the court below, and was allowed; and that on March 3, 1896, the bond for costs was approved by the court. It has been held by the supreme court that the omission to give a bond for costs at the time the appeal is taken does not necessarily avoid the appeal, and that the appellant may be allowed to file the bond afterwards, within a reasonable time. *Anson v. Railroad Co.*, 23 How. 1; *Davidson v. Lanier*, 4 Wall. 447, 454; *Seymour v. Freed*, 5 Wall. 822. These decisions, we think, justify us in overruling the motion to dismiss the appeal here. We are the more inclined to deny the motion because it is not apparent to us that the appellee has been prejudiced in any respect by the delay in filing the bond. Motion denied.

RANDOLPH v. ALLEN et al.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1896.)

No. 205.

1. APPEAL—ASSIGNMENTS OF ERROR.

Assignments of error are necessary in appeals, as well as on writs of error; but they should be directed to the rulings of the court, and, where the decree appealed from is one confirming a master's report, the assignments should not be in the form of elaborate arguments in support of the contention that the court erred in sustaining the master's findings.

2. SAME—AMENDMENT OF TRANSCRIPT—CERTIORARI.

Presumptively the transcript filed in the appellate court is correct, and that court has no power, by certiorari, upon ex parte affidavits, to cause the record to be amended by inserting a paper which appellant claims was introduced before the master, but of which neither the master nor counsel for appellee has any recollection.

3. SAME—REVIEW—MASTER'S FINDINGS.

Where all the issues have been referred to a master to hear and decide, and his report is confirmed, after the overruling of exceptions thereto, an appellate court is required to treat his findings as so far correct as not to be disturbed, unless clearly in conflict with the weight of the evidence. *Kimberly v. Arms*, 9 Sup. Ct. 355, 129 U. S. 512, followed.

4. FRAUD—REPRESENTATIONS AS TO FINANCIAL STANDING.

A person about to enter into a contract with a stranger in a distant state, which required large advances of money, inquired of a member of a banking firm, doing business in the region of the stranger's residence, as to the latter's business character and responsibility. The banker made certain favorable statements, and also solicited and obtained for his firm the banking business connected with the transfer of the funds. *Held*, that the firm was under no obligation to make a voluntary disclosure of the fact of a considerable indebtedness to them by the stranger arising from his ordinary business transactions, when they had no reason to question his integrity or financial ability.

5. INSOLVENCY—PREFERENCES.

The giving of a mortgage by a failing debtor to secure one of his creditors, on condition that the latter shall pay a note held by another creditor, which condition is complied with, is not a diversion of funds, nor an unlawful delay or hindrance of other creditors, but the mortgage merely operates as a double preference, and is not forbidden by the laws of Texas. *Sonnen-thell v. Trust Co.* (Tex. Civ. App.) 30 S. W. 945, followed.

6. MORTGAGES—SALE UNDER TRUST DEED—EMPLOYEE AS TRUSTEE.

In Texas a mortgagee may act as trustee to sell under a mortgage to himself, and therefore an employé of a mortgagee may also be authorized in

the deed to act as trustee, and a sale by him will not be void merely because he acts by direction of his employer.

7. FRAUD—REPRESENTATIONS AS TO FINANCIAL STANDING—CONCEALMENT.

A representation by a member of a banking firm, upon inquiry by one about to enter into a contract with one of their customers, that a bond offered by the customer as a guaranty of his performance of the contract is a good bond, does not impose on the bankers any duty to voluntarily disclose the fact of an indebtedness of one of the bondsmen to them, where such indebtedness is not of a character to induce a belief on their part that its existence will injuriously affect the obligee; nor does the representation render it inequitable for the bankers to enforce their demand against the property of such bondsman before the claims of the obligee growing out of the contract are satisfied.

8. CONSTRUCTIVE TRUSTS—FOLLOWING MONEY INTO PROPERTY.

Where one advanced money to a cattle buyer, under a contract whereby the latter was to purchase and deliver cattle to him, and it afterwards appeared that he was being defrauded by the cattle buyer, *held* that, even if he elected to treat the money advanced as obtained by fraud, and the title thereto still in himself, and conceding that he would then have a right to follow the money into property purchased with it, he could not do so in respect to a herd of cattle which was purchased in part with other moneys. *Litchfield v. Ballou*, 5 Sup. Ct. 820, 114 U. S. 190, followed.

9. MORTGAGE FORECLOSURE—RIGHTS OF CREDITORS AS AGAINST EACH OTHER.

Whatever moral obligation a creditor, who has bought in property of his debtor on foreclosure under a mortgage to himself, may be under to another creditor to make some allowance on the balance of his indebtedness, because of a possible excess of value of such property over the price bid for it, he is under no legal obligation to do so; and where such other creditor claims a right in the property so acquired, and his conduct is such as to indicate future litigation with him, it is not unlawful or fraudulent, as against him, for the first-named creditor to stand upon his strict legal rights, and, by enforcing further liens against the debtor's property, obtain as great a margin as possible, so as to recoup himself, out of the possible profits thereof, for the legal and other expenses, and the growing interest account.

10. BANKS AND BANKING — COLLECTION OF DRAFTS — RESPONSIBILITY OF BANKERS.

The mere collection by bankers of drafts of their customer, and the placing of the money to his credit as a depositor, with the knowledge that it is advanced to him by another to enable him to buy and deliver cattle to such other, creates no implied obligation on the part of the bankers to exercise a supervisory control over the business of their depositor, so as to see that the money is properly applied by him. *Bank v. Gillespie*, 11 Sup. Ct. 118, 137 U. S. 411, distinguished.

11. GUARANTY—REPRESENTATIONS AS TO FINANCIAL RESPONSIBILITY.

In the face of a positive refusal of a banking firm to sign a bond guarantying the performance, by one of their customers, of a contract with a third party, it should not readily be inferred that they made such representations in respect to the character and financial responsibility of their customer as would impose upon them the same responsibility they would have incurred by signing the bond.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This is an appeal from a decree, rendered July 8, 1893, by the circuit court for the Northern district of Texas, overruling exceptions to the report of a master, and dismissing the bill of complaint. The defendants named in the bill are Heard, Allen & Floore, bankers, of Cleburne, Johnson county, Tex.; S. B. Allen and John W. Floore, members of said firm, sued individually; S. E. Moss, sued as claiming to be the purchaser of Allen's interest in the firm of Heard, Allen & Floore, and in the lands mentioned in the bill; Sam White; Sophia White; Andrew Green White; and William T. Hudson.

The bill charged that William T. Hudson, Sam White, and Heard, Allen & Floore formed and carried out a combination and conspiracy against complainant, his rights and property, and had "absolutely refused to pay and convey to complainant certain moneys, and certain cattle and the proceeds thereof, and to convey certain described lands claimed to be held fraudulently against the right and title of complainant, and which, in equity and good conscience, should be transferred to complainant." The averments of the bill are, in substance, that L. V. F. Randolph, of the city of Plainfield, state of New Jersey, in reliance upon certain alleged false representations, made by one W. T. Hudson, of Kopperl, Bosque county, Tex., at the time a depositor and customer of the banking firm of Heard, Allen & Floore, and in further reliance upon alleged false assurances of said firm, through S. B. Allen, to the effect that Hudson was financially able to perform a proposed contract, hereinafter referred to, and was a man of good character for honesty and integrity, and that a bond offered as security for the performance of said contract was perfectly good and safe, did, on May 8, 1885, enter into a contract for the purchase from W. T. Hudson of a large number of cattle, and accepted the bond referred to guaranteeing the performance by Hudson of the stipulations of the contract; that, by the contract, Hudson agreed to deliver to Randolph, on or before July 1, 1885, at Red Fork ranch, in the Indian Territory, 5,500 head of steer cattle, for which complainant agreed to pay \$66,000; that \$14,000 of such agreed price was paid, at the time of the execution of the contract, by draft upon a New York bank, and, about May 22, 1885, a second draft for \$16,000 was paid upon presentation; that these drafts were collected through Heard, Allen & Floore, at their special solicitation; that the remainder of the purchase price was to be paid on the delivery of the cattle, and, moreover, the agreement provided, in the event of a total failure to perform, Hudson should pay and forfeit \$24,000 as liquidated damages, and for a partial failure he should pay and forfeit \$5 for each head undelivered. The sureties on the bond were B. F. Vinson, A. J. Hudson, George D. Hudson, John R. Haley, Sam White, and L. B. Hudson. In addition, the bill averred that the representations and inducements of Hudson and Heard, Allen & Floore, upon which complainant relied in making the contract, "were false, and, your orator believes, and so charges, were made to induce the contract by and through which your orator parted with his money." The bill further averred that, at the time of the making of the aforesaid representations by Heard, Allen & Floore, they were creditors of said Hudson in a large sum; that a part of this indebtedness was then overdue, and that the firm fraudulently concealed knowledge of such facts, which, if they had been made known, complainant would not have made the contract, and parted with his money in accordance with the terms thereof; that Hudson had been frequently indicted, prior to the said representations, for grave crimes and felonies, and, upon belief, complainant charged that Heard, Allen & Floore well knew of such indictments, and concealed their knowledge from complainant; that Allen, on May 25, 1885, in reply to a telegram which Randolph sent, a day or two following the second payment upon the contract, falsely stated that reports to Randolph of possible bad faith of Hudson were false, and that the cattle which were to be delivered under the contract were all bought, and would move about June 1st, and substantially reiterated the statements in a subsequent letter; that complainant, very soon after receipt of the telegram and letter from Allen, went to Texas, and personally investigated the progress being made by Hudson, and from Kopperl proceeded to Red Fork ranch, and there awaited the arrival of the cattle. It was averred that, about the 12th of June, Hudson started with about 3,000 head of cattle, ostensibly to make delivery under his contract, but on the way began to cut out and sell portions of the herd, and that, learning of this, Randolph hurried back to Texas and employed counsel to protect his interests; and the bill charged that, subsequent to the execution of the contract, "the parties to the contract had conveyed to one B. F. Hudson about sixty or seventy thousand dollars' worth of property," and L. B. Hudson has transferred his property to his wife, and caused her to make a conveyance to one Black, all with intent to hinder and delay and defraud complainant.

Specific averments are contained in the bill as to conveyances executed by Sam White in the latter part of July, 1885, to his wife and children, of about 2,000 acres of land, and, following said conveyances, on August 6th, White is

alleged to have executed a mortgage on the same land to Heard, Allen & Floore, and it is alleged that, on the next day, White and his wife and children executed another mortgage to said firm upon the same property, charged to be fraudulent, and that on said last-named date White also gave said firm a chattel mortgage upon 400 head of cattle. It was charged that Heard, Allen & Floore, in order to have a pretense of a claim upon which to base an incumbrance upon the White land, and with intent to hinder, delay, and defraud Randolph, and to protect White from process in a suit then anticipated to be brought by Randolph, did, about August 6, 1885, pay at the First National Bank of Cleburne a note for the sum of \$3,480.24, made by W. T. Hudson to or for the benefit of one Mrs. Blair and said to bear the name of Sam White. The bill averred that, on August 14, 1885, Randolph instituted an action in the circuit court of the United States for the Northern district of Texas, sitting at Dallas, upon the contract and bond of May 8, 1885, and sued out a writ of attachment, which was levied upon lands claimed to be the property of the defendants, including the White land, heretofore referred to as mortgaged to Heard, Allen & Floore. It was averred that, at a sale, in October, 1885, under the mortgage to them, Heard, Allen & Floore became the purchasers of the mortgaged cattle for \$2,500, and of the real estate mortgaged to them by White for \$2,000; and the bill alleged that the firm thereafter realized many thousands of dollars from the sale of said cattle, and received notes and promises to pay for a portion thereof. It was averred that, subsequent to the bidding in of said property by Heard, Allen & Floore, Randolph obtained a judgment in his suit, instituted, as above stated, against Hudson and his bondsmen, and caused the lands formerly owned by White, and then claimed by Heard, Allen & Floore as their property under the said purchase, to be sold upon an order of sale entered in said suit, and became the purchaser at said sale for the sum of \$2,250. Complainant further alleged that Heard, Allen & Floore appropriated \$10,000 of the \$30,000 advance payments upon the contract, by depositing the amount to the credit of Hudson, and then charging the account with a part of the debts due the firm by Hudson, which had arisen prior to the making of the contract with Randolph. It was averred that, when Randolph returned to Texas from Red Fork ranch, 1,959 of the herd of cattle with which Hudson had left Texas were then in the Indian Territory, and were subsequently driven back into Texas by the government authorities; that Randolph caused said cattle to be attached in his then pending action against Hudson and his sureties; that the same were replevied by Hudson, and were subsequently sold by Hudson to the sureties on the replevin bond, he (Hudson) taking the note of said sureties therefor in the sum of \$20,660; that Heard, Allen & Floore employed attorneys to procure said attachment to be quashed; that the said 1,959 head of cattle had been bought with plaintiff's money, but that Heard, Allen & Floore constantly sought, and "still seek," to collect their claims against Hudson out of said cattle and the note in question, and had taken the note into their possession, and claimed that a large proportion thereof had been transferred to them. Complainant averred that, in equity, he had the prior right to the said property, or the proceeds thereof. It was also averred that Heard, Allen & Floore claimed to exercise, and did exercise, control over said cattle, and had offered to deliver a portion thereof to complainant in settlement of his claim, and that said firm had delayed and hindered the trial of complainant's suit against Hudson and his bondsmen, and, as a result thereof, by the time the judgment was obtained, it was uncollectible, whereas, if the judgment had been recovered a year earlier, the greater part would have been collected.

The foregoing averments were the basis of the claim, asserted by complainant, that there had been a confederacy and conspiracy between Heard, Allen & Floore and the defendant Hudson to defraud complainant, whereby he had been damaged to the extent of \$50,000. In addition, it was alleged that the White land was worth \$18,000, the 1,959 head of cattle \$20,660, and the 400 head of cattle \$11,000; that Heard, Allen & Floore had absorbed other large quantities of land belonging to White, situated in Erath and Palo Pinto counties, Tex., the amount and value of which were to complainant unknown; that Hudson and White voluntarily permitted Heard, Allen & Floore to take large default judgments against them in the district court at Cleburne for \$10,979.82 and for \$857.13; and that the same were wholly fraudulent and void; but for what reason said judgments were fraudulent and void the bill did not

specifically state. The relief prayed was, in substance, cancellation of the various deeds and mortgages upon the White land, referred to in the bill, and the annulment of the purchase by Heard, Allen & Floore of White's land, as being clouds upon complainant's title to said land; that Heard, Allen & Floore be required to account for the \$30,000 advanced by Randolph upon the contract with Hudson, and that judgment be awarded against them for such sum as might be found to have been appropriated for other purposes than that for which the money was furnished; that Heard, Allen & Floore be required to account for and pay over to complainant the proceeds received by them from the sale of the cattle mortgaged by White, as also the proceeds from the sale of the 1,959 head of cattle heretofore referred to.

S. B. Allen and J. W. Floore, for themselves individually, and as surviving members of the late firm of Heard, Allen & Floore, jointly demurred to the bill. S. E. Moss filed a separate demurrer. Both demurrers were overruled. Thereupon, by leave of court, complainant amended his bill by inserting proper allegations of the citizenship of the respective parties, and the insolvency of the defendants in the suit of Randolph v. Hudson et al.

Allen and Floore subsequently filed a joint answer, and specifically denied each allegation of the bill charging Heard, Allen & Floore with fraudulent conduct, and with conspiring to defraud plaintiff, and set forth the state of accounts between the firm and Hudson and White at the time of the execution of the contract. The indebtedness owing from Hudson and White when the contract was entered into was alleged to be bona fide, that the same was not concealed from Randolph, that he made no inquiry upon the subject, and they were under no legal duty to volunteer information regarding the same. They averred that it was not within the scope of the business of the firm for one member to make representations regarding the financial ability of any one, but that no representation was made to complainant by any member of the firm regarding Hudson's integrity or financial ability to carry out the contract with Randolph, and that the only representations made to Randolph were made by Allen, in answer to questions by Randolph, were believed by Allen to be true when made, and were uttered in good faith, and were simply expressions of opinion,—Allen merely stating he thought Hudson could make Randolph secure; that he (Hudson) was a live, energetic person; and that the bond to be given for the fulfilment of the contract was a good bond. Defendants also averred that they had no pecuniary interest in the contract between Randolph and Hudson, and did not try to induce its execution, and that, when the agreement was entered into, they had no reason to question the integrity in business or any other relations of Hudson, did not then know that Hudson had been indicted in the courts of Texas for crimes or felonies, and had not heard of his being convicted of any crime or felony. The answer admitted that Allen solicited Randolph to make the payments through their bank, and averred that the same was done with no intention, on the part of the firm or its members, to appropriate the money to be collected, or any part thereof; but that the request was made in the line of their business, and that the money was collected without any agreement on the part of the firm to see to the appropriation thereof by Hudson, and was deposited to Hudson's credit, and became his property, and subject to his control, and was withdrawn by his checks thereon. Regarding the telegram of May 25th, and his subsequent letter, Allen averred that they were written and sent in good faith, and in reliance upon information believed by him to be true. Floore denied any knowledge at the time of the writing or sending of the dispatch or letter. Defendants averred that the first knowledge on their part of the probable intention of Hudson not to carry out his contract was on August 5, 1885, when one McIntyre presented to them a check, drawn by Hudson, and from him they learned that Hudson was making sales of the cattle. They averred that thereupon they took immediate steps to protect themselves, brought suit, and obtained judgments by default against Hudson, White, et al., and tried to obtain a settlement from Hudson, but failed, and then obtained from White, under threats of attaching his property, the mortgages upon his land and cattle referred to in the bill. They averred that, when their attorney was about to place the first mortgage upon record, he discovered that White had already conveyed his land to his wife and children; that the execution of the second mortgage or deed of trust was then taken, and, in addition, as the land was ascertained not to be as valuable as

at first supposed, a mortgage upon White's cattle was obtained. As a condition of giving said mortgages, White required that they should pay the Blair note, referred to in the bill, and, in order to obtain the security from White, they assumed the payment of said note, and paid the same, and the amount thereof formed a part of the indebtedness for which White executed the mortgage for their benefit. Defendants further averred that the low prices realized upon the sale of the land and cattle were caused by the interference of Randolph, through an attorney, who attended the sale, and warned those present against bidding. They denied any attempt to control the 1,959 head of cattle, but averred that Allen, in the effort to get Hudson to apply the property controlled by Hudson in settlement of the balance still due the bank and his indebtedness to Randolph, was authorized by Hudson to propose to Randolph that he and the firm take charge of the cattle, wagons, horses, and all his outfit, and sell them, complainant to receive two-thirds of the proceeds and a note for the balance with security, and Heard, Allen & Floore to receive the remaining one-third, but that the proposition was declined by Randolph. Defendants admitted that they employed attorneys to quash the attachment upon the 1,959 head of cattle, and accepted a transfer of a portion of the note given by the replevin sureties upon their purchase of the cattle from Hudson; but they averred that they did so in an honest endeavor to collect the indebtedness due them, and that they did not authorize a contest of plaintiff's right to recover against Hudson and his sureties, or any attempt to delay the trial of the cause, but employed attorneys to secure for them the benefit of the attempted assignment of a portion of said note, the payment of the note being conditional upon the discharge of the attachment. They further averred that they never realized anything from the note, or from the cattle which formed the consideration thereof. Defendants also alleged that Hudson paid for the cattle collected by him, to be delivered under his contract, upwards of \$35,000. It was averred that the White land, after deducting the homestead of White, aggregated 1,935½ acres, and was not worth to exceed \$10,000, and that the firm still held the land, except 170 acres, which has been sold for \$1,000; that they had sold a lot in Glen Rose, Tex., for \$325, and realized from the sale of the 400 head of cattle \$4,100, from the sale of a smaller number \$75, and had bought, under a sale on a trust deed, a small tract of land worth, probably, \$300. The proceeds of the auction sales of White's land and cattle were applied on certain of the notes, and judgments were taken against Hudson and White for the remainder, the judgments embracing interest at the rate of 12 per cent. and 10 per cent. attorney's fee.

S. E. Moss answered the bill, and averred that, at the time of the making of the contract by complainant with W. T. Hudson, defendant was not a resident of Johnson county, Tex., and had no knowledge of the matters stated in complainant's said bill; that, on December 23, 1888, he had purchased Allen's interest in the firm of Heard, Allen & Floore, embracing one-third of the lands in controversy, and paid him, for such interest, in cash, \$20,000; and that he made said purchase without knowledge or notice that Randolph laid or would lay any claim thereto, or had any interest therein. Upon information and belief, he adopted the averments of the answer of Heard, Allen & Floore as a part of his answer.

Thereafter evidence was taken, and, upon motion of the complainant, on February 2, 1893, the cause was referred to the standing master in chancery of the court, "to consider and determine upon all matters of law and fact contained therein not heretofore decided by this court, and in connection with such other and further evidence as may be submitted to him by either party"; and said standing master was "required to report his findings and judgment upon the law and facts." There is no recital of any opposition to the motion, and no exception was taken to the order or any part thereof. On May 3, 1893, the master filed his report, and, accompanying the same, referred to in the report, was a copy of the order of introduction of the testimony and the oral evidence introduced at the hearing. The master found as follows:

"(1) There was no conspiracy on the part of Heard, Allen & Floore with Hudson, or any one else, to influence the complainant to make the contract with Hudson in regard to the cattle. (2) That the bond of Hudson, given to Randolph, to secure the money advanced by him to Hudson, was, at the time so given, a good and sufficient bond for the amount of money expressed therein, and that the defendants Heard, Allen & Floore, nor any of them, made any

false or fraudulent statements in regard to same. (3) That the charge, made by complainant, that Allen represented Hudson to be a man of good character, is not proven, under the rules of evidence in such cases, it only being sworn to by complainant, and being denied under oath by the defendants Allen and Floore. (4) That the claim of Heard, Allen & Floore, under which they sold the property of Sam White, was a valid and subsisting claim. (5) That the complainant, L. V. F. Randolph, knew, as soon as Heard, Allen & Floore did, that W. T. Hudson was not going to carry out his contract with him, and that said Hudson was fraudulently disposing of his property to prevent him from enforcing his contract. (6) That Heard, Allen & Floore made no representations to complainant, nor did any act after the cattle bond was signed, that made it not equitable for them to take and enforce their lien on White's land and cattle. (7) That, under the facts in this case, it was not illegal or inequitable for Heard, Allen & Floore to employ lawyers to defeat the attachment proceedings in this court, as alleged by complainant. (8) That complainant was very badly and fraudulently treated by W. T. Hudson, but I can find no facts, under the law, as I construe it, by which the said Heard, Allen & Floore rendered them either legally or equitably liable for the fraudulent acts of said Hudson. (9) I therefore find, and so adjudge, that complainant's bill against the defendants Heard, Allen & Floore be dismissed at his costs. (10) The complainant seeks no relief against the Whites, except to cancel the deeds made to White's wife and children, on which it is unnecessary to make any ruling, because of my former findings in this case, and they seek no relief against W. T. Hudson. I adjudge that the entire bill be dismissed at complainant's costs."

On May 22, 1893, complainant filed exceptions to the findings of the master. On July 8, 1893, the court overruled such exceptions, and approved and confirmed in all things the report of the master, and his findings on the facts, and the law as therein contained, and dismissed the bill of complaint, with costs. The case was then brought to this court by appeal.

Girault Farrar, for appellant.

W. W. Leake, for appellees.

Before WHITE, Circuit Justice, and LOCKE and PARLANGE, District Judges.

WHITE, Circuit Justice, after stating the case, delivered the opinion of the court.

The paper referred to in the report of the master, and filed with his report, styled "copy of the order of introduction of the testimony and the oral evidence introduced at the hearing," was, in effect, a certificate by the master of what was the evidence introduced before him, and was so treated by the trial court. We do not regard the objection of counsel to the right of this court to review the findings, because of the want of a proper certificate, as well taken, and we shall therefore consider the case upon the merits.

While assignments of error are required as well in cases brought into a reviewing court by appeal as in cases brought up by writ of error (rules 11 and 24, subd. 2, par. 2, of this court [11 C. C. A. cii., cx., 47 Fed. vi., xi.]; and see *Farrar v. Churchill*, 135 U. S. 609, 613, 10 Sup. Ct. 771), such assignments of error clearly must be directed to rulings of the court. This requirement is disregarded in the 34 assignments of error filed in the court below, and contained in the record. They are, in the main, but elaborate arguments in support of the contention that the court erred in sustaining the findings of the master. We shall, however, ignore the unnecessary and superfluous matter contained in the assignments and in the specifications of error stated in the brief of counsel, and treat

plaintiff in error as simply objecting to the rulings of the court upon the findings, and its action in dismissing the bill.

It is difficult to determine, from the bill, precisely upon what theory complainant bases his right to the relief demanded. He avers, for instance, the recovery of a judgment, but nowhere definitely alleges that any sum is owing thereon, although the bill appears to seek an application upon that judgment of the proceeds of the property received by Heard, Allen & Floore from defendant Sam White, as being the property of said White. In some respects the bill is an ordinary creditors' bill, seeking to subject property of a debtor in the hands of a third party. It also seeks to recover alleged trust moneys as the property of complainant. From other allegations, a claim of damages for alleged fraud would seem to be asserted; and relief is also sought to remove a cloud on the title to land of which complainant alleges he is the owner in fee. We may, however, leave out of view, as the basis of any substantive relief, the claim that, by reason of the alleged deceitful and fraudulent practices of Heard, Allen & Floore, complainant was damaged \$50,000, not only because no demand for judgment for such damages is asked, but for the reason that a recovery of damages must be in an action at law. *Dunphy v. Kleinsmith*, 11 Wall. 610; *Root v. Railway Co.*, 105 U. S. 189, 207, 213, 214; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249. The relief prayed is all sought against Heard, Allen & Floore, and is, in substance, (1) that, as to the lands originally owned by Sam White, and acquired and held by the firm at the time of the filing of the bill, and claimed by complainant to have been purchased by him at the sale under his judgment in his action against Hudson et al., the title of claimant be quieted; (2) that, as to the lands, cattle, and other property acquired by the firm from White, and converted by them into money, and the proceeds of the 1,959 head of cattle attached by complainant in his suit against Hudson et al., and the amount of the note for \$20,660, given by the replevin sureties on their purchase of the cattle from Hudson, Heard, Allen & Floore be required to account for and pay the same to complainant, to be applied on the judgment recovered against Hudson and his bondsmen; and (3) that Heard, Allen & Floore be required to account to complainant for the \$30,000 advanced as payments upon the contract with Hudson, and that complainant have judgment for any portion thereof found to have been misapplied.

As to the White land, the record title to which is still in Heard, Allen & Floore, complainant does not appear as a creditor, seeking to set aside fraudulent conveyances, and to subject the land to the payment of his judgment against Hudson et al., after a fruitless attempt to enforce its collection at law, or to set aside such conveyances as being hindrances to the enforcement by sale of a lien acquired in his action at law (*Jones v. Green*, 1 Wall. 330; *Lessee of Sockman v. Sockman*, 18 Ohio, 362; *Gormley v. Potter*, 29 Ohio St. 597); but he sets up an alleged title in himself, which is claimed to have been acquired by purchase at a sale under a judgment in his favor, and asks that his title be quieted. While the bill, in this particular, would seem to be open to the objection that it is a mere ejectment

bill to recover possession of land (*Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276; *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. 631; *Lewis v. Cocks*, 23 Wall. 466; *Hipp v. Babin*, 19 How. 271), yet as a determination of the right to relief sought with reference to the proceeds of the land and cattle formerly belonging to White, received by Heard, Allen & Floore, will be decisive of the right to relief with reference to the land to which the firm now has the legal title, we will consider the issue as to this branch, and dispose of it on the merits.

The averments relating to the second ground of relief set up a right of discovery, and to subject to complainant's judgment the property of his debtor, White, in the hands of Heard, Allen & Floore, and is, in substance and effect, a creditors' bill. The third ground of relief, with reference to the \$30,000 advanced payments, does not, however, proceed upon the theory that a portion of that fund, if any, misappropriated, is a debt owing to Hudson, but proceeds upon the assumption that the money was received by the firm with knowledge of the fraudulent intention of Hudson to misappropriate, and under circumstances which made Heard, Allen & Floore trustees *ex maleficio* of the same.

Before considering the question as to the right of complainant to the relief thus sought, we will notice an application which has been made on his behalf, since the submission of this case, that this court consider, as part of the record herein, an official abstract of the judgment of February 5, 1887, which Randolph obtained in his suit against Hudson et al., certified by the clerk of Somervell county, Tex., to have been filed for record in his county, and duly recorded in the judgment and record book of said county on March 21, 1888. It is stated, in the affidavit of the attorney who represented complainant at the hearing before the master, that this abstract was offered before the master to show notice to the defendant Moss, who claimed to be a bona fide purchaser from Allen, his co-defendant. That affidavit, with others submitted to us in support of the application, in substance set forth that, in the making up of the record before the master, that officer omitted the abstract of judgment therefrom, and all reference thereto, and that the appellant did not discover the omission until after the transcript of appeal had been filed in this court, and after the original had been put into the hands of the printer for printing, in accordance with the rules of this court, and that though repeated inquiries were made of the clerk of the circuit court at Dallas, and of the master, it was not until a short time previous to the application to this court that the abstract was discovered in the hands of the clerk of the circuit court. Counsel for appellees have consented that the abstract in question may be used by us as part of the record here, provided we consider that the record could be amended by certiorari, upon *ex parte* affidavits, so as to get this judgment into the record, coupling this qualified consent with the statement that he has no personal recollection as to whether the abstract was offered at the hearing before the master, and that the master states that he has no recollection of it. The transcript filed in this court should be a complete transcript of the

record as it exists in the court from whose judgment the appeal was taken. A hearing can be had in an appellate court only upon the record brought from the trial court. *Maxwell Land Grant Case*, 122 U. S. 365, 375, 7 Sup. Ct. 1271. Presumptively, the transcript of the record before us is complete. In analogy to the order made in *U. S. v. Adams*, 9 Wall. 661, on an application made in due season, the court below might have directed the master to report as to whether the certified abstract had been introduced in evidence, and, if so, to amend his report to show such fact, but it is clear that we cannot give such a direction. The application is, therefore, overruled.

To determine whether or not the bill and proofs establish a case entitling the complainant to relief necessitates, in the first instance, a consideration of the sufficiency of the exceptions filed to the findings of the master. As all the issues in the case were referred to the master to hear and decide, and this upon the motion of the complainant himself, the case is brought within the rule laid down in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, which requires that we treat the findings of the master as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made. Keeping this rule in mind, we take up the first and third findings of the master, which read as follows:

"(1) There was no conspiracy on the part of Heard, Allen & Floore with Hudson, or any one else, to influence the complainant to make the contract with Hudson in regard to the cattle."

"(3) That the charge, made by complainant, that Allen represented Hudson to be a man of good character, is not proven, under the rules of evidence in such cases, it only being sworn to by complainant, and being denied under oath by the defendants Allen and Floore."

The exceptions of complainant, in effect, were that, upon the evidence, the master should have reached directly opposite conclusions. There is an entire absence of proof in the record that any improper motive influenced Heard, Allen & Floore to enter into a conspiracy such as charged in the bill, and there is no proof whatever that they derived any pecuniary benefit from the conduct of Hudson. They did not seek out Randolph, introduce Hudson to his notice, and urge the bestowal of confidence upon him; but Randolph made the acquaintance of Hudson elsewhere, was induced, by the offer of Hudson to supply cattle at a less figure than other parties were willing to furnish them, to negotiate with Hudson, and accompany him to Cleburne to conclude a contract. Allen, who, alone, of the firm of Heard, Allen & Floore, made whatever representations were made by that firm to Randolph, denied that he represented Hudson to be financially able to carry out the terms of such contract, or that he was an honest man, or a man of integrity, but admitted that he did, in reply to inquiries of Randolph, express the opinion that Hudson was able to make plaintiff secure in the performance of such a contract, and that the bond offered by him was a good bond. When Randolph found that Hudson was in truth a customer of the bank, —a fact which, in itself, implied that Hudson was considered honest,—it is altogether unlikely that he would have propounded to the

bankers, and in the presence of Hudson, the broad question whether Hudson was an honest man or a man of integrity. The nature of the business dealings between Hudson and Heard, Allen & Floore also tends to corroborate the testimony of Allen and Floore that they were ignorant, when this contract was made, of the fact that Hudson had been indicted for crimes or felonies, or convicted of crimes or felonies, and that they did not think that Hudson was a dishonest person, or a man with whom it was unsafe to have business dealings. A few witnesses were introduced by complainant who testified that the reputation of Hudson was bad in a section of Bosque county, but it was not shown that such knowledge had extended into Johnson county, where these bankers were engaged in business; and, while two officials of Johnson county testified to the arrest of Hudson on several occasions upon indictments, and the clerk of the court testified to a half dozen indictments of Hudson, running back some 15 years, on charges of theft of cattle and misdemeanors, there was no proof offered to establish the fact that such charges were generally known, or that Hudson was reputed in Johnson county to have been guilty of any serious infraction of law; nor, indeed, was any evidence introduced warranting the inference that any member of the firm knew that Hudson had committed a dishonest act. The defense, however, introduced a number of apparently reputable business men, one (H. S. Wilson) a merchant of Cleburne, who testified that Hudson's reputation, in May, 1885, for honesty, was good, and B. L. Durham, a bank officer at Cleburne, who had never heard, on or before May 8, 1885, that Hudson had ever been indicted for theft or swindling; while the clerk of the district court testified that Hudson never had been convicted of anything except some misdemeanors.

As we have said, Heard, Allen & Floore dealt with Hudson in a manner indicating confidence in his integrity. They had financial dealings with him prior to the 8th of May, 1885, occasionally made loans to him upon the security of his indorsed notes, or upon the hazardous security of live stock, and furnished him money to be used in the purchase of cattle, to be repaid from the proceeds of expected sales. For instance: On the 8th day of May, 1885, when Randolph and Hudson executed their agreement, Heard, Allen & Floore held a 30-day note of Hudson's for \$7,400, dated April 21, 1885, secured by a deed of trust on 300 steers. They held a note for \$5,000, executed by Hudson as principal, with Sam White, A. J., N. S., and L. B. Hudson as sureties, which note was dated April 31, 1885, and due May 6-9, 1885. The money had been paid to Hudson on this latter note to enable him to purchase cattle with which to carry out a contract he had made to deliver cattle to a purchaser named Baker, who had deposited the price thereof with the banking firm, receiving a certificate of deposit from them, which was to be given to Hudson as payment on the delivery of the cattle; Hudson agreeing that, on receipt of the certificate, he would turn it over to the firm in payment of his notes. Here was an indication that the firm considered Hudson trustworthy, and his personal security of value; else, they would not have relied upon his promise to sur-

render the certificate of deposit in question. A great deal of stress has been laid upon the alleged fact that this \$5,000 note was overdue at the time Randolph made his inquiries of Allen concerning Hudson, and that Hudson had negotiated the certificate, instead of surrendering it, as was agreed. But it is consistent with the facts in evidence to assume that the agreed time of payment of the note was when the cattle buyer had received the cattle and delivered the certificate of deposit to Hudson, and that, on the 8th of May, 1885, the certificate of deposit had not been delivered to Hudson, for it was not until the 28th of May that the firm discovered that the certificate had been negotiated, and thereupon debited Hudson's account with an amount equal to the sum to his credit on their books (\$4,599.28) in reduction of the amount due on the note. It is not improbable that the explanation offered by Hudson satisfied Heard, Allen & Floore, especially as very nearly the full amount was to his credit, and he was apparently investing largely in cattle to carry out his contract with Randolph. Certainly, the bankers exhibited their continued confidence in Hudson's integrity by loaning him the sum of \$5,000, upon the mere security of a new indorsed note, when he protested against this debiting of the balance to his account.

We do not attach weight, as a circumstance tending to show a fraudulent intent on the part of Heard, Allen & Floore, to the fact that the firm did not volunteer information as to the state of Hudson's account with them. They clearly did not, at the time, consider the indebtedness of Hudson a bad debt. The indebtedness originated from ordinary business transactions, and we do not regard the contention well founded that Heard, Allen & Floore owed a duty to Randolph to volunteer information as to the state of their customer's accounts, or the dealings had with them. Nor is the subsequent conduct of Randolph consistent with the claim that, in making the contract with Hudson, he relied upon alleged false representations of the firm as to the integrity, etc., of Hudson. Complainant took a bond to secure himself from the danger of violation by Hudson of his agreement. He telegraphed and wrote, not to the firm, but to Allen, and in a letter to Allen, written late in May, expressing alarm because of the bad reports made to him as to the good faith of Hudson, he made no allusion whatever to the fact that he had made the contract upon the faith of statements of Allen or his firm, and that the reports he was receiving were inconsistent with such statements; nor when, subsequently, he stopped at Cleburne, in June, on his visit to Hudson to personally investigate the progress being made, did he direct Allen's attention to the character of the assurances given on May 8th, or suggest that he had been misinformed, and express a fear that he might sustain loss by reason of having relied thereon.

As before stated, no motive has been proven for fraudulent conduct on the part of Heard, Allen & Floore, or any member thereof, or any reason shown which would have induced them to practice deception towards complainant in order to entice him into making the contract in question. When the drafts for \$14,000 and \$16,000, respectively, were collected, they were placed to Hudson's credit,

and he was permitted to check the same out at his own pleasure. Had the firm been actuated by improper motives, we would have expected to find them demanding and obtaining from Hudson immediate payments of his then existing indebtedness; but they made no such demand. Hudson checked against his account, as he had been accustomed to do; and when, on August 5, 1885, the discovery of Hudson's bad faith towards complainant was brought to their notice, Hudson's indebtedness to the firm was greater than it was on May 8, 1885. The master drew, from the circumstances surrounding the transaction, so far as they bore upon the conduct of Heard, Allen & Floore, inferences favorable to their good faith. We cannot say that he erred in so doing.

The second finding reads as follows:

"(2) That the bond of Hudson, given to Randolph, to secure the money advanced by him to Hudson was, at the time so given, a good and sufficient bond for the amount of money expressed therein, and that the defendants Heard, Allen & Floore, nor any of them, made any false or fraudulent statements in regard to same."

This finding is fully sustained by the evidence. The allegations of the bill of complaint tend to support it, for it is therein charged that the sureties on the bond, subsequent to the making thereof, and the final consummation by Hudson of the swindle, fraudulently conveyed to B. F. Hudson "about sixty or seventy thousand dollars' worth of property; that W. T. Hudson transferred the larger part of his property to his said brother; and that L. B. Hudson made fraudulent transfers of his property." In the bill, complainant estimates the value of Sam White's property as approximately \$50,000. Even though the \$60,000 or \$70,000 of property transferred to W. T. Hudson embraced cattle bought with Randolph's money, we perceive from the record no good reason to doubt the truth of the testimony of Allen that, when he expressed the opinion that the bond was good security, he honestly believed such to be the fact. This firm, as before stated, dealt with Hudson and his sureties on the basis of their possessing financial responsibility. White was one of the sureties on the \$5,000 note of Hudson held by the firm on May 5, 1885, and he was also principal on a note, dated April 22, 1885, and due May 2-5, 1885, for \$2,231.55, upon which one of the guarantors on Hudson's contract (Haley) was surety; and White was surety on a 30-day note for \$319.46, dated April 7, 1885, being regarded, as to the last-mentioned note, as the only responsible debtor. Disinterested witnesses, one a banker and another a judge, corroborated Allen's opinion, by testimony to the effect that, from the general reputation, on May 8, 1885, of Hudson, White, et al., as to financial responsibility, they would have regarded the bond as perfectly good. We therefore conclude that the second finding was sustained by the evidence.

The fourth finding of the master reads as follows:

"(4) That the claim of Heard, Allen & Floore, under which they sold the property of Sam White, was a valid and subsisting claim."

The exception taken by complainant was that the master should have found the reverse. The consideration expressed in the deed

of trust executed by the White family in favor of Heard, Allen & Floore was the sum of \$16,000, and the recited condition of the mortgage was that it was given to secure the payment of \$15,633.33, and interest thereon, accrued and to accrue, made up of a note of W. T. Hudson and S. White for \$12,833.33, a note of S. White and John R. Haley for \$2,500, and a note of S. White and J. S. James for \$300. The chattel mortgage recites the consideration as \$7,000, and that it was given to secure the same indebtedness as is recited in the real-estate mortgage. The indebtedness of Hudson and White consisted of a 30-day note, executed by W. T. Hudson, with S. White and A. J. Hudson as sureties, dated June 23, 1885, for \$4,500 (which was the balance due on the note for \$7,400 that the firm held May 8, 1885, and which latter note was secured by a chattel mortgage on 300 steers, but which security the firm released, after payments had been made aggregating about \$2,900, in order that Hudson might dispose of the same to complete his contract with Randolph); a note for \$5,000, dated June 1, 1885, which represented money loaned on that day, by the firm, practically in renewal of the \$5,000 note held by the firm May 8, 1885, and the \$3,480.24 note to Mrs. Blair, assumed as a condition of White giving the mortgage.

There was no evidence adduced tending to contradict the statement, under oath, contained in the answer, that this indebtedness was bona fide, and actually due to the firm. While, as to a larger portion of the indebtedness, the money may have been obtained by Hudson for his personal benefit, it is conceded that the notes were overdue, and that the liability of White was fixed if the consideration was valid. White's explanation as to his readiness to secure Heard, Allen & Floore is reasonable. He had had considerable dealings with them. They had often accommodated him in his business transactions. By the deed of trust he was to have 30 days' time to make settlement, and he expected to be able within that time to induce Hudson to save him from loss. Further, Heard, Allen & Floore threatened to attach. They were resident convenient to White's property, and White may well have believed that they were able to protect themselves by hostile measures. That the giving of the security to the bankers was not altogether voluntary is apparent from the circumstance that he concealed from their attorney, when giving the first mortgage, that he had already conveyed the property to his children.

The finding under consideration imports a holding that the allegation of the bill, that the payment of the Blair note for \$3,480.24, which formed a part of the consideration of the mortgages given by the Whites to Heard, Allen & Floore, was collusive, and made with the intent to hinder, delay, and defraud complainant, was not supported by the evidence. There is no evidence contradicting the fact that Heard, Allen & Floore, when the mortgage was given, assumed the payment of this note, and within a few days paid it. The surrounding circumstances corroborate their claim that the payment was not voluntary, but was made in order to obtain the desired security from White. The mortgages given by White operated as a double preference by him, in favor of Heard, Allen & Floore,

and also in favor of his creditor, Mrs. Blair. It was not a payment to White of money, whereby White was enabled to divert his property from just claims of others. A preference by a debtor of one or more creditors is not forbidden by the laws of Texas, and is not an unlawful delay or hindrance of other creditors. *Sonnentheil v. Trust Co.* (Tex. Civ. App.) 30 S. W. 945.

The bill also seeks to annul the sale by Bryan, named as a trustee in White's deeds of trust, on the ground that the consideration in the mortgage by White as to the Blair note was fraudulent, and because the intention of White and the firm was to put and to keep the property out of complainant's reach. These contentions we have just met and disposed of. There is no allegation in the bill that the mortgage was void upon its face. It is not averred that there were irregularities in the sale by Bryan which entitled complainant to any relief, nor was there any attack upon the validity of Bryan's deed for any cause, outside of the alleged fraudulent character of the deed of trust on which the sale was based, which, it was claimed, rendered the deeds of trust void, and the sales thereunder unlawful. Counsel for complainant, however, in their argument, devote much attention to a discussion of alleged irregularities in the manner of sale not specified in the bill; but, as complainant must recover upon the case made in his bill (*Foster v. Goddard*, 1 Black, 506), proof as to such irregularities cannot afford a basis for substantive relief. The fact, however, that Bryan was an employé of Heard, Allen & Floore, did not tend to show fraud in the transaction. In Texas a mortgagee may also act as trustee to sell, and may sell under a mortgage to himself (*Scott v. Mann*, 33 Tex. 725; *Goodgame v. Rushing*, 35 Tex. 722; *Marsh v. Hubbard*, 50 Tex. 203); and no reason is apparent why a sale made by an employé authorized in the deed of trust to make sale, would not be valid, merely because he acted by the direction of his employer. The deed from Bryan was not introduced in evidence, and is not in the record. We are bound to assume that it was regular and valid upon its face, and passed the legal title. We are, of course, not now concerned with the question as to whether, at another time and in another proceeding, complainant might have been entitled, as a party having an interest in or lien upon the land, to claim that the sale was voidable, because of irregularities in the proceedings, and that he was entitled to redeem or to other relief.

The claim made by the bill is that complainant owns the fee of the White land, the legal record title to which is also apparently in Heard, Allen & Floore, and that the cloud of the trustee's conveyance to them should be removed. The right to such relief, as well as complainant's right to have the proceeds of land and cattle sold applied on his judgment, we think, has not been established.

There was no promise on the part of White to hold the property he then owned or might subsequently acquire as a pledge for the fulfillment of his guaranty. Randolph took no lien upon White's land at that time, and White retained perfect control over it, and could incumber it. *Adler v. Fenton*, 24 How. 407. Clearly, Heard, Allen & Floore cannot be required to account for the proceeds of

White's property, which they subjected to the satisfaction of valid mortgage liens at a time when that property was not charged with a prior lien in favor of Randolph.

The fifth finding reads as follows:

"(5) That the complainant, L. V. F. Randolph, knew, as soon as Heard, Allen & Floore did, that W. T. Hudson was not going to carry out his contract with him, and that said Hudson was fraudulently disposing of his property to prevent him from enforcing his contract."

The exception alleges that other facts claimed by complainant to have been established by the evidence neutralized this finding. This finding is supported by the evidence and the allegations of the bill to the effect that complainant was informed of the fact that Hudson was cutting out and selling cattle from the herd about August 1, 1885, while the evidence tends to show that the first intimation that Heard, Allen & Floore had that Hudson was not acting in good faith was on August 5, 1885. The finding seems only important as bearing upon the question of good faith of Heard, Allen & Floore.

The sixth finding reads as follows:

"(6) That Heard, Allen & Floore made no representations to complainant, nor do [did] any act after the cattle bond was signed, that made it not equitable for them to take and enforce their lien on White's land and cattle."

In his exception complainant asserted that the finding should have been the reverse of this. From what has been heretofore stated, it is evident that we concur with the master in this finding. Had Heard, Allen & Floore represented they were not creditors of Hudson and his sureties, and had Randolph, to their knowledge, entered into the contract, and executed the bond, upon the faith and assurances of the firm that the parties thereto were not so indebted, it might plausibly be urged that it would be inequitable for the firm to enforce their demands against the property of any of the parties to the bond until Randolph's claim had been satisfied. But, in the case at bar, there was no active concealment by Heard, Allen & Floore of the existing indebtedness, and no duty rested on them to disclose it. The indebtedness was not of such a character as would likely induce the belief on the part of Allen or his firm that its existence would injuriously affect Randolph, or impose on them a moral duty even to volunteer information regarding the same. Advances such as had been made to Hudson were not of an extraordinary character. It appears to have been the ordinary course of business of bankers in the cattle districts to extend similar accommodations to cattle dealers.

We advert, in passing, to the claim of complainant that fraud is to be inferred from the circumstance that, subsequent to May 8, 1885, Heard, Allen & Floore, at the request of Hudson, and after the payment of \$1,987 on the note for \$7,400, released their lien on the 300 steers and accepted the personal security of a newly-indorsed note of Hudson. There is no good reason shown for denying to Heard, Allen & Floore the right to do as they did. The evidence was that it was done at the request of Hudson, in order that he might dispose of his cattle in performance of his contract with

Randolph. There is no proof that the firm designed, by it, to aid Hudson in making a fraudulent disposition of his property. It does not appear that Hudson's financial condition was rendered less favorable. He was, presumably, still possessed of property as large in amount as before the transaction. The conversion of the steers into money or other form of property could not change the value of Hudson's assets. In fact, by reason of the release of the specific lien of Heard, Allen & Floore upon the steers, Hudson's property, to the sum of the value of the cattle, became amenable to the claims of general creditors, who, to that extent, derived a benefit. No good reason exists for the contention that Heard, Allen & Floore, because of Hudson's contract with the complainant, were restricted in their business dealings with Hudson to a mode of dealing which, in the opinion of complainant, might not operate to his detriment, in the event of Hudson not living up to his contract.

We cannot infer fraud from the release of the lien on the steers. It is altogether unlikely that it entered into the minds of Heard, Allen & Floore, or any of the members of that firm, at the time of the execution of the contract, on May 5, 1885, or when they released their lien on the steers, that there would be a deliberate attempt on the part of Hudson to defraud complainant. The utmost that they could reasonably have anticipated as likely to happen was delay or a partial delivery, and the possibility of some loss to Hudson by reason of the forfeiture clause in the contract. Of course, if the deliberate attempt to swindle, subsequently attempted, had been regarded by Heard, Allen & Floore as likely to occur, we should be justified in viewing every act of theirs with much suspicion; but the case established by the evidence does not warrant us in presuming a wrongful intent.

The seventh finding reads as follows:

"(7) That, under the facts in this case, it was not illegal or inequitable for Heard, Allen & Floore to employ lawyers to defeat the attachment proceedings in this court, as alleged by complainant."

In his exception complainant states that the master should have reached an opposite conclusion. The interference of Heard, Allen & Floore in the litigation referred to is explained by them as arising from a desire to realize from what they regarded as Hudson's property the balance owing to them. While it is alleged by Randolph that the 1,959 head of cattle which he attached were part of the herd with which Hudson started, ostensibly, for Red Fork ranch, in June, 1885, and were bought with his money, the latter claim is a mere inference, drawn from the circumstance that \$30,000 of Randolph's money was paid to Hudson in the expectation that it would be applied in the purchase of cattle. There was no attempt at the hearing to establish that all or any particular portion of this 1,959 head of cattle were bought with the \$30,000, though, as a matter of fact, complainant never repudiated the contract with Hudson, or elected to treat the money obtained by Hudson as fraudulently obtained, and the title to it still in complainant. But, even though complainant had done so, and though it be concluded he had a right to follow the proceeds of that money, he could assert no lien against

property where other moneys had also been used in the purchase. *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820. The herd originally, when it was started by Hudson from the neighborhood of Kopperl, consisted of more than 3,000 head, and the outfit embraced 50 or 60 head of horses, a number of wagons, and other paraphernalia, which aggregated in value a much larger sum than \$30,000, the amount advanced by Randolph. While Hudson was largely indebted to Randolph, he was also largely indebted to Heard, Allen & Floore, and it certainly does not appear improbable that Heard, Allen & Floore entertained the belief that, though Randolph, like themselves, had been the victim of misplaced confidence, they had a legal right to save themselves from loss by realizing whatever balance was still due them from the visible assets of Hudson, however unfortunate the condition in which Randolph had been or might be placed by Hudson's rascality. Heard, Allen & Floore had received mortgages from White to secure an indebtedness aggregating \$15,633.33. The purchase price of the sale of the land and cattle under the mortgages by White, to wit, \$4,500, was applied in payment of the White and Haley note of \$2,500, the White and James note of \$319, and a note of White's for \$26, and interest on said notes, leaving \$1,862.90, which was applied as a credit on the note given by Hudson and White in lieu of the Blair note, which Heard, Allen & Floore had assumed to pay, and had paid, as heretofore stated. The default judgments for \$10,979.82 and \$857.13, referred to in the bill, represented the balance due upon the Hudson and White notes, less the credit of \$1,862.90. The judgments included 10 per cent. attorney's fee, and also interest at the rate of 12 per cent. per annum. Whatever moral obligation might have rested upon Heard, Allen & Floore to make some allowance upon the indebtedness for which these judgments were taken, because of a possible excess of value of the land and cattle, to which they had acquired the legal title by their purchases at the sales under the trust deed, over the amounts bid for the same, they were under no legal obligation to do so. The land, however, appears to have been not readily salable or income-producing; and with the then necessity for the employment of attorneys to protect their interests, and the implied threats of complainant, evidenced by his interference, through an attorney, with the sales under the trust deeds, and the impression which the parties must have derived of future litigation with Randolph, it was not unlawful or fraudulent for Heard, Allen & Floore to stand upon their legal rights, and obtain as great a margin as possible, so that they might recoup themselves, from the increased profits which they might derive, in the future, from the property purchased, for the legal and other expenses and the growing interest account. And it is well to notice the fact that complainant himself is not unwilling to treat the value of the lands to which he claims to have acquired title by purchase at the sale under his judgment as being simply the amount of his bid.

The sweeping allegations, made in the bill, with reference to Heard, Allen & Floore's alleged wrongful interference in Randolph's suit and attachment are not specifically noticed by the master. They

are, however, not only denied in the answer, but find no support in any evidence presented. It does not appear, in the proofs, that they procured the trial of complainant's attachment suit to be delayed, and there is certainly nothing shown to indicate any irregular or improper conduct by them in reference to postponements of the attachment suit, or a wrongful and fraudulent use or abuse of the process or powers of a court of justice, which might be weighed, as was done in *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, with other wrongful acts committed by a party, the result of which was the fraudulent acquisition of property to which another had, in equity, a superior claim. The mere causing of delay in a litigation, however, would furnish no ground for an appeal to a court of equity to compel a defendant claiming an interest in property to account in relation to the property, particularly when he had not received the property into his possession or control, or derived any benefit therefrom.

The eighth finding reads as follows:

"(8) That complainant was very badly and fraudulently treated by W. T. Hudson, but I can find no facts, under the law, as I construe it, by which the said Heard, Allen & Floore rendered them either legally or equitably liable for the fraudulent acts of said Hudson."

The converse of this, it is claimed by complainant, in his exception, would have been proper. It follows, from what we have already said, that we are of opinion there was no error committed by the master in reaching the conclusion stated in this finding. The master has made no specific finding concerning the allegations of the bill with reference to the \$30,000 collected by Heard, Allen & Floore, and placed by them to the credit of Hudson upon the books of the bank. We find no warrant for the claim that this money was received under circumstances that made the firm chargeable with the duty of seeing to its proper application. Certainly, we would not be justified in holding, from the mere fact that Randolph paid \$30,000 as an advance upon the purchase price of the cattle which he had agreed to receive from Hudson, particularly when he had taken security guarantying the payment by Hudson of a heavy penalty in the event of complete or partial failure to perform his agreement, that Heard, Allen & Floore, by the mere receipt, as bankers, of money which they collected for account of a depositor, and which belonged to him, impliedly undertook to see to the proper disposition of the money, and became bound to exercise a supervisory control over the business of Hudson, especially when his course of dealing with the bank embraced various other matters growing out of the general business of cattle buying, and where, from the nature of the account, deposits, simply, of cash or checks, and withdrawals by check, it was practically impossible for Heard, Allen & Floore to accurately inform themselves of the dealings of Hudson. They certainly had no right to question Hudson as to how he conducted his business, or for what reason he checked out his money; and, had they attempted a supervisory control over him, Hudson possessed the right to close his account, and transfer his business elsewhere. Heard, Allen & Floore entered into no agreement

with Randolph to see to the disbursement by Hudson of the moneys advanced by Randolph. They collected it as the agents of Hudson, and were liable to account to him for the money. Whether Hudson disbursed all of Randolph's payments in the purchase of cattle was none of their concern. If, as between Hudson and his bankers, there was no relation of trust created by the credit of the proceeds of the drafts, but merely that of debtor and creditor (*Scammon v. Kimball*, 92 U. S. 362, 369, 370; *Mining Co. v. Brown*, 124 U. S. 385, 391, 8 Sup. Ct. 531), it is difficult to see how, in the absence of fraud, a trust relation could arise between Heard, Allen & Floore and Randolph by the mere collection of the drafts. Hudson was not credited with, and did not disburse, the proceeds of the drafts as a mere factor or agent of Randolph, and, therefore, the ruling in *Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, has no application. If, at the time he entered into his agreement with Randolph, Hudson had formed the intention of defrauding Randolph, and Heard, Allen & Floore had notice of such fraudulent intent when the drafts were deposited with them for collection, it might with some propriety be urged that they became trustees *ex maleficio*, and liable to account to Randolph therefor; but, while we entertain some doubt whether, upon the evidence in this record, we would be warranted in inferring that Hudson originally intended to defraud Randolph, we are clearly of opinion that the evidence does not justify the inference that any part of the money was appropriated by Heard, Allen & Floore in satisfaction of any indebtedness of Hudson to them. The only ground for the assertion of a claim that there was such an appropriation is the fact, already referred to, that, upon discovering Hudson had negotiated the certificate of deposit, which was to be returned, when received from Baker, and applied in cancellation of his note for \$5,000, held by the firm, on May 8, 1885, Heard, Allen & Floore debited his account with a sum equal to the money then to his credit, viz. \$4,599.28. But the evidence showed that, of this sum to his credit, thus absorbed by the debit thus made, \$1,785.96 was not money which had been advanced from Randolph, but was other money, deposited by Hudson with the bank in the ordinary course of his business, and it was satisfactorily shown that, a few days afterwards, upon Hudson's representation that he needed this money for the purchase of cattle under his contract with Randolph, the firm loaned to Hudson, and placed to his credit, the sum of \$5,000, thus extinguishing the debit made of \$4,599.28.

The master also failed to report specifically upon the allegations of the bill with reference to the claim of complainant for an accounting as to the proceeds of a note for \$20,660, given by Reed and Odem, on the purchase by them, from Hudson, of the 1,959 head of cattle attached by Randolph. He perhaps regarded the claim as too frivolous to require special notice. Certain it is that there is no proof whatever contradicting the denial of the surviving partners that they collected anything whatever upon the note. Nothing having been received by Heard, Allen & Floore, there is no room for the application of the doctrine that a trust may sometimes arise by reason of an intermeddling with property.

Elsewhere in this opinion we might have appropriately called attention to the fact that Hudson lived at Kopperl, about 30 miles from Cleburne, where Heard, Allen & Floore were located; that his real property was located in the vicinity of Kopperl; and that the cattle for delivery under the Randolph contract were collected at that point, and not at Cleburne. Randolph, therefore, must have contemplated that Allen's knowledge of Hudson's financial ability, and of Hudson's acts in supposed performance of his contract with Randolph, was derived, in all probability, in great part, from mere information from others. We have also failed to notice the claim, made in the argument on behalf of complainant, that the intercourse between Hudson and Heard, Allen & Floore was of an intimate character after August 5, 1885, when the firm first received information that led them to fear that Hudson was not acting honorably towards Randolph. This claim is based upon evidence that Hudson occasionally called at the bank, and that offers regarding the disposition of the cattle, etc., controlled by Hudson, and then in the Indian Territory, were made by the firm. But it is to be borne in mind that the efforts of the bankers were directed to obtaining a settlement from Hudson. They had not antagonized him by hostile measures, and we cannot say, because Heard, Allen & Floore treated Hudson in a manner which induced him to exhibit a willingness to subject the property over which he had control to the payment of his debts, is proof of collusion.

While, also, we are considering the claims of Randolph to a reliance upon representations made by Heard, Allen & Floore, by which he was induced to make the contract with Hudson, it must not be overlooked that he asserts that he endeavored to obtain the signatures of the firm to the bond, and that he claims they declined. In the face of a positive refusal to consent in writing to be bound for the acts of Hudson, it ought not readily to be inferred that representations were made which operated to produce the same liability. The failure, also, of Randolph to bring an action to recover damages for the alleged deceit is in itself a circumstance to be considered in weighing the evidence in the case.

It has become unnecessary, in consequence of the foregoing views, to consider the question whether or not the representations made by Allen were within the legitimate scope of the partnership business, and so binding upon the other members of the firm. It is also unnecessary to consider what bearing the absence from the record of the heirs or representatives of the deceased partner, Heard, would have had in the event we had found that the allegations of the bill had been sustained. Impressed with the zeal and earnestness of counsel for complainant in their efforts to make clear that their client was entitled to relief at our hands, we have carefully examined the voluminous record, and have assumed the presence therein of the documentary evidence certified by the master as produced before him. After such examination, however, and a careful weighing of all the evidence in the case, we have reached the conclusion arrived at by the master and the circuit court, viz. that the complainant has not sustained, by proof, the allegations against the de-

defendants Heard, Allen & Floore. It follows that, as relief cannot be had against them, complainant is not entitled to relief against any of the other defendants, and the judgment of the circuit court is therefore affirmed.

OLMSTEAD v. DISTILLING & CATTLE-FEEDING CO. GRAVES v. SAME. BAYER v. SAME.

(Circuit Court, N. D. Illinois. June 24, 1895.)

1. CORPORATIONS—QUO WARRANTO—EFFECT OF APPEAL.

A judgment of ouster in quo warranto proceedings against an Illinois corporation goes into effect from its rendition, and is not suspended or annulled by an appeal to the state supreme court, pursuant to Rev. St. Ill. c. 112.

2. SAME—EQUITY JURISDICTION—APPOINTMENT OF RECEIVERS.

The Illinois statute relating to corporations provides that corporations organized thereunder, whose powers have expired "by limitation or otherwise," shall continue their corporate capacity, with the use of their names, for two years, for the purpose of settling up their affairs, conveying property, prosecuting or defending suits, and that dissolution for any cause whatever shall not impair any remedies against it, or its officers or stockholders, for liabilities incurred before dissolution. Rev. St. Ill. c. 32, §§ 10-12. *Held* that, upon a judgment of ouster in quo warranto proceedings, the corporation itself becomes a trustee for its creditors and stockholders, so that equity will have jurisdiction, on the ground of the trust relation, of a suit by a stockholder, in behalf of himself and other stockholders who may join with him, for the appointment of receivers to administer its assets, where proper averments are made showing that the corporation's affairs are involved, and its property in danger of being seized and dissipated, by means of attachments, executions, etc. *Bacon v. Robertson*, 18 How. 480, applied.

3. SAME—STOCKHOLDERS' AND CREDITORS' BILLS.

Even when a receiver is appointed for a corporation, upon an erroneous assumption of the court that the bill discloses a case of equitable jurisdiction, such appointment cannot be questioned collaterally; and, if no objection is made by any one to such appointment, the court will have jurisdiction of a creditors' bill subsequently filed, even though it does not appear that such creditors have exhausted their legal remedies. *Brown v. Iron Co.*, 10 Sup. Ct. 604, 134 U. S. 530, followed.

4. JUDICIAL SALE—PURCHASE OF CORPORATE PROPERTY.

Where the property of a corporation is to be sold in judicial proceedings, the court cannot entertain objections to the purchase thereof by a committee of stockholders, founded upon the theory that the corporation had attempted to create a trust or monopoly, and that the proposed purchasers would also endeavor to monopolize the business. The court cannot assume that any improper use will be made of the property, or undertake to control it after it has been sold and conveyed by the receiver.

These were three bills, filed, respectively, by John F. Olmstead, Chester H. Graves, and Stephen D. Bayer, against the Distilling & Cattle-Feeding Company, which have been consolidated and heard as one cause. For a decision on a motion for removal of receivers, see 67 Fed. 24. The cause is now heard upon the petition of Richard B. Hartshorn and others, constituting a reorganization committee, for a judicial sale of the property of defendant company:

Moran, Kraus & Mayer and John P. Wilson, for petitioners.
Walker & Eddy, Dupee, Judah, Willard & Wolf, and Runnells & Burry, contra.

SHOWALTER, Circuit Judge. Certain stockholders of defendant company now petition the court to sell certain distilleries, being part of the estate of the defendant corporation in the hands of the receiver heretofore appointed in said consolidated causes. They offer to buy said property, bidding therefor the sum of \$9,800,000, on terms and conditions which will be spoken of presently. Certain other stockholders and creditors of said defendant company oppose said sale. They contend: (1) That the court has no jurisdiction to order such sale; (2) that it would be error for the court to order such sale, at the present stage of the litigation, and before the claims have been ascertained; (3) that the petitioners ought not to be permitted to buy, or that the property in question ought not in any event to be alienated to said petitioners.

The jurisdiction of the court over the property, and the interests therein of the litigants, may be referred to any one of the three consolidated causes. In the Olmstead bill which was the first proceeding, it is set forth that Olmstead, a citizen of New York, is a stockholder of the defendant company, which is an Illinois corporation; that defendant has a large amount of property in Illinois and other states, including the distilleries in question, which are going concerns; that defendant has a great number of creditors and outstanding contracts; that its affairs are greatly involved; that it is much embarrassed financially, and will be unable in future to meet its pecuniary obligations; that, pursuant to a quo warranto proceeding commenced in the circuit court of Cook county, Ill., against defendant, to deprive it of its charter, a judgment of ouster had been lately rendered; that an appeal was perfected in said quo warranto proceeding from said circuit court to the supreme court of Illinois; that said appeal is still pending and undetermined; that said judgment of ouster remains in full force and effect; that divers creditors of defendant threaten and are about to commence suits, by attachment and otherwise, against defendant, in Illinois and in other states; that by reason of executions and attachments in such suits the property of defendant will be wasted and destroyed to such a degree as to make the same inadequate and insufficient to pay its debts; that, if a receiver be appointed by this court, to take and conserve and distribute the estate of defendant, and if said creditors be in the meantime enjoined from such proceedings at law, said estate will pay all the creditors of defendant in full, leaving a balance to be divided among its stockholders,—and an injunction and receiver are thereupon prayed for. Said Olmstead filed this bill, to which the said Distilling & Cattle-Feeding Company was made sole defendant, on behalf of himself and all other stockholders who might choose to join with him in that behalf. On the filing of this bill a receiver was, or rather receivers, to whom the present receiver is successor, were, appointed by the consent of the defendant corporation. Said receivers took possession, and their successor now holds all the assets and property of the defendant corporation in the state of Illinois, and all its property in other states by force of judicial proceedings in such states ancillary to this proceeding. This court thereupon commenced, and has thenceforward and up to the

present time proceeded with, the administration of the estate of the defendant; and claims against the property in the hands of the receiver have been filed with the master, pursuant to the order in that behalf of this court, by some 3,000 claimants.

It is now said that there is no jurisdiction, meaning that there is not, and never was, any power in this court to make any order or do anything whatever in the matter of this estate. The appeal bond in the quo warranto suit suspended all such further proceedings as were authorized in enforcement by the said circuit court of Cook county of its judgment in said suit. No execution could rightly issue for the costs, or a fine, if one were adjudged in said quo warranto proceeding, pending the appeal. But I am unable to find anything in any statute of Illinois which in any manner annulled or suspended the effect of Judge Gibbon's judgment in the (state) circuit court, so far as it fixed, as from the date of its rendition, the status of the defendant corporation. The statute concerning quo warranto proceedings (chapter 112 of the Revised Statutes of Illinois) provides that, in such proceedings, appeals and writs of error may be taken and prosecuted in the same manner and upon the same terms and with like effect as in other civil cases. The pleadings and procedure in such cases are also analogous to pleadings in other cases at law. Within the rules touching the effect of appeals, as stated in *Oakes v. Williams*, 107 Ill. 156, the judgment of the circuit court, so far as it declared the status of the defendant corporation, went into effect as soon as rendered, subject, merely, to possible reversal by the supreme court.

Section 10 of chapter 32 of the Revised Statutes of Illinois, on the subject of corporations, is in words following:

"All corporations organized under this law whose powers may have expired by limitation or otherwise, shall continue their corporate capacity during the term of two years for the purpose only of collecting the debts due said corporation and selling and conveying the property and effects thereof."

Section 11 is in words following:

"Such corporations shall use their respective names for the purpose aforesaid and shall be capable of prosecuting and defending all suits in law or equity."

Section 12 is in words following:

"The dissolution for any cause whatever of any corporation created as aforesaid shall not take away or impair any remedy given against such corporation, its stockholders or officers for any liabilities incurred previous to its dissolution."

The corporation in question was organized under the general corporation law of the state of Illinois, from which the foregoing sections were quoted. The effect of the quo warranto judgment, in view of said enactments, was to make of the defendant corporation a trustee. I do not think, as was argued here, that the directors of said corporation became trustees. It seems to me that, within the sense of the statute, the corporation itself became a trustee as soon as the judgment of ouster was rendered. The property of said corporation thereupon became at once a trust property, and the stockholders and creditors became at once the beneficiaries or equi-

table owners thereof. Prior to the judgment of the circuit court, the defendant corporation owned its property legally and equitably. After the judgment the equitable ownership ceased in the corporation, and became at once vested in the creditors, and, subject to their rights, in the stockholders. On this view of the law, the Olmstead bill showed, not only jurisdiction in the court, but a good and valid cause of action in equity. Upon the averments of that bill creditors had no right of priority over each other. The remedy of each, as against the corporation, is preserved; but they had no right, as against each other, to seize and squander, through executions and attachments, the property of the defendant. The corporation itself, on the showing of that bill, acting through its directors,—though, if unmolested by executions and attachments, said directors might under the statute have administered and wound up its affairs,—was unable to execute and carry out the trust.

But the jurisdiction of this court did not depend on the failure or inadequacy of legal or statutory remedies. The matter of trusts falls within the equitable cognizance of this court. The power to adjudicate concerning the same belongs to this court as of course, and as part of its original jurisdiction. I may add, further, that section 25 of the chapter on corporations in the Revised Statutes of Illinois does not meet the case of a corporation deprived of its charter by a judgment of ouster in a quo warranto proceeding, nor, if it did, would said section have any force as against the chancery powers of this court. It seems to me, therefore, that this court not only had jurisdiction to take control of the estate of defendant by a receiver, pursuant to the prayer of the Olmstead bill, but, as stated, that said bill showed a good cause of action in equity. The case, so far as the matter of jurisdiction is concerned, is like *Bacon v. Robertson*, 18 How. 480. There a judgment of ouster had been rendered against a corporation in Mississippi. Pursuant to a statute of that state, a person was named, and by the court which rendered the judgment of ouster, as trustee, to take the estate and effects of the corporation, and administer the same. While this trustee was selected by the court, he derived his powers from the statutes in that behalf of Mississippi, and not from the court; the court acting, in his appointment, ministerially, rather than judicially. Said trustee thereupon took possession of the estate of the corporation, and proceeded in the administration of the same. He collected its debts, and was authorized by law to apply to the court for an order directing a sale of the same. He failed or neglected to sell, or to apply for such order, and, at the time of filing the bill in the United States court, was still in the possession of the property. Suit was brought in said federal circuit court by stockholders of the corporation, nonresidents of Mississippi, on behalf of themselves and all other stockholders who might choose to join with them. The supreme court of the United States declared that the circuit court had jurisdiction to take charge of the estate and distribute it among the persons to whom it belonged. That case, therefore, as already stated, was identical with this, so far as the question of jurisdiction was concerned. There, upon the dissolution of the corporation, a per-

son was appointed, as trustee, to take charge of and administer the trust estate. Here, by our statute, the corporation itself, when the judgment of ouster was rendered, became the trustee, for the purpose of converting and dividing its property among the persons who were entitled to receive the same.

Even if no cause of action were shown on the face of the Olmstead bill,—that is to say, even if the judge who appointed the receiver erred in his assumption that a cause of action was shown,—he still had jurisdiction, or the power, to appoint the receiver, according to the decisions of the supreme court of the United States. This being so, the appointment of the receiver could not be questioned collaterally; and the Graves bill, the second of these consolidated causes, on this theory, shows a cause of action in equity, and jurisdiction in the court to appoint the receiver. The Graves bill is an ordinary creditors' bill, filed by a judgment creditor, on behalf of himself and all other creditors similarly situated.

If, however, we assume that there was no jurisdiction in the court to appoint a receiver pursuant to the Olmstead bill, then the Graves bill would not show a cause of action in equity, because, on the face of said bill, it would not appear that the complainant had exhausted his remedies at law. If the court were without jurisdiction to appoint a receiver in the Olmstead bill, then Graves' execution might have been levied, and he had failed to exhaust his remedies at law. But the receiver was appointed in the Graves case without objection on the part of the defendant corporation, or any person in its behalf, and the administration of the estate through the receivership has proceeded, without objection to the jurisdiction, up to the present time. The Graves bill showed a cause of action at law; that is to say, it showed that Graves had a valid claim against the estate, and was entitled to collect it out of the assets of the corporation. Upon this assumption, and in the absence of any objection, the law is well settled that the appointment of the receiver was within the power and jurisdiction of the court. Not only so, but such appointment cannot now be insisted on even as error. On the theory last supposed, the Graves case becomes identical with the case of *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604. That case was a bill filed by a judgment creditor who had not sued out execution, and with whom was joined, as complainants, contract creditors who had not as yet even obtained judgments. A receiver was appointed, who took charge of the property of the defendant corporation without objection, divers claimants afterwards filed claims, and it was held, by the supreme court of the United States, not only that the court had jurisdiction, but that the cause of action would go on the equity side of the court notwithstanding the failure to show that the remedy at law had been exhausted.

I am confident that the objection here made to the jurisdiction is invalid. I am of the opinion, also, that the property bid for may be now sold. The question is one of expediency in the administration of the estate. From the report made by the receiver, it will be extremely inconvenient, if not impracticable, for him to care for the distilleries in question, and keep them in operation through an-

other season. For him to make cattle-feeding contracts, and attempt to run the distilleries another year would involve the estate in an expense that could hardly be justified. Within the authority of such cases as *Crane v. Ford*, Hopk. Ch. (3d Ed.) 130, *Forsaith Mach. Co. v. Hope Mills Lumber Co.*, 109 N. C. 576, 13 S. E. 869, and *Bank v. Shedd*, 121 U. S. 74, 7 Sup. Ct. 807, I think it is competent for the receiver to sell any part of the estate, and hold the proceeds for the benefit of such claims as may be adjudged valid.

The objection that the property ought not to be sold to these petitioners proceeds, apparently, upon the ground that the corporation attempted to create a trust or monopoly in that kind of property, and that these petitioners, representing upwards of 347,000 of the shares of the stock of defendant, were responsible for the unlawful conduct of the corporation,—upon the surmise that these petitioners are themselves, now and by this proposed purchase, attempting to monopolize the distillery business. It seems to me that there is no validity in this objection. In making their offer for this property, these petitioners are simply shareholders. In that capacity they are interested in the property in question, and have the right to preserve the same by buying it from the receiver, if the latter can be induced and empowered to sell. The court cannot assume that any improper use will be made of this property by the purchasers, nor can the court undertake to control the use of the property after it has been sold and conveyed by the receiver.

I am disposed to make the order of sale, and to accept the bid made by this reorganization committee upon the terms proposed by them, but upon the further understanding that they take the care and management of the property in subordination to the possession of the receiver until the payments which they propose to make shall have been made. In order to preserve the liens which now exist, I am disposed to insist that the paramount possession of the receiver be maintained. The petitioners say that they have collected a fund of \$1,400,000, and that they intend to give security conditioned that they shall make to the receiver, or his successor, the payments as proposed. I understand, from this, that they mean to give bond to secure these payments. If they are willing to do that, and to take the care and use of the property in subordination to the possession of the receiver, so that the court shall not lose the control of the property in this proceeding, I think the order for sale may be made.

AMES et al. v. UNION PAC. RY. CO. et al.

(Circuit Court, D. Nebraska. March 27, 1896.)

1. RAILROADS — INTERCHANGED BUSINESS — ADJUSTMENT OF EARNINGS UNDER RECEIVERSHIP.

The K. Ry. Co., which formed a part of the U. P. System, was operated under contracts with the U. P. Ry. Co. and the G. Ry. Co., which also formed part of that system, by which contracts a share of the income from joint business, sufficient to pay its operating expenses and fixed charges, was guaranteed to the K. Co., the effect of such contracts being to charge a large annual deficit to the U. P. and G. companies. In a suit brought
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by stockholders of the U. P. Co., receivers of all the roads were appointed, who renounced these contracts, and divided the earnings of the roads on a mileage basis, resulting in a deficit for the K. Co., which was apportioned, by an order made December 20, 1894, to be paid in certain proportions by the U. P. Co., the G. Co., and the R. Co., another road in the U. P. System, the receivers being authorized to make such modifications in the division of revenues from interchanged business between the several roads as should be just. Immediately after the entry of such order, the bondholders of the G. Co. protested against it, and notified the receivers not to pay the proportion of the K. Co.'s deficiency, charged against the G. Co. Shortly after, the trustees under mortgages of the G. Co. and U. P. Co. brought suits to foreclose such mortgages and impound the earnings of the roads, and the same receivers were appointed in these suits. A similar suit was afterwards brought to foreclose the mortgage on the R. Co. and the same receivers appointed. The bondholders of the K. Co. were fully notified of all these proceedings, and in May, 1895, instituted a suit for the foreclosure of the mortgage on the K. Co., in which, in August, the same receivers were appointed. In this suit, in October, 1895, they filed a petition for a readjustment of the earnings of the K. Co. from interchanged business, upon which, after notice to and on agreement of all parties, an order was made making a new adjustment of such earnings after October 1, 1895. On May 1, 1895, the receivers had petitioned for the suspension of the order of December 20, 1894, as inapplicable to the situation resulting from the commencement of the foreclosure suits, and in February, 1895, the bondholders of the K. Co. had filed a petition for an order requiring the receivers to pay certain delinquent taxes on the K. Co.'s property out of the earnings of the other roads, according to the order of December 20, 1894. Such petitions having been referred to a master, who reported favorably upon the former and adversely upon the latter, the K. bondholders excepted to his report. *Held*, that such bondholders, having been fully advised that the order of December 20, 1894, was objected to and resisted by the other roads, the earnings of such roads having been impounded by the foreclosures, and the bondholders of the K. Co. not having acted promptly in taking possession of their own road under their mortgage, the order of December 20, 1894, did not foreclose the court or the lienholders upon the other lines from working out a fair and just division of the earnings from interchanged business, after the making of that order, and up to the commencement of the new adjustment already ordered to be applied after October 1, 1895, and it appearing that the latter adjustment was fair and just, while that of December 20th was not, it would be applied to the earnings between December 20, 1894, and October 1, 1895.

2. SAME—IMPOUNDING REVENUES.

Held, further, that the revenues impounded in the foreclosure suits upon the lines of the G. and other companies were not the gross revenues, but the net revenues, after deducting operating expenses and preferential claims, including the just shares of connecting roads in the earnings of interchanged business, and therefore that such companies could not insist that no part of their earnings, after commencement of the foreclosure suits, should be applied to the deficit in the earnings of the K. Co.

On exceptions of the bondholders of the Kansas City & Omaha Railroad Company to the report of the master upon the petition of said bondholders for an order directing the receivers to pay taxes. Also on exceptions of the bondholders of the Kansas City & Omaha Railroad Company to the report of the master upon the petition of the receivers for an order suspending the provisions of the order of December 20, 1894.

Parrish & Pendleton, for bondholders' committee.
Morris, Beekman & Marple, for interveners.
W. R. Kelly, for Union Pac. R. Co.

SANBORN, Circuit Judge. The Kansas City & Omaha Railroad Company (hereafter called the "Kansas Company") has three lines of railroad, which aggregate 193.68 miles. They are situated in the state of Nebraska, and are tributary to the railroad of the St. Joseph & Grand Island Railroad Company (hereafter called the "Grand Island Company"). The Grand Island Company has 251.06 miles of railroad, and, prior to the receiverships hereafter named, operated the railroads of the Kansas Company. The Omaha & Republican Valley Railway Company (hereafter called the "Valley Company") has 482.04 miles of railroad, situated in Kansas and Nebraska, and one of its lines connects with one of the lines of the Kansas Company. The Union Pacific Railway Company has 1,827.59 miles of railroad, and among these a main line of road extending from Council Bluffs, in Iowa, to Ogden, in the state of Utah; another from Kansas City, Mo., to Denver, in the state of Colorado. Prior to the receiverships of these roads, they were all operated by the Union Pacific Railway Company as a part of the Union Pacific System. The railroad of the Kansas Company was operated under a contract between that company and the Union Pacific Railway Company and the Grand Island Company to the effect that the two latter companies would give to the Kansas Company such a share of the revenues derived from the business which passed over any part of the railroad of the Kansas Company and some part of the Union Pacific system that its income would pay its operating expenses, the interest on its bonds, and other fixed charges. Bonds to the amount of \$2,940,000 had been secured upon the property of this road by a first mortgage. In carrying out the traffic contract between these three companies the earnings from the joint business had, prior to the receivership, been divided on a mileage basis with the allowance to the Kansas Company of a minimum haul of 50 miles. The effect of this division had been that at the end of each year there was a large deficit charged against the Kansas Company, which was paid by the Union Pacific Company and the Grand Island Company, under the contract. On October 13, 1893, this court appointed receivers of the property of these three railroad companies, and of all the other railroad companies that constituted a part of the Union Pacific System, under a bill filed in this suit on behalf of certain stockholders of the Union Pacific Railway Company, for the purpose of preserving the vast property in the control of that company from disintegration and dissipation, at the suit of separate creditors, of marshaling its assets and liabilities, and of administering the trust which arose through the insolvency of the Union Pacific Railway Company and its constituent companies. These receivers, by direction of the court, renounced the traffic contract between the Kansas Company, the Grand Island Company, and the Union Pacific Company, and divided the earnings from the interchanged business between the Kansas Company and the other constituent lines of the Union Pacific System upon a mileage basis, with an allowance of a minimum haul of 50 miles to the Kansas Company, in the same way that these earnings had been divided prior to the receivership. The result of this division was that the expenses

of operating the railroads of the Kansas Company between October 13, 1893, and July 31, 1894, including the taxes for the year 1893, amounted to \$40,851.40 more than its gross earnings during that period. On June 26, 1894, the receivers filed a petition in this court, in which they set forth the fact that the operation of the railroads of this company produced a continuing deficit, and prayed for the directions of this court as to whether or not they should continue to operate these railroads, and, if so, in what way, and from whose funds this deficit should be paid. Upon this petition the court issued an order that the petition be filed, that notice of its filing should be given to all the railroad companies in any way interested therein, and to the trustees of the several mortgages and trust instruments, securing debts owing by the defendants in this suit, among whom were the Grand Island Company, the Kansas Company, the Union Pacific Railway Company, and all the constituent companies of the Union Pacific System. That order further provided that any of these parties might intervene and answer the petition, and that it should be heard before the court on the 19th day of July, 1894. When the hearing came on, that portion of the petition which related to the Kansas Company was referred to a master, who, after hearing, reported that the Kansas City & Omaha Railroad Company should be operated by the receivers; that the deficiency resulting from its operation constituted a just charge upon the properties of the Grand Island Company, the Republican Valley Company, and Union Pacific Railway Company in the following proportions, to wit, 68 per cent. thereof upon the property of the Grand Island Company, 14 per cent. thereof upon the property of the Republican Valley Company, and 18 per cent. thereof upon the property of the Union Pacific Company. The Grand Island Company had mortgaged its railroads to secure bonds to the amount of \$7,000,000, and Frederick P. Olcott and others, who constituted a committee of certain holders of these first mortgage bonds, excepted to this report. After hearing, these exceptions were overruled; and on December 20, 1894, the court ordered that the deficiency arising from the operation of the Kansas Company, together with such further deficiency as might result from the continued operation thereof after July, 1894, should be borne and paid by the receivers out of the revenues derived by them from the operation of the properties of the Grand Island Company, the Republican Valley Company, and the Union Pacific Railway Company, in the proportions stated in the report, and that the receivers should be, and they were, authorized and allowed to make such modifications in the division of revenues derived from interchanged traffic and in the routing of business, as between the lines of the Kansas Company and those of the Grand Island Company and the other constituent lines of the Union Pacific System, as in the judgment of the receivers should be just and equitable as between said several lines. On December 29, 1895, the Central Trust Company of New York, as trustee for the first mortgage bondholders of the Grand Island Company, filed a bill in the usual form in this court for the foreclosure of the first mortgage upon the properties of that company, and

on August 26, 1895, the receivers herein were appointed receivers of that property under that bill. On January 21, 1895, F. Gordon Dexter and Oliver Ames, 2d, trustees under the first mortgage of the Union Pacific Railway Company, for \$27,229,000, upon that line of railroad which extends from Omaha, Neb., to Ogden, in the state of Utah, filed in this court their bill to foreclose that mortgage, and prayed for the appointment of receivers thereunder. These receivers were thereafter appointed receivers under this bill. On May 29, 1895, Elias C. Benedict, Simon Wormser, Samuel L. Parish, and others, on their own behalf and on behalf of all others similarly situated, filed their bill against the Kansas Company to foreclose the first mortgage upon its property. This bill was in the usual form, save this: that it alleged that the complainants were bondholders under said mortgage, and that the trustee was so adversely interested that it could not act as complainant for the foreclosure of this mortgage. The same receivers were, under this bill, appointed by the court receivers of the property of the Kansas Company, which they had prior to that time been operating under the bill in the Ames suit. On August 15, 1895, the American Loan & Trust Company, the trustee in the first mortgage upon the property of the Republican Valley Company, filed its bill to foreclose certain mortgages covering that property, and the same receivers were appointed, pursuant to the prayer of that bill, and continued to operate the properties therein described. Immediately after the filing of the order of December 20, 1894, the committee of the holders of the bonds secured by the first mortgage of the Grand Island Company, notified the receivers herein that they must not pay that portion of the deficiency in the operation of the Kansas Company charged to the Grand Island Company in that order; that they intended to appeal therefrom; and that, if they paid it, they would be held personally responsible. After serving this notice, their trustee filed its bill, impounding the net earnings of that road, on December 29, 1895. At the time the order of December, 1894, was made there was due for taxes on the property of the Kansas Company for the year 1894 about \$35,000, which would become delinquent on the 1st of February, 1895. Upon receiving this notice from the bondholders of the Grand Island Company, and upon the filing of the bill of their trustee for the foreclosure of their mortgage, the receivers declined to pay these taxes, and on February 23, 1895, Benedict and others, constituting a committee of the bondholders of the Kansas Company, filed a petition in this court, in which they prayed for an order upon the receivers to pay these taxes and charge them to the Grand Island Company, the Union Pacific Company, and the Republican Valley Company in the proportion specified in the order of December 20, 1894. The court referred this petition to the master, directed notice of its filing and the hearing upon it to be given to the defendants in this suit, and to the trustees under the various mortgages securing bonds upon their respective properties; and after a hearing the master reported that the receivers had not derived from the operation of the property of the Kansas Company sufficient funds to pay the taxes, nor sufficient to pay all the expenses of the operation

of the property; that there were no moneys in their hands which could be applied to the payment of the taxes or to the payment of any deficit arising from the operation of the property of the Kansas Company; and he recommended that the prayer of the petition should be denied. The bondholders of the Kansas Company excepted to this portion of his report, and this is the first exception presented for our consideration.

On October 18, 1895, Benedict and others, the complainants in the bill for the foreclosure of the first mortgage upon the property of the Kansas Company, filed in that suit a petition, praying an order of the court, making a just and proper division of the rates and earnings of the Kansas road from interchanged business between that road and the railroads of the Union Pacific Railway Company, the St. Joseph & Grand Island Railroad Company, and the Republican Valley Company. The petition was referred to the master, with directions that notice thereof and of the hearing thereon should be given to these companies and to the trustees in the various mortgages secured upon their property. The Central Trust Company, the trustee under the first mortgage upon the Grand Island property, and the receivers herein, answered the petition. A hearing was had thereon before the master. The testimony before him on the part of all parties was without conflict, and it was to the effect that certain rules for the division of rates and earnings upon interchanged traffic, as between the property of the Kansas Company and the Grand Island Company, and as between the property of the Grand Island System, so called, and the properties of the Union Pacific System, were just and equitable, and that they ought to be applied to the division of all such earnings that had accrued after October 1, 1895. It, in effect, appears from the testimony that these rules for the division of the rates and earnings were practically agreed upon by the representatives of the various parties in interest at this hearing. The master accordingly reported this set of rules. No exception was taken to his report, and on December 11, 1895, this court ordered that these rules for the division of rates and earnings upon interchanged traffic between the properties of these various railroad companies should be applied by the receivers to the division of all such earnings that accrued subsequent to October 1, 1895. On May 23, 1895, the receivers filed in this court a petition for an order suspending the operation of the order of December 20, 1894. The court issued an order to the trustee under the first mortgage of the Grand Island Company, to the Grand Island Company, and to Benedict and others, complainants in the foreclosure suit against the Kansas Company, to show cause why the petition should not be granted, and referred the matter to the special master for a hearing. The committee of the bondholders of the Kansas Company answered the petition, and a hearing was had before the master, who reported that, by reason of the commencement and pendency of the various foreclosure suits against the property of these various railroad companies, the order of December 20, 1894, became inapplicable and inoperative, in so far as it directed the payment of continuing deficits resulting from the operation of the

property of the Kansas Company after the filing of the bill in the foreclosure upon the first mortgage against the property of the Grand Island Company, and that the receivers were, therefore, not warranted, after that date, in paying or attempting to pay these deficits from the Kansas Company out of the revenues of the Grand Island Company, or out of the revenues of any of the other companies against which it was charged by that order. Benedict and others, bondholders of the Kansas Company, have filed exceptions to this report, and these are also presented for consideration.

The exceptions to these two reports of the master present this question: Shall the \$35,000 taxes for 1894, upon the property of the Kansas Company, and the deficit which resulted from operating it from the 1st of January, 1895, to the 1st of October, 1895, be paid out of the property of the Kansas Company, or out of the revenues or property of the Grand Island Company, the Republican Valley Company, and the Union Pacific Company? The reports of the master leave these taxes and this deficit upon the property of the Kansas Company. The order of December 20, 1894, if it is still applicable to this period, charges them upon the connecting companies. The bondholders of the Kansas Company insist that, as the order of December 20, 1894, had been made by this court, they had a right to rely upon its continuous enforcement, and that the court, the companies owning connecting roads, and those holding liens upon them, are estopped by that order, and bound to enforce it, until the 1st of October, 1895, when, by consent of the parties, the just and equitable rules for the division of the earnings upon interchanged business between these roads was put into effect. There might be force in this contention if the lines of railroad connecting with the property of the Kansas Company had remained in the hands of the receivers in the Ames suit, unaffected by the filing of bills of foreclosure and the impounding of their earnings thereby. But within 10 days after the order of December 20, 1894, was made, the trustee under the first mortgage of the Grand Island Company, against whose revenues 68 per cent. of this deficit and of these taxes was charged by the order of December 20, 1894, filed its bill of foreclosure, and impounded the revenues of the property of that company. The committee of the bondholders had notified the receivers that they would be held personally responsible if they paid this deficit out of the earnings of the Grand Island Company, which were thus impounded. It was evident to the receivers and to the court, and it was not unknown to the bondholders of the Kansas Company, that the purpose of the filing of this bill on behalf of this trustee was to present this question, and to insist that so large a portion of this deficit should not be charged against the revenues of that company. This was known to the bondholders of the Kansas Company, because as early as February 27, 1895, they filed in this court a petition praying that the receivers should be directed to pay the taxes of 1894, under the order of December 20th, and they took an order upon the trustee under the mortgage of the Grand Island Company, and upon various other parties, to show cause why the prayer of that petition should not be granted; and on April 5, 1895, the

receivers answered the petition, and set forth the facts relative to the action of the bondholders of the Grand Island Company. From the time they presented this petition they knew that the order of December 20th was not unquestionably in force, because they knew, if it had been so, the court would have directed the taxes to have been paid without a hearing before the master. The railroads of the Kansas Company were, during all this time, at the command of the bondholders. Their mortgage was in default. The operation of their roads was producing a deficit. They had the right to file their bill for the foreclosure of their mortgage, and to take and operate these railroads under a receiver for the benefit of these bondholders themselves. They took no action. They did not file their bill for a foreclosure of their mortgage until one of the last days of May, 1895, and never applied for the appointment of receivers thereunder until the last of August in that year. Under these circumstances, the order of December 20, 1894, does not, in my opinion, foreclose the court or the lienholders under the mortgages upon the lines of railroad connecting with those of the Kansas Company from working out a fair and just division of the revenues derived from business interchanged between these roads, and apportioning a just share thereof to the payment of the deficits and taxes under consideration. Moreover, it was the intent and purpose of the court that this should be done under that order. The object of the order was to provide for the deficit which had already arisen, and to empower the receivers, who were operating all these roads, to immediately establish a just division of the earnings upon interchanged business, and to so keep their accounts as to accomplish that division. After providing for the deficit that had already accrued and that which might accrue after July, 1894, until this action was taken, the order provided "that the receivers herein be, and they are hereby, authorized and allowed to make such modifications in the divisions of revenues derived from interchanged traffic and in the routing of business, as between the lines of said Kansas City & Omaha Railroad Company and those of the St. Joseph & Grand Island Railroad Company and other railway lines in the receivership herein, as in the judgment of the said receivers shall be just and equitable as between said several lines." Thus the receivers were authorized by this very order to make a just division of these revenues. Certainly the court may do what it authorized its receivers to do when they have failed to accomplish the task assigned to them.

It is contended, on the other hand, that all the taxes upon the property of the Kansas Company for 1894, and the entire deficit, which resulted between January 1 and October 1, 1895, from the operation of the property of that company, and from the division of the earnings upon interchanged business upon a basis of mileage with an allowance of a minimum haul of 50 miles to that company, must be borne by the property of the Kansas Company, and that no part of the revenues which accrued to the Grand Island Company after the bill to foreclose the first mortgage upon its property was filed can be diverted to pay any portion of these taxes or this deficit, because the filing of that bill impounded all its earnings for the ben-

efit of the holders of its mortgage bonds. It is said that the revenues of the Union Pacific Company and of the Republican Valley Company are protected from this diversion in the same way by the filing of the respective bills of foreclosure against their property. But this position is equally untenable. The filing of a proper bill of foreclosure of a mortgage covering the income of a railroad company undoubtedly impounds the revenues of that company for the benefit of its mortgage bondholders, but it does not impound its gross revenue. It impounds only the net revenues that remain after the payment of the operating expenses of the railroad, and such preferential claims as may be allowed under the settled rules of the law. *Trust Co. v. Riley*, 16 C. C. A. 610, 614, 70 Fed. 32; *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658, 673, 678, 8 Sup. Ct. 1011. The payment to connecting lines of railroad of their just and equitable share of the earnings from interchanged business is one of the necessary expenses of operating a railroad. The result is that the revenues from business interchanged with other roads derived by a railroad company or its receiver after a bill for the foreclosure of a mortgage upon it has been filed may be and ought to be justly divided among the roads interchanging the business, and that portion of it which equitably belongs to other roads or their owners is not impounded by the foreclosure.

The question presented by these exceptions thus becomes, what proportion of the earnings between January 1 and October 1, 1895, from business interchanged between the railroads of the Kansas Company and the railroads of the Grand Island Company, the Republican Valley Company, and the Union Pacific Company justly and equitably belong to the Kansas Company? This question is not difficult of solution. It is clear from the traffic contract between these railroad companies prior to the receivership, from the testimony, and the findings of the master, which resulted in the order of December 20, 1894, and from the rules for the division of rates and earnings which were established and put in effect from October 1, 1895, without objection or exception on the part of any one of the parties in interest here, that a division of the earnings from interchanged business upon the basis of mileage, with an allowance of a minimum haul of 50 miles to the Kansas Company, is neither just nor equitable. There is no testimony, no act of any of the parties, no finding of the master, no record of any kind to support the view that such a division of the interchanged business would be right. It is equally clear, from an examination of the evidence in this case, that the charge of the taxes of 1894 and the deficit during this period against the revenues and property of the Grand Island, Republican Valley, and Union Pacific Companies in the proportion stated in the order of December 20, 1894, would place upon them an unjust and unequal burden. A single illustration is sufficient to demonstrate this proposition. The gross amount earned by the roads of the Kansas Company and the roads of the Grand Island Company from passenger and freight traffic originating or terminating on the roads of either company between July 31, 1894, and June 1, 1895, was \$70,385.28. Of this amount the Kansas Company re-

ceived \$17,865.42 and the Grand Island Company \$52,519.86. The deficit in the operating expenses of the Kansas Company during this period was \$28,181, and the taxes of 1894, delinquent in February, 1895, were \$35,240.17, making together \$63,421.17. If the Grand Island Company should pay, pursuant to the order of December 20, 1894, 68 per cent. of this amount, it would pay to the Kansas Company \$43,126.66, and the latter company would thus derive the sum of \$46,126.66 and \$17,865.42, or \$60,992.08 from this interchanged business, the total earnings of which were only \$70,385.28. The Grand Island Company would receive under this division \$52,519.86 less \$43,126.66, or only \$9,393.20, from interchanged business that earned \$70,385.28, and this, too, when the hauls of this interchanged business were undoubtedly very much shorter upon the lines of the Kansas Company than they were upon those of the Grand Island Company. A division of earnings so unjust and inequitable ought not to be continued after its injustice is discovered, and the diversion of the net revenues of the Grand Island Company which must result from such a division cannot be lawfully made after the bill for the foreclosure of the mortgage upon it was filed. What, then, shall be the basis of division? A true answer to this question is found, I think, in the report and order made in the suit of E. C. Benedict and others, complainants, against the Kansas City & Omaha Railroad Company and others, defendants, upon the petition of the complainants in that case for a proper division of these rates and earnings. Rules for their division were established in that case upon testimony which stood uncontradicted. They were reported to be just and equitable by the master. No exceptions were taken to his report. He recommended that they should be applied to all earnings derived from interchanged business between these roads after October 1, 1895. The court confirmed his report, and carried his recommendation into an order of the court; and I am of the opinion that the same rules should be applied to the division of the earnings of the business interchanged between the roads of the Kansas Company and the roads of the Grand Island Company, Republican Valley Company and the Union Pacific Company between January 1, 1895, and October 1, 1895.

There was no error in the finding of the master that the receivers had no moneys applicable to the payment of the \$35,000 taxes, and his recommendation that the petition for their payment be dismissed, and the exception to that report must be overruled.

There was no error in the findings and conclusion of the master that the order of December 20, 1894, for the payment of the deficit arising from the operation of the roads of the Kansas Company was inapplicable, and ought not to be enforced subsequent to the filing of the bill for the foreclosure of the first mortgage upon the property of the Grand Island Company. The exceptions to both these reports must accordingly be overruled, but an order will be made that the rules for the division of the rates and earnings upon interchanged traffic as between the property of the Kansas City & Omaha Railroad Company and that of the St. Joseph & Grand Island Railroad Company and the properties of the other railroad companies con-

stituting the Union Pacific System, in force subsequent to October 1, 1895, by the order of this court in the Benedict Case, made December 11, 1895, be applied by the receivers to the division of these earnings between January 1 and October 1, 1895.

WILLIAMS v. GROAT.

(Circuit Court, D. Oregon. March 2, 1896.)

No. 2,223.

RECEIVERS—PRIORITY OF CLAIMS—JUDGMENT FOR COSTS.

A judgment rendered against a partnership after the appointment of a receiver of its property, for costs of a suit in which it was an unsuccessful plaintiff, such costs having been mainly incurred prior to the receivership, is not to be regarded as a preferred claim merely because, if the judgment had been for plaintiffs, the creditors would have had the benefit of it. It is only costs incurred while the action is being prosecuted for the benefit of the creditors, or where it was in fact for their benefit, that are entitled to a preference.

This was a suit by Thornton L. Williams against Cadmus J. Groat, in which a receiver was appointed for the property of the firm of Williams & Groat. The present proceeding is upon an intervening petition filed by the Island City Mercantile & Milling Company, praying the court to direct the receiver to pay a judgment recovered by it against the partners, for the costs of an action, in which it was a successful defendant.

Cox, Cotton, Teal & Minro, for petitioner.

Carey, Idleman, Mays & Webster, for receiver.

BELLINGER, District Judge. The Island City Mercantile & Milling Company petition in this suit for an order directing the receiver to pay a judgment for \$471.61, recovered by that company in the state circuit court. The action in which such judgment was rendered was brought by the firm of Williams & Groat against the petitioner. Three trials were had in the case, with the result that, in the end, the petitioner recovered judgment for his costs in the sum named. The receiver was not a party to that action. He was appointed receiver on the 24th of July, and the judgment was entered on the 29th following. The last of the trials referred to was had the day after his appointment. The receiver applied to be made a party defendant in the action, but, on the objection of the petitioner, the application was denied. The petitioner claims that this judgment should be made a preferred claim, to be paid in full out of the estate, upon the ground that the action was prosecuted for the benefit of the assets in the receiver's hands. It is conceded that the general rule is that, when an action is prosecuted for the increase of a fund in the receiver's hands, it is at the risk of the fund; and that it makes no difference that the receiver did not begin the action or prosecute it in his own name.

In this case the action had been long pending and twice tried before the receiver was appointed. Presumably, nearly all of the

expenses for which this judgment stands were incurred before that time. If it can be said that the action was in the interest of the creditors, then the judgment should be paid as a preferred claim, but not otherwise. But this action cannot be distinguished in this regard from any other action that may have been brought and prosecuted by the partners during their management of the firm business. In a certain sense, all expenses and other indebtedness incurred by them were for the benefit of the fund that ultimately came into the receiver's hands. Probably, every unpaid creditor can make this claim to be preferred. In what respect, then, does this creditor have better right than others? It does not appear that Groat & Williams were insolvent when this action was brought and these expenses were incurred, and an action by a solvent suitor is not for the benefit of his creditors, who are in no way concerned, so long as there is enough to pay their debts. As just suggested, there is nothing to distinguish these expenses from any others incurred by the partnership in the ordinary conduct of its business, unless it is the fact that, if a judgment had been recovered by them, it would have gone to the receiver, and become an asset in his hands. But, so far as appears, the conditions upon which this result depended were independent of the action, and subsequent to the liability in which the action had involved the partners. The action, therefore, does not appear to have been begun or prosecuted for the benefit or in the interest of the creditors. The court cannot know that expenses incurred in the prosecution of an action are for the benefit of creditors, unless it appears that a recovery, if then had, would have been impounded for the creditors' benefit. In my opinion, it is not enough that it so happens that, if a judgment in favor of the plaintiffs had been had at the time the petitioner recovered judgment, the creditors would have had the benefit of it. All the remaining assets would, upon such an argument, come into the receiver's possession, burdened with expenses and other charges incurred in the conduct of the business by which such assets were created and preserved. It is only where the expenses were incurred while the action was being prosecuted, no matter in whose name, for the benefit of the creditors, or where it was in fact for their benefit, that such expenses are entitled to preference. The prayer of the petitioner is denied.

TRUSCOTT, County Treasurer, v. HURLBUT LAND & CATTLE CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

1. INDIAN RESERVATIONS—JURISDICTION OF TERRITORY AND STATE.

The act of May 26, 1864, organizing the territory of Montana, provides that no lands shall be included therein which, by treaty with any Indian tribe, were not, without its consent, to be included in any territory or state. *Held* that, as there was no treaty existing, at the passage of the act, with any Indian tribe, containing such a provision in respect to the lands constituting the present Crow reservation, that reservation was included in the boundaries and jurisdiction of the territory and state of Montana.

2. SAME—TAXATION OF PERSONAL PROPERTY ON RESERVATION.

The constitution of Montana, in compliance with the conditions of the enabling act (25 Stat. 676), contains, in section 4, subd. 2, a disclaimer of all right to any public lands owned or held by Indian tribes, and provides that, until the Indian title is extinguished, such lands shall remain under the absolute jurisdiction and control of congress. *Held*, that this provision does not prevent the state or its counties from taxing cattle of a corporation grazing upon an Indian reservation under a contract with the Indians which is sanctioned by the United States.

Appeal from the Circuit Court of the United States for the District of Montana.

This was a bill in equity by the Hurlbut Land & Cattle Company to enjoin John S. Truscott, county treasurer of Custer county, Mont., from levying and collecting taxes upon cattle of the corporation which were grazing upon the lands of the Crow Indian reservation. The circuit court granted an injunction as prayed, and the defendant appealed.

Chas. H. Loud and Strevell & Porter, for appellant.

B. P. Carpenter and O. F. Goddard, for appellee.

Before GILBERT and ROSS, Circuit Judges, and MORROW, District Judge.

ROSS, Circuit Judge. The Crow Indian reservation is within the geographical limits of the county of Custer in the now state of Montana, and the sole question here presented for decision relates to the power of the proper authorities of that county to levy and collect taxes, pursuant to the state laws, upon cattle belonging to an Illinois corporation, and being within the lines of the reservation, grazing upon its lands, under lease from the Indians, ratified and confirmed by act of congress, and for which the Indians are paid, under the direction of the secretary of the interior.

Montana was organized as a territory by an act of congress approved May 26, 1864 (13 Stat. 85), by the first section of which it is provided:

"That nothing in this act contained shall be construed to impair the rights of persons or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory, but all such territory shall be excepted out of the boundaries and constitute no part of the territory of Montana until such tribe shall certify their assent to the president of the United States to be included within the said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been for the government to make if this act had never been passed."

At the time of the passage of this act of congress organizing the territory of Montana, there existed no treaty between the United States and any Indian tribe prohibiting any part of the present Crow reservation from being included within the territorial limits or jurisdiction of any state or territory, without the consent of such tribe. It is clear, therefore, that the reservation in question was embraced within the limits of the territory of Montana. *Langford v. Monteith*,

102 U. S. 145, 147; *Railway Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. 246. A treaty between the United States and the Crow Indians was, however, entered into May 7, 1868 (15 Stat. 650), by which the United States set apart for the undisturbed use and occupation of those Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them, that portion of the territory of Montana—

"Commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana territory; thence, along said 107th meridian to the mid-channel of the Yellowstone river; thence, up said mid-channel of the Yellowstone river to a point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude, and thence east along said parallel to the place of beginning."

The treaty contained the further agreement on the part of the United States that no persons, except those therein designated and authorized so to do, and except such officers, agents, and employés of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the reservation so set apart for the use of the Crow Indians, and also a relinquishment, on the part of those Indians, of all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits of the said reservation.

Subsequently, to wit, on the 12th day of June, 1880, a certain agreement was executed by a majority of all the adult male members of the Crow tribe, in conformity with the provisions of article 11 of the treaty of May 7, 1868, agreeing to dispose of and sell to the government of the United States, for certain considerations, a certain part of the Crow reservation, which agreement was ratified by act of congress approved April 11, 1882 (22 Stat. 42), and which agreement, so ratified, contained the provision:

"That, if at any time hereafter, we (the Crow Indians), as a tribe, shall consent to permit cattle to be driven across our reservation, or graze thereon, the secretary of the interior shall fix the amount to be paid by parties so desiring to drive or graze cattle; all moneys arising from this source to be paid to us under such rules and regulations as the secretary of the interior may prescribe."

Certainly, until the territory of Montana became a state, the jurisdiction of the United States over the soil embraced within the limits of the reservation, and over the people who should inhabit it, subject to the provisions of the treaty and of the subsequent agreements with the Crow Indians, was absolute and exclusive.

Prior to the 3d day of March, 1871, the United States always exercised its power and jurisdiction over the Indian tribes by means of treaties; but, on that day, a radical change was made in the pre-existing policy by the enactment of a law which, while continuing unimpaired every obligation of any treaty theretofore lawfully made and ratified with any Indian nation or tribe, declared that thereafter:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Rev. St. § 2079.

The territory of Montana became a state under and in pursuance of the act of congress, approved February 22, 1889 (25 Stat. 676), entitled "An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states." By that act the qualified electors of the then territory of Montana, at an election to be held for the purpose, were authorized to meet in convention to form a constitution and state government for the proposed state of Montana, which constitution should be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and which should not be repugnant to the constitution of the United States or the principles of the Declaration of Independence, and which convention should provide by ordinance, among other things, that the people inhabiting the proposed state of Montana—

"Agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. * * * But nothing herein or in the ordinances herein provided for shall preclude the said state from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States, or from any person, a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, but said ordinances shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as such act of congress may prescribe."

The act providing for the formation and admission into the Union of the state of Montana contained no other exception of the Crow reservation, or jurisdiction over it, than is found in the foregoing quotation, which provisions were embodied in section 2 of Ordinance No. 1, adopted by the constitutional convention of 1889, in these words:

"Second. That the people inhabiting the said proposed state of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States residing within the said state of Montana shall never be taxed at a higher rate than the land belonging to the residents thereof; that no taxes shall be imposed by the said state of Montana on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved to its use. But nothing herein contained shall preclude the said state of Montana from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States, or from any person, a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or

Indians under any act of congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of congress may prescribe."

All of the provisions of the enabling act having been duly complied with on the part of the proposed state of Montana, the state was duly admitted into the Union on an equal footing with the original states, and afterwards the state enacted this statute:

"The sovereignty and jurisdiction of this state extends to all places within its boundaries as established by the constitution, excepting such places as are under the exclusive jurisdiction of the United States; but the extent of such jurisdiction over places that have been or may be ceded to, purchased or condemned by the United States, is qualified by the terms of such cession, or the laws under which purchase or condemnation has been or may be made." Pol. Code Mont. § 40.

By section 41 of the same Code, the legislature of the state declared that all legal processes of the state, whether civil or criminal, may be served upon persons and property found within any of the military reservations or on any Indian reservation in all cases where the United States has not exclusive jurisdiction.

Undoubtedly, so far as concerns the government and protection of the Crow Indians, and for all purposes relating to the treaty and agreements between that tribe and the United States, the reservation in question is within the sole and exclusive jurisdiction of the United States. But is it to be regarded as without the jurisdiction of the state of Montana for all purposes? Clearly not. The people inhabiting the proposed state were required by congress to agree, and did agree, as one of the conditions to its admission into the Union, to disclaim any right or title to all lands lying within the limits of the proposed state owned or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and under the absolute jurisdiction and control of congress. The people inhabiting the proposed state were required to make, and did make, as one of the conditions of its admission into the Union, a similar disclaimer in respect to all right and title to the unappropriated public lands lying within its boundaries. Those, too, remained in the absolute jurisdiction and control of congress for all purposes relating to their control or disposition. The state could not tax or incumber such unappropriated public lands, or otherwise interfere with the jurisdiction and control over them reserved by the United States, but no one, we apprehend, would contend that personal property taken upon them by a third party, whether rightfully or wrongfully, would not be liable to be taxed in the state and county in which it should be found. We are unable to see any good reason why the authority of the state, and its subordinate subdivisions, the counties, may not also include the taxation of all such personal property found within their geographical limits, although upon the reservation in question, provided, as in this case, the Indians are in no way interested in it. The cattle upon which the taxes in question were levied were grazing upon the reservation under lease from the

Crow Indians, the sanction of which by the United States did no violence to the provisions of the treaty between the government and them. They were within the geographical limits of the state of Montana, and of the county of Custer of that state, and were the property, not of the Indians, but of a corporation of the state of Illinois, and were confessedly liable to the taxes levied unless they were without the jurisdiction of the state of Montana. That they were not we consider very clear. What was said by the supreme court in the case entitled *Railway Co. v. Fisher*, 116 U. S. 28-31, 6 Sup. Ct. 246, in respect to the authority of the then territory of Idaho, to tax that portion of a railroad extending, with the consent of the Indians, through a similar reservation, is applicable to the state of Montana. "The authority of the territory," said the court, "may rightfully extend to all matters not interfering with the protection of the Indians. It has, therefore, been held that process of its courts may run into an Indian reservation of this kind, where the subject-matter is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation, it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it. The authority to construct and operate the road appears from the agreement of July 18, 1881, between the United States and the Indians, which was ratified by act of congress of July 3, 1882." 116 U. S. 31, 32, 6 Sup. Ct. 246.

The cattle here sought to be taxed, as has been said, were upon the reservation under lease from the Indians, sanctioned by act of congress, and it is impossible to perceive that any of their just rights under the treaty and agreements with them on the part of the United States can be impaired by subjecting complainant's cattle to taxation. In reserving lands for the exclusive and undisturbed use of these Indians, and for others who, with their consent and with that of the United States, should occupy them, it was not the intention of congress to establish an asylum into which persons other than the Indians, whether natural or artificial, can take their property, and hold it exempt from its just portion of the taxation necessary for the support of the government which gives it protection. For the protection of the complainant's cattle in all matters unconnected with the Indians, the authority of the state of Montana is available. In *Langford v. Monteith*, supra, it was held that where, by treaty, the reservation was not excluded from the limits of the territory, civil process in a suit between white men in a court of the territory may run into the reservation, notwithstanding the Indians themselves are exempt from that jurisdiction. And that the criminal jurisdiction of the state courts extends to crimes in which the Indians have no part, committed upon a similar reservation, was held by the supreme court in *U. S. v. McBratney*, 104 U. S. 621, and in *U. S. v. Kagama*, 118 U. S. 375, 383, 6 Sup. Ct. 1109. See, also, *U. S. v. Thomas*, 151 U. S. 577, 14 Sup. Ct. 426; *Torrey v. Baldwin* (Wyo.) 26 Pac. 908. The doctrine of these cases sustains, we think, the authority of the state of Montana to tax the cattle in question, and other personal property similarly situated.

As this is the only question presented for decision, the order enjoining the state authorities from proceeding with the collection of the taxes in question is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

SCOTTISH UNION, ETC., INS. CO. OF EDINBURGH et al. v. J. H. MOHLMAN CO.

(Circuit Court, S. D. New York. March 30, 1896.)

EQUITY—JURISDICTION—BILL OF PEACE—MULTIPLICITY OF SUITS.

Several actions commenced or threatened by the same plaintiff against different insurance companies which had issued policies on the plaintiff's property, and refused to pay losses thereunder, do not constitute a multiplicity of suits, within the meaning of the law, authorizing the interference of equity, although the same defense is set up by each of the defendants; and an injunction will not be granted to restrain the prosecution and commencement of such actions, upon a bill in the nature of a bill of peace, filed by all the insurance companies against the plaintiff in such actions.

Michael H. Cardozo and Benj. N. Cardozo, for the motion.
Treadwell Cleveland, opposed.

LACOMBE, Circuit Judge. This is an application for a preliminary injunction to restrain the prosecution of actions at law brought by defendant in this court against two of the complainants, and to restrain defendant from bringing any action at law against any of the other complainants. The bill is in the nature of a bill of peace. Inasmuch as the two actions already pending are at issue, and on the calendar for trial next week, a prompt decision of this motion is necessary. It will not be possible, in the brief time thus allowed, to discuss at length the learned and exhaustive brief presented by counsel for the complainants. It has been carefully examined, however, and due consideration given to all the points presented, with the result that the court is clearly of the opinion that the injunction asked for should be refused.

The Mohlman Company, a New York corporation, was the owner of a stock of groceries and other merchandise contained in the premises No. 339 Greenwich street and Nos. 19 and 21 Jay street, and in the premises No. 156 Franklin street, through to, and being, Nos. 38 and 40 North Moore street, all in the city of New York. It insured its property against loss by fire in several companies, including the complainants. On April 30, 1895, a very large part of the merchandise in the last-mentioned premises was wholly destroyed, and the remainder thereof greatly damaged, by fire. Each of the insurance companies has declined to pay the loss under its policy. The Mohlman Company can therefore recover the amount such company is entitled to receive from each underwriter only by a separate action at law against it. Whatever other defenses these companies, or one or more of them, may have, all insist that they are relieved from the obligations of their respective policies because, as they aver, the building in which the goods were stored fell before the fire began. Every policy contains this clause: "If a building, or any

part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The assured insists that the building did not fall, except as the result of the fire. There will be thus presented in the controversy arising upon each policy the issue of fact, which was first, the fall or the fire? This is a plain and simple issue, easy to be tried in a court of law. Each policy of insurance is a distinct and separate contract between two parties only,—the assured and the single insurance company which issued it. By no possibility can there be any multiplicity of suits against any one of the complainants. A single action at law upon its policy will finally determine all questions in which it is at all concerned. Nor will the result of an action against one company alter or modify in any way the rights of the parties to another. If the assured is beaten in his action against Company X., and recovers \$10,000 against Company Y., the successful company will be under no obligation to pool the results of both cases with the unsuccessful one. Surely there is no hardship in the fact that an insurer who has issued a policy, and refuses to pay a loss because it believes the assured is not entitled to recover, may be brought into a court of law by the assured to settle the issue of fact between them. The complainants nevertheless contend that they are entitled to tie the assured up, possibly for years, by this bill of peace, and meanwhile litigate in a forum of their own selection the single defense above suggested. Should that point be decided against them, the other defenses to the assured's actions would still remain, and he would still have to prove his case separately against each, unless the insurers graciously decided to put him to no further trouble.

It is contended that the numerous authorities cited in the brief warrant the granting of such relief. In the opinion of this court, however, none of them go to that length; and, if the drift of some of them be in that direction, it would seem to be a good time to call a halt. The system of jurisprudence and procedure which is known to courts and lawyers as "equity" is a good thing, but justice and fair dealing are better. If a court of chancery has the power, it should be slow to exercise its discretion to hale into its own jurisdiction an individual who, having rights under different, independent contracts, is seeking to enforce them against independent defendants in the courts appropriate to pass upon them, simply because these separate defendants may think it more convenient or more expedient to combine forces against him in a single suit. Each of these insurers, independently of all the others, has entered into a contract with the assured which entitles the latter to come into the federal court in a common-law action, and submit all issues between them to its arbitration, and the constitution of the United States secures to him a trial of those issues by a jury. It might well be inferred from the present application that there is some aversion to face such a tribunal, and that it is expected the chances of success will be greater if the testimony be taken, according to the invariable practice in equity in this district, by written deposition, when the court never sees the witness, nor has the benefit of observing how his testimony

is given, and noting his demeanor under cross-examination. If the present application were successful, we might, no doubt, expect to see all such insurance litigation promptly transferred to the equity side of the court. Most persons insure against fire in more than one company, and if a dozen companies can, by combining as complainants have, take the assured out of the common-law courts, there is no good reason why a half dozen, or even less, should not go and do likewise.

The fundamental difficulty with complainants' position is that although there may be a multiplicity of actions from the point of view of the assured, who may have to sue each company, there is no multiplicity of actions from the point of view of the insurer, for no insurer is threatened with more than a single action. For this reason, perhaps, much is made in the brief of the difficulties and embarrassments to which the court will be exposed in trying practically the same issue over and over again, "in an interminable series of litigations, while the course of justice is obstructed by repeated and protracted trials, each of which will occupy a period of not less than two weeks." The court does not share counsel's alarm. Other groups of actions, wherein practically the same issue was involved in all the actions of each group, have, within the court's experience, been tried here before. The experience was monotonous, no doubt, to both court and counsel, but did not produce any perceptible inconvenience to other litigants, or embarrassment or obstruction to the course of justice. Moreover, it by no means follows that there will be as many actions tried as the complainants seem to anticipate. It may be that the assured will not be discouraged, should he lose his first action, or even his second, on the defense above suggested; but the idea that he will continue to throw good money after bad, in prosecuting an indefinite number of expensive two-weeks trials, each requiring the presence of able counsel and "forty witnesses," and in which he is uniformly unsuccessful, is a purely gratuitous assumption. And if he succeeds in the first two or three actions, the several defendants therein being unable, even with the assistance of the other insurers, to prove the defense relied on, these complainants will no doubt be able successfully to avoid any further multiplicity of actions without having to invoke the aid of a bill of peace. The motion for a preliminary injunction is denied.

This suit is brought by insurance companies who are either aliens, or citizens of some other state than this. An application to be allowed to intervene is made by several other insurance companies, who are citizens of New York, and who have issued policies on the same property. Since the Mohlman Company is also a citizen of New York, none of these companies could be sued in the federal court. There seems no good reason then why that court should be asked to interfere. There is no risk of interference with its calendars, or with the course of administration of justice in its precincts. The state court can best decide whether the public interests require a stay of actions at law brought or threatened within its jurisdiction, and to it should be made the application of the domestic corporations for a so-called bill of peace. The motion to intervene is also denied.

BAUSMAN v. DENNY et al.

(Circuit Court, D. Washington, N. D. March 24, 1896.)

1. EQUITY—JURISDICTION—ANCILLARY SUITS.

A suit in equity, brought by the receiver of an insolvent corporation, appointed by a federal court, against the subscribers to the stock of the corporation, to collect the balances due on their subscriptions, is within the jurisdiction of such federal court in equity, as an ancillary suit, without regard to the citizenship of the parties, or the adequacy of the remedy at law.

2. CORPORATIONS—SUBSCRIPTIONS TO STOCK—SET-OFF.

Defendant, one of the stockholders in the R. Co., in order to enable it to obtain funds without making an assessment on the stock (which would have been burdensome to the stockholders, and to defendant in particular), gave to the company his promissory note, which was discounted by the company, and afterwards replaced by other notes of defendant, for larger amounts, the last of which, exceeding the amount due on defendant's subscription to the stock, was paid by him. The R. Co. became insolvent, and a receiver was appointed, who brought suit against defendant to recover the balance of his stock subscription. *Held*, that defendant was entitled to be credited with an amount sufficient to extinguish his subscription to the stock.

3. EQUITY PLEADING—PAYMENT AND SET-OFF.

The rules of equity pleading do not require the defenses of payment or set-off to be set forth in an answer according to any particular form, but it is sufficient for the pleader to set forth the facts in a concise and intelligible manner.

Bausman, Kelleher & Emory, for complainant.

John R. Kinnear and Joslin, Denny & Bailey, for defendants.

HANFORD, District Judge. This is a suit in equity by the receiver of an insolvent corporation, against its stockholders, to collect from them the unpaid portions of their subscriptions to its capital stock.

As to the defendant Louisa Denny, the bill must be dismissed for failure of proof. The stock standing in her name upon the books of the company at the time of the appointment of the receiver appears to have been transferred without her knowledge or consent, and, when informed of the transaction, she refused to receive the stock. Having never subscribed for stock, nor become a holder of unpaid stock, she is not liable.

The defendant the Western Mill Company is only a nominal party. The Rainier Power & Railway Company having acquired ownership and possession of all its assets before the receiver was appointed, no decree for substantial relief can be enforced.

The defendant W. Gladstone Dickenson has failed to answer, and as to him the bill must be taken as confessed.

The defendant George Kinnear disputes the jurisdiction of the court on the ground that the parties are all citizens of this state, and the subject-matter is not cognizable in a federal court, and upon the further ground that the complainant has a plain, adequate, and complete remedy at law, and therefore the case is not cognizable in a court of equity. The suit is of an ancillary character, commenced and prosecuted by the receiver in his official capacity; and it is there-

fore properly brought in the court which appointed him, and which has jurisdiction of the principal case in which the receiver was appointed, and legal custody of the assets of the insolvent corporation. This court has jurisdiction because the suit is one arising under the constitution and laws of the United States; the authority of the receiver to sue being derived from the constitution and laws of the United States, pursuant to which he holds his appointment. *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Railway Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843; *White v. Ewing*, 159 U. S. 36-40, 15 Sup. Ct. 1018; *Wood v. Drake*, 70 Fed. 881-883. The mere fact that separate actions at law against each holder of unpaid stock might be maintained is not good ground for denial of equitable relief. A single suit, to which all the stockholders are made parties, and in which all equities claimed by them, singly or collectively, may be considered and adjudged, and saving the expense of separate suits against each stockholder, is not only advantageous to all creditors and stockholders, but is to be commended because more just than the method of collecting stock subscriptions by separate actions against each subscriber, whereby some may entirely escape from liability, and leave the whole burden of paying the company's debts to rest upon others, who may fail in establishing equally meritorious defenses. Numerous precedents and authorities have settled the controversy as to the jurisdiction of courts of equity in these cases, leaving no room for doubting that the jurisdiction exists. 2 Mor. Priv. Corp. §§ 896-902.

Mr. Kinnear also defends on the ground that his stock was fully paid for before the corporation went into the hands of a receiver. From the evidence offered in support of this defense, I find that Mr. Kinnear paid in cash to the company the amount of four assessments upon his stock, of \$250 each, and in the month of October, 1891, he gave to the company his negotiable promissory note for \$3,197.29, which note was renewed from time to time until in the month of February, 1893, when he gave to the company a new note for the sum of \$5,000, and when that note became due it was taken up, and a new note for the same amount, payable to D. T. Denny, was given as payment. These several notes were indorsed by the company and by Mr. Denny and his sons, and were discounted by the company and the proceeds used in the prosecution of its business. The last note given, for \$5,000, has been paid by Mr. Kinnear, principal and interest. These notes were not given by Mr. Kinnear in payment for his stock, but were intended as a loan of credit to assist the company at a time when it was incurring debts in the construction of its line of street railway, so as to enable the company to obtain funds without resorting to assessments upon its capital stock, which at that time would have been burdensome to its stockholders, and especially to Mr. Kinnear. These notes were given, however, in consideration of Mr. Kinnear's liability for his unpaid subscription. He was not indebted to the company on any other account, and would not have loaned his credit to the company for any other purpose than to avoid being required to pay for his stock. The last note given exceeds in amount the balance remaining unpaid on Mr. Kinnear's

stock, and for that reason he obtained indemnity by taking a second mortgage upon property owned by Mr. Denny. As the matter now stands, the company has received from Mr. Kinnear in assessments paid by him, and, by discounting his notes, more than the full amount of his stock subscriptions, and he has a lien upon property of Mr. Denny as security for any loss which he may sustain by reason of being compelled to pay the note.

The receiver contends that Mr. Kinnear should not be credited on account of his stock subscription for the note transaction, for the reason that the note was not intended as payment, but was a mere loan of credit, and therefore the plea of payment in the answer is not sustained by the evidence, and that the amount paid upon the note should not be allowed as a set-off or counterclaim, for the reason that it is not so pleaded in the answer, and for the further reason that a debt of the corporation to a stockholder cannot be set off against an unpaid stock subscription. As to this contention, I hold that the rules of equity pleading do not require the defenses of payment or set-off to be set forth in an answer according to any particular form; all that is required is for the pleader to set forth the facts in a concise and intelligent manner. Mr. Kinnear's answer contains a true statement of the facts as I find them to be from the evidence, which facts, in my opinion, entitle him to be credited with an amount sufficient to extinguish his entire subscription to its capital stock. In the case of *Sawyer v. Hoag*, 17 Wall. 610-624, the supreme court refused to allow a stockholder to set off a debt of the corporation against a promissory note given in payment for stock. But the facts in that case are so different, I cannot regard it as a precedent which the court is bound to follow in this case. The important consideration upon which that decision rests was the fact that after the corporation had become insolvent the stockholder purchased a liability for one-third of its face value, and claimed credit for it as a set-off at par. If his scheme had been successful, the capital of the company would have been actually diminished by an amount equal to the difference between the amount of the unpaid subscription and the dividend payable from the company's assets upon the liability which he purchased after the company had become insolvent. *Scammon v. Kimball*, 92 U. S. 362-371 is a similar case. An insolvent fire insurance company held notes given for unpaid balances of subscriptions to its capital, and was also liable to the plaintiff in the case for losses covered by policies of insurance issued to him, which he proposed to set off against the notes upon which he was liable as maker and guarantor. The court refused to allow the set-off. To have allowed it would have diminished the trust fund, in which all the creditors were entitled to share equally, because the liability upon the insurance policies did not represent actual money received. The company only received the amount of the insurance premiums. In *Scovill v. Thayer*, 105 U. S. 145-159, a delinquent subscriber claimed a set-off on account of money paid for stock issued to him in excess of the limit fixed by the charter of the company. The court held that money paid voluntarily, pursuant

to an illegal contract, was not recoverable, and refused to allow the set-off. In *Cook Co. Nat. Bank v. U. S.*, 107 U. S. 445-453, 2 Sup. Ct. 561, the court held that "a trustee cannot set off against the funds held by him in that character his individual demand against the grantor of the trust," and denied to the government priority of payment of debts due to it, out of the proceeds of bonds deposited to secure circulating notes of the bank pursuant to the national banking law. Other cases which follow *Sawyer v. Hoag* simply hold to the doctrine that the capital of an insolvent corporation is a trust fund for the benefit of all its creditors, and that good faith towards creditors and the public requires that subscriptions to the capital of the corporation be made good by full payment in money or its equivalent. In this case the capital of the *Rainier Power & Railway Company* will not be diminished a particle by allowing Mr. Kinnear credit for the amount which he has actually paid, for the company has actually received in money a sum exceeding the amount of his subscription, and the fund to be distributed among its creditors ratably has been augmented by the amount so received.

The defendant David T. Denny has paid debts of the company exceeding the amount of the balance upon the stock for which he subscribed. But said payments are not set forth in his answer, and no exemption from liability is claimed on account thereof. The answer admits that there is due from this defendant a balance of \$33,750. The sum of \$7,200 remains unpaid on the stock held by D. Thomas Denny, and against this liability there appears to be no valid defense. In their answer these two defendants plead the statute of limitations, but this is not available, for the reason that no right of action accrued upon the subscription contract until a call had been made. *Scovill v. Thayer*, 105 U. S. 143-159. As no call was made until a short time before this suit was commenced, the demand against the defendants cannot be regarded as stale, and the defense is without merit.

It will be decreed that the plaintiff recover from the defendant W. Gladstone Dickenson, \$800; from David T. Denny, \$33,750; and from D. Thomas Denny, \$7,200,—with interest on said amounts at the legal rate from the 21st day of September, 1894, and costs, and that as to all the other defendants the suit be dismissed, with costs.

UNITED STATES et al. v. WINANS et al.

(Circuit Court, D. Washington, S. D. March 31, 1896.)

1. INDIAN TRIBES—RIGHT OF FISHERY—YAKIMA INDIAN TREATY.

The treaty of the United States with the Yakama Indians, after stipulating for the cession of the Indian lands to the United States, excepting a reservation for the Indians to which they agree to remove, provides that the Indians shall have the exclusive right of taking fish in all streams running through or bordering on the reservation, and also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle, upon open and unclaimed land. *Held*, that it was an

invasion of the rights of the Indians under such treaty to exclude them from fishing in the Columbia river, at a place to which, at and prior to the making of the treaty, the Indians were accustomed to resort, for fishing, though the lands bordering on the river at such place had been patented to private citizens, but that the right of the Indians to erect temporary buildings on any particular land ceased when such land was so patented and vested in private citizens.

2. SAME—RIGHT OF UNITED STATES TO SUE.

The United States has the right, as guardian and trustee of a tribe of Indians, to bring a suit to protect their rights secured by treaty.

3. UNITED STATES COURTS—JURISDICTION—LOCAL SUITS.

It seems that a suit by the United States to enforce the rights of a tribe of Indians to a fishery is local in its nature, and properly brought in the district where such fishery is, without regard to the residence of the defendants.

In Equity. Suit by the United States, together with certain Indian plaintiffs, for an injunction to restrain the defendants from interfering with fishery rights guarantied to the Indians of the Yakama Nation, by the terms of the treaty made and concluded between the United States and said Indians. Demurrer to the bill of complaint. Overruled.

Wm. H. Brinker, U. S. Atty.
F. P. Mays, for defendants.

HANFORD, District Judge. The bill of complaint in this case claims for the Yakama Indians an unlimited right to take fish from the Columbia river at a certain specified place, and a right of ingress and egress to and from said place, and a right to erect temporary buildings for curing fish, and for the habitations of said Indians during each fishing season, to the same extent as if such rights were especially granted and conferred by a patent from the proprietor and sovereign of the country. The basis for the claims is to be found in the reservations contained in the treaty between the United States and the Indians of the Yakama Nation, whereby the said Indians ceded to the United States the Indian title to certain lands. The provisions of the treaty material to be considered are as follows:

"Article 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them. * * *

"Art. 2. There is, however, reserved from the lands above ceded, for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, * * * all of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant. Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

* * *

"Art. 3. And provided, that, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways. The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. * * *

"Art. 10. And provided, that there is also reserved and set apart from the land ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam river, and known as the 'Wenatshapam Fishery,' which said reservation shall be surveyed and marked out whenever the president may direct, and be subject to the same provisions and restrictions as other Indian reservations"

12 Stat. 951.

It is plain that the treaty, whether considered as a grant from the United States government to the Indians or as a reservation by the Indians, secures to the Indians rights of two kinds, viz. exclusive rights and rights to be enjoyed in common with citizens. The rights of fishery within the tracts set apart for the Indians, and in streams bordering the same, are exclusive in favor of the Indians; while the right to take fish at usual and accustomed places, outside of reservations, is to be enjoyed in common with citizens of the territory. This common right of fishery at usual and accustomed places is coupled with the right of erecting temporary buildings for curing fish, and of hunting, gathering roots and berries, and pasturing horses and cattle, upon open and unclaimed land. It would not be a fair construction of the treaty to hold that any particular ground in addition to the reservations to be set apart and surveyed for the exclusive use of the Indians should be held permanently as places for temporary buildings, or for the pasturage of horses and cattle. The theory that lands conveyed by government patents, after being so conveyed, and appropriated by individual citizens, still remain subservient to use and occupation by the Indians, for travel over the same, otherwise than by lawfully established public highways, and for camping grounds, finds no support in the provisions of the treaty, nor in the rules for the construction and interpretation of statutes, which must be applied in the interpretation of the treaty and of the public land laws of the United States. On the contrary, the enumeration of other rights secured to the Indians by express words negatives any possible presumption of rights by mere implication; for the rule is, "*Expressio unius est exclusio alterius.*" The language of the treaty indicates that the purpose was to secure to the Indians equality of rights with citizens in the matter of fishing, hunting, gathering roots and berries, and pasturing horses and cattle, and in the use and occupation of unclaimed land for the erection of temporary buildings during each fishing season.

The United States attorney has argued that the patenting of the banks of the Columbia river should not be made effective as a means of depriving the Indians entirely of all benefits secured to them by

the treaty in the matters of places for temporary houses, for, without some place to build upon, their common right of fishery will be itself destroyed. This might be a good argument against issuing patents, but, in so far as it bears upon the questions in this case, it may be well answered by saying that the executive branch of the government had ample power to provide for the Indians by reserving from sale and settlement as much ground as the Indians require for their use; and if the president has failed to exercise his power, and if it is now too late for him to protect the Indians in their treaty rights, they may purchase and own the ground necessary for their use, as citizens who have a common right of fishery with them may do.

The bill of complaint charges the defendants with having violated the rights of the Indians in the following particulars: By forcibly preventing the Indians from fishing in the Columbia river in front of certain specified land in the possession of the defendants, and to which they claim to have acquired the title from the government of the United States, the place indicated having been at the time of the making of said treaty, and long prior thereto, one to which the Indians were accustomed to resort during the fishing season of each year, for the purpose of taking fish and curing the same, to supply themselves with food; by placing fish wheels so as to take all the fish coming in front of said land, and thereby excluding the Indians from enjoying their common right of taking fish at said place; and by destroying the buildings erected by the Indians for curing fish, and, by force, preventing the Indians from rebuilding. It is plainly an invasion of the rights of the Indians, under the treaty, to exclude them from fishing in the Columbia river at the place indicated, and the government has the right to employ the power of this court to make the treaty effective. But the right of the Indians to erect temporary buildings on any particular spot of ground, according to the terms of the treaty, as I construe it, ceased when the title to that land was transferred from the government, and became vested as private property. The demurrer must be overruled, for the bill states facts sufficient to require the court to enjoin the defendants from interfering with the Indians in the enjoyment of their common right of fishery, although, in my opinion, the court will not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing.

The defendants, upon the authority of the cases of *U. S. v. Huffmaster*, 35 Fed. 81-83, contend that this court is without jurisdiction, for the reason that the amount in controversy does not exceed, \$2,000. The *Huffmaster* Cases, however, have been overruled by the supreme court in a decision rendered December 23, 1895, in the case of *U. S. v. Sayward*, 16 Sup. Ct. 371.

The United States has the right to maintain the suit as guardian and trustee of the Indians, to protect their rights secured by the treaty. *U. S. v. Boyd*, 68 Fed. 577; *U. S. v. Flournoy Live-Stock & Real-Estate Co.*, 69 Fed. 886; *U. S. v. Holliday*, 3 Wall. 407; *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109.

The defendants voluntarily entered a general appearance in this

case, without reserving any right to object to the jurisdiction of the court by reason of being inhabitants of the state of Oregon. Their demurrer, filed more than a month afterwards, goes to the merits of the controversy, and it does not specifically make the objection that the suit was not brought in the proper district. I consider the suit to be local in its nature,—that is to say, a suit to enforce a claim to property situated within this district; and therefore this court is authorized to assume jurisdiction, by virtue of the eighth section of the act of March 3, 1875 (1 Supp. Rev. St. [2d Ed.] 84, 85). *Hatch v. Ferguson*, 57 Fed. 966; *Id.*, 15 C. C. A. 201, 68 Fed. 43; *Greeley v. Lowe*, 155 U. S. 58-76, 15 Sup. Ct. 24. But if this were not so, the defendants having waived their personal privilege of exemption from being sued in this district, by having appeared and pleaded to the merits, they cannot be heard to urge the objection now. *Railway Co. v. Cox*, 145 U. S. 593-808, 12 Sup. Ct. 905. The subject-matter of the action is within the jurisdiction of the court, and the defendants are in court for all purposes of the litigation.

Demurrer overruled.

CANADIAN PAC. RY. CO. v. CLARK.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

1. PLEADING—CASE AND TRESPASS—CONTRIBUTORY NEGLIGENCE.

A declaration, in an action against a railroad company, setting forth special facts and circumstances showing a case of negligent injury by the defendant to the plaintiff's person and property, averring that the defendant did not provide a reasonably safe passage over a highway crossing; that it suffered the crossing to be obstructed; that it did not manage its engines with due care; that it negligently ran them at high speed; that it did not ring a bell or blow a whistle, by reason whereof plaintiff was injured,—is in case, not trespass; and the defendant, under the plea of not guilty, is entitled to avail itself of the defense of contributory negligence of the plaintiff.

2. CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for personal injuries, it appeared that the accident occurred at a grade crossing, at which there was a side track on each side of the main track, while the highway ran parallel to the tracks for some distance, and then turned sharply across them. A freight train was standing on the side track, between the highway and the main track, with its rear car close to the crossing, and the engine some 700 feet up the track. Plaintiff, who was totally deaf in the ear nearest the tracks, drove down the highway, past the freight train, and, without stopping, urged his horse across the tracks, and was struck, on the crossing, by an express train coming from the same direction as plaintiff, and which had been concealed by the freight train. Plaintiff was familiar with the locality, and knew that the presence of the freight train on the side track indicated the approach of a train, which might be the express; but he did not see or hear it, and was so engaged with his horse that he did not observe signals and cries of warning from men on the freight train, and at a station a short distance away on the other side of the tracks. The court, after declining to instruct the jury to find for the defendant on the ground of contributory negligence, instructed them that it was plaintiff's duty to approach the crossing cautiously and carefully, to look and listen, and do all that a reasonably prudent man would do, before attempting to cross; that, if the crossing was so obstructed that an approaching train could not be seen or heard till close at hand, prudence required him to approach the crossing at a speed which would enable him to stop in time, if a train were

seen; and that such an obstruction required increased care on plaintiff's part. Afterwards, the jury having for some time failed to agree, the court withdrew any question of contributory negligence of the plaintiff, and instructed the jury that, as the plaintiff was struck by defendant's train, he was entitled to a verdict, unless they found that the defendant did all that the law and reasonable prudence required to prevent the injury, and could not prevent it. *Held* error.

In Error to the Circuit Court of the United States for the District of Vermont.

This was an action by Samuel O. Clark against the Canadian Pacific Railway Company for personal injuries, and for damage to plaintiff's horse and sleigh. There was a verdict for plaintiff, and, defendant's motion for a new trial having been denied (69 Fed. 543), it brings error.

Frank E. Alfred and Joel C. Baker, for plaintiff in error.

A. B. Brown and W. D. Wilson (Wilson & Hall and Rustedt & Locklin, on brief), for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. The action was brought to recover for personal injuries to the plaintiff, and the destruction of his horse and sleigh, alleged to have been caused by the negligence of the defendant. While driving over the railroad of the defendant at a highway crossing in the town of Richford, Vt., he was struck by the locomotive of the defendant's express train, which was coming from the north. The railroad, at the crossing, consisted of a main track, and a side track at either side. It was a grade crossing, planked between the tracks. There was a station house quite near the easterly track, southwardly of the crossing. On the occasion in question, the westerly side track was occupied, northerly of the crossing, by a freight train, which had been side-tracked to await the passing of the express train, the locomotive being about 700 feet from the crossing, and the van or rear car being on the edge of the planking. The highway, as it approaches from the north, runs for a considerable distance quite close to and nearly parallel with the tracks of the railroad, and until it makes a somewhat abrupt turn across the tracks. The plaintiff was driving from his farm, which lay northwardly from the crossing, on the westerly side of the railroad, to his residence, which was located across the railroad, southwardly from the crossing. According to his testimony at the trial, while he was proceeding southerly along the highway towards the crossing, and as he came opposite the locomotive of the freight train, his horse was frightened by the steam of the locomotive; but he soon got him under control and continued driving quite rapidly towards the crossing. He supposed the freight train was side-tracked to allow some other train to pass on the main track, and knew the express from the north was due about that time, but was not sure that it had not already passed. He looked up the track to the south, and saw no train coming, and after he came opposite the

locomotive he could not see the main track. That he was totally deaf in his left ear. That, as he proceeded, he listened, and heard no whistle blown or bell rung, nor the noise of an approaching train. That, about 15 or 20 feet from the crossing his horse wanted to stop, but he struck him with the reins and urged him forward. That, just as the horse reached the main track, he heard some one call to him to "look out for the express," but that it was then too late to turn back, and he was struck by the train. The evidence for the plaintiff tended to show that no bell was rung or whistle blown from the locomotive of the express train as it approached the crossing. There was evidence for the defendant showing that a brakeman upon the platform of the van of the freight train, and another man standing with him there, endeavored, by waving their hands and shouting, to attract the attention of the plaintiff, and stop him, as he came near the crossing; that the station agent of the defendant, and another man standing by him on the platform of the station house, when plaintiff was some distance from the crossing, signaled to him to stop; that the plaintiff could have seen any of these men far enough away to have avoided danger if he had looked, but that his attention was concentrated upon his horse, and he did not see or hear them. The evidence for defendant also tended to show that, as the train arrived at a distance of 80 rods from the station the whistle was blown, and that the bell upon the locomotive was rung all the way from that point until the plaintiff was struck; that, as the train approached the crossing, its ordinary speed was reduced, and it was kept at a reduced speed until the accident happened; and that no person upon the train saw, or could see, the plaintiff, after he reached a point in the highway opposite the locomotive of the freight train, until he drove upon the track. At the close of the evidence the defendant requested the court to instruct the jury to find a verdict for the defendant upon the ground that the plaintiff's negligence, as shown by his own testimony, contributed to the accident. The court refused to grant the instruction, and submitted the case to the jury. The defendant thereupon requested the court to instruct the jury, in substance, that it was the duty of the plaintiff, in approaching the crossing, to do so cautiously and carefully; that he should look and listen, and do everything that a reasonably prudent man would do before attempting to make the crossing; and that, if he was familiar with the crossing and its dangers, and frequently used it, and, under the circumstances of the case, failed to act as a prudent and cautious man should have acted, or omitted some precaution that a prudent man ought to have taken, whereby he was injured, he was not entitled to recover; that, if the crossing was so obstructed that an approaching train could not be seen or heard until plaintiff came very near the railroad track, common prudence required him to approach it at such speed that, when an approaching train might have been seen or heard, he might have been able to stop and allow it to pass; and that such obstruction required increased care on the part of the plaintiff in approaching the crossing.

In his original instructions to the jury the trial judge substantially presented to them the propositions thus requested; but, after a long

deliberation on the part of the jury, occupying a day and two nights, and when they had returned into court and announced that they were unable to agree, he gave them further instructions by which he withdrew from their consideration any question of the contributory negligence of the plaintiff, and informed them that, inasmuch as it appeared that the plaintiff was struck on the crossing by the defendant's train, the plaintiff was entitled to a verdict, unless they were able to find that the defendant did all that the law required, and all that reasonable prudence required to prevent the injury, and could not avoid it. The defendant duly excepted to the refusal of the court to instruct the jury to render a verdict for the defendant, and to that part of his instructions withdrawing from their consideration the question of the plaintiff's contributory negligence, and embodying the proposition that he was entitled to recover unless the evidence disproved negligence on the part of the defendant.

It is not necessary, for present purposes, to consider whether the defense resting upon the ground of the contributory negligence of the plaintiff was not so persuasively and conclusively established that the jury should have been instructed to find for the defendant. The plaintiff was aware, from the presence of the freight train on the side track, that a train was expected on the main track, and that such train might be the express train coming from the north. He had been driving rapidly for an eighth of a mile, with his view of the track in that direction cut off by the interposed freight train. Driving rapidly, as he had been, and being totally deaf in the ear towards the track, he could not but be aware that, although he had been listening for them, he might have failed to hear the signals from the express. Before he reached the crossing he knew that the van of the freight train was so near to it that he would be unable to see the main track to the north until his horse would be upon the track. Under these circumstances, common prudence required him, as he neared the tracks, to proceed cautiously, to look, to listen, and, as we think, to stop, in order that he could listen more perfectly, before attempting to cross. He did neither, but kept his attention so exclusively upon his horse that he did not see the signals of danger which were being made to him from men in full view, on his right hand and on his left, at each side of the crossing, and urged his horse to dash rapidly across. If these undisputed facts were not such as to leave no room for inferences, such that a jury could legitimately draw no other conclusion from them than that the plaintiff had failed to exercise reasonable care and prudence, they were certainly sufficient to justify such a finding, and in no possible view could they justify the court in deciding to the contrary as a question of law. The most culpable negligence on the part of a defendant will not authorize a recovery in behalf of a plaintiff whose own negligence has contributed to his injury.

It is urged in support of the refusal to leave the question of the plaintiff's negligence to the jury, that such an issue was not raised upon the pleadings. This is the only conceivable ground upon which that refusal can be justified. No question that the issue was not within the pleadings was raised upon the trial. Much of the testi-

mony of the defendant was introduced for the purposes of maintaining that issue, and had no other bearing; and, as has been stated, the question was originally submitted to the jury by the trial judge. In his final instructions to the jury, in which he withdrew that question from their consideration, no such reason for doing so was suggested by him. Nevertheless, in considering the motion for a new trial, the learned trial judge placed his denial of the motion, in part, upon the ground that the contributory negligence of the plaintiff was not in issue. To this conclusion we are unable to accede.

The declaration contains three counts. The plea was not guilty. The first two counts of the declaration are concededly in case. The third sets forth, as the cause of action, special facts and circumstances, showing a case of negligent injury by the defendant to the plaintiff's person and property while he was crossing the defendant's railway. It avers that the defendant did not provide a reasonably safe passage over the highway crossing; that it carelessly and negligently suffered the same to be obstructed; that it did not manage and control its engines and cars with due and proper care; that it carelessly and negligently ran them at a high rate of speed; that it did not ring a bell upon the locomotive, or blow a steam whistle, until the locomotive had passed over the crossing, by reason whereof he and his horse and sleigh were struck and injured.

If the third count was in trespass, inasmuch as, under a plea of not guilty, the defendant in such an action is not permitted to prove that the plaintiff was guilty of contributory negligence, and inasmuch as the statute of Vermont relating to pleadings requires that, in counts where case and trespass are joined, pleadings must conform to those in trespass, the conclusion of the learned trial judge was correct. But we are of the opinion that the third count, like the first and second, was in case. It sets forth a cause of action in which, although the injury was immediate, the fault of the defendant consisted in negligence; and, as the defendant was a corporation, which could only act through its agents and servants, case was the only appropriate form of remedy.

Case is the appropriate and proper remedy for negligent injuries at common law. In *Claffin v. Wilcox*, 18 Vt. 610, the rule is stated to be that, when the fault of the defendant consists in negligence, it is mere nonfeasance; and, although the injury is immediate, the appropriate remedy is case. All the authorities upon common-law pleading state the rule to be that, while trespass is the proper remedy for an immediate injury inflicted by the willful act of the defendant, yet case lies where the act is negligent; and, where injuries are occasioned by the carelessness or negligence of a servant of the defendant, the plaintiff must generally bring case. Chitty says:

"If the injury arise from a want of care or negligence of the servant, case is the remedy; but if it occurred as the necessary, probable, or natural consequence of the act ordered by the master, then the act is the master's, and he should be sued in trespass, if the act were forcible and immediate."

See 1 Chit. Pl., 131; *Huggett v. Montgomery*, 2 Bos. & P. N. R. 446; *Morley v. Gaisford*, 2 H. Bl. 443; *McManus v. Crickett*, 1 East, 106.

The rule is thus stated in *Campbell v. Phelps*, 17 Mass. 245:

"In general, the true distinction is, when the injury is done directly by the person sued, the action should be trespass; when it is consequential, as when done by a servant, and the master is sued on account of his liability for the acts of his servant, case is proper."

It is entirely well settled that, under the plea of not guilty in an action on case, the defendant may show that the immediate or proximate cause of the injury was the negligence of the plaintiff. *Flower v. Adam*, 2 Taunt. 315; *Williams v. Holland*, 10 Bing. 110; *Vennall v. Garner*, 1 Crompt. & M. 21; *Bridge v. Grand Junction Ry. Co.*, 3 Mees. & W. 244; *Sills v. Brown*, 9 Car. & P. 601; *Smith v. Dobson*, 3 Man. & G. 59; *Holden v. Coke Co.*, 3 C. B. 1.

The adjudications of the supreme court, to the effect that the contributory negligence of a plaintiff is matter of defense, and the burden of proof is upon the defendant, do not touch the question of pleading which arises here. That question is controlled by the rules which obtain in the state in which the action is tried, and in some of the states, under the code system of pleadings which prevails, the defendant may be required to specifically allege the defense in cases in which the complaint does not allege that the plaintiff was free from negligence on his part. As in Vermont the rules of pleading which obtain are those of the common law, and under these rules a defendant, in an action upon a case, is permitted, under a general traverse, to show that the plaintiff's negligence contributed to the injury, we are unable to doubt that the defendant in the present case was entitled to avail himself of the defense, and that the instruction to the jury which is complained of by the assignments of error was erroneous.

The judgment is accordingly reversed.

AMERICAN CREDIT INDEMNITY CO. v. WOOD et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

1. PARTNERSHIP—EVIDENCE.

It is not error, in an action between persons who sue as partners, and a third party, to permit persons, whose business relations with the alleged partners are intimate, to testify as to the apparent relations between them, although the partnership may have been constituted by indentures or other writings.

2. INSURANCE—WARRANTY IN APPLICATION—BURDEN OF PROOF.

It is not necessary for the plaintiff in an action on an insurance policy to aver and prove the truth of representations, amounting to warranties, which are contained in the application only, and not in the policy itself; but it is incumbent upon the defendant, who relies upon the breach of such warranty, to allege it and assume the burden of proof.

3. CREDIT INSURANCE—IDENTITY OF INSURED—CO-PARTNERSHIP.

A policy of credit insurance, issued to W. & Co., provided that it should cover only losses on sales of merchandise owned "by the indemnified." *Held*, that such provision did not require that the business of the indemnified should have been conducted, throughout the term of the policy, under exactly the same firm name, if the firm had been in existence, composed of the same members as when the policy was issued.

4. SAME—PROOF OF LOSS.

A policy of credit insurance provided that proof of loss should be made within 20 days after knowledge of the insolvency of any debtor should have been received by the indemnified, and that final proof of loss should be given to the insurer within 20 days after the expiration of the policy. *Held*, that the former provision was intended only to afford the insurer prompt notice that a loss had happened, for the purposes of investigation and measures of protection, and that it was fully complied with by furnishing, within the required time, notice of the appointment of a receiver of the debtor's property in a creditor's suit, with a statement of the debtor's account, followed at the expiration of the policy by legal proof of the debtor's insolvency.

5. SAME—CONSTRUCTION OF POLICY—AMBIGUITY.

In construing a policy of credit insurance, being an instrument prepared by the insurer, an ambiguity in its terms is to be resolved in favor of the insured; and if, by the introduction of a subsequent and obscure clause, difficult to understand, or requiring expert knowledge for its comprehension, the preceding clauses, plainly and unequivocally expressed, by which the initial loss of the insured is fixed, are nullified, the subsequent clause must be ignored.

6. SAME—OTHER INSURANCE.

A provision in a policy of credit insurance that, where the insured shall hold other security or indemnity, the amounts realized therefrom shall be deducted before the loss under such policy shall be adjusted, does not entitle the insurer to deduct the proceeds of a policy in another company, which provides in terms that it shall not cover losses insured by the first company, but shall only attach when that company's policy is exhausted.

In Error to the Circuit Court of the United States for the Southern District of New York.

Horwitz & Herstfield (James L. Blair of counsel), for plaintiff in error.

Albert Stickney and Frank L. Crawford, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiffs entered upon the verdict of a jury. The action was brought upon a bond, dated May 29, 1893, which was, in effect, a contract by the defendant to insure Charles F. Wood & Co., to the extent of \$10,000, against losses for merchandise sold or to be sold by them during the year 1893, arising from insolvency of debtors. It also contained a clause covering losses on sales made by the insured since September 1, 1892, "provided that no account under extension at the time of payment of premium" should be included. It contained this recital:

"This bond is issued and accepted upon the condition that the terms and conditions printed or written by the company upon the back of this bond are accepted by the indemnified as part of this contract, as fully as if they were recited at length over the signatures hereto affixed."

Among the conditions are these:

"(4) Proof of loss must be made upon the blanks furnished and in the manner prescribed by said company, within twenty days after knowledge of the insolvency of any debtor shall have been received by the indemnified, or his or their agent; otherwise, such claim shall be barred." "(12c) Final proof of loss shall be forwarded to the central office of this company, upon the blanks furnished and in the manner prescribed by the company, within twenty days after the expiration of this bond; and the amount due by this company,

under final proof of loss, shall be adjusted and paid within sixty days after the receipt by the company of such final proof of loss."

The complaint set forth the bond, alleged compliance by the plaintiffs with its conditions, and alleged that the plaintiffs had sustained losses during the year 1893 upon sales made to three debtors subsequent to September 1, 1892, viz. Sanford & Co., Kipling, and Cottier & Sons, aggregating approximately the sum of \$22,000. The answer admitted the execution of the bond as set forth, and, among other defenses, alleged that upon the application for insurance, and to induce the defendant to make the bond, the plaintiffs made certain representations, knowing the same to be false. It also alleged that the loss of Sanford & Co. was not provable, under the terms of the policy, because the account of that debtor was under an extension at the time of the making of the bond, and that nothing was recoverable in respect to the Kipling loss, because no proof of insolvency had been furnished by the plaintiffs to the defendant as required by the terms of the bond.

There are 44 assignments of error. We shall only attempt to consider those which have some color of merit.

It was a condition of the bond that the liability of the defendant should be limited to sales of merchandise "owned, sold, and delivered by the indemnified." There was an issue upon the trial whether the losses arising from sales made between September 1, 1892, and January 1, 1893, were not excluded by force of that condition. According to the testimony for the plaintiffs, although their firm name had been Charles F. Wood & Co. only since January 1, 1893, they had been co-partners carrying on the identical business under the name of Charles F. Wood during the period in question. There was testimony for the defendants indicating that John B. Wood and Elmer E. Wood did not become co-partners with Charles F. Wood until January 1, 1893. Several of the assignments of error relate to the rulings of the trial judge in admitting evidence and in instructing the jury relative to that issue.

It was not error to permit persons whose business relations with the alleged partners were intimate to testify as to the apparent relations existing between them prior to January 1, 1893. The usual proof of partnership is by the evidence of clerks, or other persons who have done business with the parties as partners; and, although the partnership may have been constituted by indentures or other writings, it is ordinarily not necessary, in an action between the partners and a third person, to produce them. Their declarations in transacting business with third persons may be given in evidence to prove their partnership, and the entries made in their books in the course of business are evidence of the same character, and equally competent. 2 Greenl. Ev. § 479; Colly. Partn. § 686.

The defendant requested an instruction to the jury, in effect, that all losses were to be excluded arising upon the sale of goods during that period, if the jury should find from the evidence "that said firm of Charles F. Wood & Co. was not in existence as a firm, composed of the same members, doing business under exactly the same firm name, as when said bond was written." The judge declined to give

this instruction, but modified it by striking out the words "exactly the same firm name," and gave it as modified. It was the manifest purpose of the bond to insure against losses the business concern which was described in the bond as "Charles F. Wood & Co., of No. 171 Broadway, New York." The firm name was used for the purpose of identifying the parties insured, and the business to which the insurance related. If the same parties had seen fit, the day after the execution of the bond, to change their firm name to that of Charles F. Wood, it cannot be doubted that the sales made by them under that name would have been covered by the bond. Those who composed the firm when the bond was made were the "indemnified," within the meaning of the condition. If they were the persons who owned and sold the goods during the period covered by the bond, and were carrying on the same business, the style of the co-partnership was of no consequence. The instruction was properly refused, and, as modified, was correct.

Many of the assignments of error are based upon the theory that the truth of various statements contained in the written application for the policy was in issue, that the plaintiffs were bound to a strict compliance with these statements, and that they were not entitled to recover if it appeared that any of the statements were untrue. Undoubtedly, these statements constituted warranties, because the bond recited that it was issued in consideration of the application; and the application offered the statements as a consideration, and warranted them to be true. A warranty in a policy of insurance is in the nature of a condition precedent, and devolves upon the insured, in an action upon the policy, the burden of averring performance in his pleading, and proving it strictly by his evidence. It has never been authoritatively decided, however, that this rule is applicable to representations contained in an application, which amount to warranties, and we are of opinion that it does not apply. It was assumed not to apply to such a case in *Dwight v. Insurance Co.*, 103 N. Y. 341, 355, 8 N. E. 654; and it has been generally supposed that it is incumbent upon the defendant who relies upon the breach of such a warranty to allege it, and assume the burden of proof. *Swick v. Insurance Co.*, 2 Dill. 160, Fed. Cas. No. 13,692; *Geib v. Insurance Co.*, 1 Dill. 443, Fed. Cas. No. 5,298; *Murray v. Insurance Co.*, 85 N. Y. 236. The rule requiring performance of warranties to be averred and proved was ingrafted into the law of insurance before it was customary for underwriters to require from the insured the full and detailed applications which are a feature of so much prominence in the modern contract,—especially in the contract of life insurance. The policy is the evidence delivered to the insured of the contract of the insurer, and ordinarily, of itself, constitutes complete evidence of the contract, while the application, although it may modify the contract, is in the nature of defensive evidence intrusted to the insurer for his protection. As a matter of pleading, if the policy is set forth, and compliance with all the conditions precedent recited in it is averred, there is no necessity for referring to the application, and the complaint or declaration is sufficient upon its face. Nothing is required to be proved which does not go to

support some necessary allegation in the complaint, and there seems to be no good reason which requires a plaintiff to assume the burden of proving affirmatively the truth of statements in an application not challenged by the defendant. As was said by the supreme court:

"The number of the questions now asked of the assured in every application for a policy, and the variety of subjects, and length of time which they cover, are such that it may be safely said that no sane man would ever take a policy, if proof to the satisfaction of a jury to the truth of every answer were made known to him to be an indispensable prerequisite to payment of the sum secured; that proof to be made only after he was dead, and could render no assistance in furnishing it. On the other hand, it is no hardship that, if the insurer knows or believes any of these statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest, and, if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded." *Insurance Co. v. Ewing*, 92 U. S. 378.

In the present case the defendant not only did not, in its answer, set up any of the statements in the application as warranties, or allege any breach of warranty, but it admitted by its answer the execution of the policy as set forth in the complaint. By this admission it dispensed with the introduction of the application. Consequently, there was no issue as to the truth or falsity of any of the statements contained in it. Whether the plaintiffs were bound by the statements contained in it; whether it was permissible for them to show that the agent of the defendant who filled it out did not do so accurately, or inserted statements which they had not made to him; and whether the statements were shown by the evidence to be true or untrue,—were questions which were not within the scope of the issues on trial, and consequently none of the rulings which are challenged by the assignments of error could have been prejudicial to the defendant. The application was competent evidence for the purpose of meeting the defense of fraud by showing what representations were actually made by the plaintiffs; and it was also competent for them to show to what extent the statements contained in it were theirs, and to what extent they were really the statements of the defendant's agent. Except for this purpose, the application, and all the testimony in regard to it, had no legitimate place in the evidence. The questions of fact arising under the defense of fraud were submitted to the jury under correct instructions. If there was any error in the instructions in regard to the written application, it was error favorable to the defendant, and only the plaintiffs had reason to complain of them. It is proper to say, however, that inasmuch as the trial judge permitted the defendant to contest the truth of the statements in the application, entertained a motion for the direction of a verdict for the defendant, and, pursuant to its request for instructions, submitted to the jury the questions of fact relating to the breach of the warranties, we have carefully examined his rulings and instructions upon this branch of the case, and do not deem the exceptions taken by the defendant worthy of discussion.

Error is assigned that the trial judge left it to the jury to construe the meaning of the word "extension," as used in the clause

of the bond which provided that "no account under extension at the time of payment of premium" should be included in its protection. If the instruction was erroneous, it did the defendant no harm. The loss arising upon the account of Sanford & Co. was the only one to which the clause was applicable, and there was no evidence in the case tending to contradict the testimony for the plaintiffs that the apparent extension of credit given to that debtor upon a single item of his account was not an extension of the original term of credit, but was the exercise of an option by Sanford & Co. pursuant to the terms of the sale.

Error is assigned of the instructions to the jury in respect to the waiver by the defendant of proofs of the Kipling loss. The defense based upon the failure of the plaintiffs to make the proofs required by the policy is an utterly frivolous one. There was no question of fact for the jury, and upon the uncontradicted evidence the plaintiffs were entitled to an unequivocal instruction that they had furnished sufficient proof of loss. The facts were these: June 13, 1893, a receiver of the debtor's assets was appointed in a creditor's suit, and June 16th the plaintiffs sent to the defendant a proof of loss, on one of the blanks furnished by it, stating that the debtor had failed and made an assignment. June 21st they sent an amended proof of loss, upon the blanks furnished by the defendant, giving the date of failure; stating that, instead of an assignment, there was a receiver, and giving details of the debtor's account, and the amount remaining unpaid. At the same time they wrote the defendant, asking it to inform them if the proof was satisfactory, and whether it required any further particulars, or any other action on their part. July 8th the defendant acknowledged the receipt of proof, and informed the plaintiffs that, under the conditions of the bond, the loss could not be adjusted until the expiration of the bond. A final proof of loss, covering all the losses which had accrued under the policy during its term, was furnished to the defendant January 6, 1894, accompanied by an affidavit showing the insolvency of the debtor. After the final proof of loss was received, the defendant retained it, without making any objection, and in March, after making an examination of the books of the plaintiffs, repudiated any liability, upon the ground of fraud in obtaining the bond. It is not contended for the defendant that the final proof was not in all respects a formal and sufficient proof. Its contention is merely that the plaintiffs did not comply with the provision of the policy which required them to make proof of loss within 20 days after the knowledge of the insolvency of the debtor. No better evidence of the supposed insolvency of the debtor could have been supplied than was furnished by the first proofs of loss. Those documents did not furnish legal proof of the insolvency of the debtor, but this was not requisite. The provision in respect to making legal proof of insolvency only applies to the final proofs. The other provision is intended, not to require formal proof of insolvency, but to afford the insurer prompt notice that a loss has happened, for the purposes of investigation and measures of protection. Occupying as it does the position of a surety, the insurer is entitled to subrogation, and, upon paying a loss,

is entitled to a transfer of the claim against the debtor. The meaning of the condition is that the defendant shall have prompt notification of a probable loss, and, in that behalf, shall have proofs within 20 days after the indemnified has reason to suppose a debtor to be insolvent. What was done by the plaintiffs was an ample compliance with both conditions in respect to proof of loss. Their earlier proof informed defendant of the failure of the debtor. Their final proof was in all respects sufficient.

Error is assigned of the court's refusal to charge the defendant's requests as to the measure of damages, or basis for the computation of loss. The court instructed the jury that if they found that the plaintiffs were entitled to recover for losses upon sales made before the 1st day of January, 1893, their verdict should be for the full amount of the bond, but, if they found that the plaintiffs were only entitled to recover for losses upon sales made during 1893, then the plaintiffs were entitled to recover \$5,893.56. No error is assigned of the last instruction. As the jury found for the plaintiffs in the smaller sum, it is obvious that they disallowed all losses arising upon sales made prior to January 1, 1893. As the bill of exceptions has been framed, it is quite impossible to determine what basis was adopted by the judge or jury for the computation of the loss. In each of the requests in which the defendant submitted its theory of the measure of damages, there was included, besides a deduction of the initial loss of \$4,000, an additional initial loss, which the defendant insisted was to be borne by the plaintiffs under one of the conditions of the bond. We are of the opinion that the clause in the bond under which this addition to the initial loss is sought to be imposed upon the plaintiffs was not intended to have that effect. The bond recites the indemnity to be—

"Against loss to the extent of, and not exceeding, \$10,000 resulting from insolvency of debtors over and above a net loss of \$4,000, first to be borne by the said indemnified on total gross sales amounting to \$400,000 or less."

Among the conditions on the back is the following :

"(5) The basis of net loss fixed in this bond is one per cent. on total gross sales by the indemnified of \$400,000, and, should such total gross sales exceed said amount, the net loss to be borne by the indemnified, under this bond, shall increase in like ratio."

Then follow various conditions in respect to provable losses, and after them the clause in question, which reads as follows:

"(12a) To simplify adjustment, and to avoid disputes, it is agreed that such sum of gross loss shall be the limit to be borne by the indemnified, as, less 25 per cent., will equal the agreed amount of annual net loss; all claims making up such said sum of gross loss to remain the property of the indemnified, the company relinquishing its claims, except as hereinbefore provided."

We are quite unable to determine what this provision means, unless it is intended to fix a temporary basis of adjustment in case the defendant should see fit to pay a loss before final adjustment, in order, by subrogation, to acquire control meanwhile of the claim against the insolvent debtor. If, however, it is capable of the construction which the defendant contended for, it is in plain antagonism to, and irreconcilable with, those provisions which make the

initial loss of the indemnified \$4,000, or 1 per cent. on total sales. The bond, with its numerous conditions, being an instrument prepared by the insurer, we must apply to its construction the rule which was applied by this court in *Guarantee Co. v. Wood*, 15 C. C. A. 563, 68 Fed. 529:

"If the particular clause requiring interpretation cannot be brought into harmony with the rest of the contract, and the instrument, considered as a whole, is ambiguous touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured."

If, by the introduction of a subsequent and obscure clause, difficult to understand, or requiring expert knowledge for its comprehension, the preceding clauses, plainly and unequivocally expressed, by which the initial loss of the indemnified is fixed, are nullified, the subsequent clause must be ignored. It cannot be permitted to operate as a snare to the unwary. The trial judge properly refused to charge the defendant's requests.

The judge also properly refused to instruct the jury as requested by the defendant in its fourth request. That request was based upon the following condition of the policy:

"(9) In all cases where the indemnified under this contract shall hold other security, guaranty, indemnity, or preference, or shall have instituted attachment or replevin proceedings against any insolvent debtor covered under this bond, the amounts realized therefrom shall be deducted before the loss under this bond shall be adjusted."

Subsequently to the issuing of the bond in suit, the plaintiffs obtained further insurance against loss from the Mercantile Credit Guarantee Company. By the terms of the policy of that company, it was distinctly provided that the policy should not attach to cover any losses insured by the defendant, but should only attach when the policy in suit was exhausted. The request related to the indemnity thus acquired by the plaintiffs, and prayed for an instruction, in substance, that the amount realized from it by plaintiffs should be deducted by the jury from the recovery for which the defendant was otherwise liable. Not being an indemnity for the same loss, the clause in question does not apply to it.

We have considered all the assignments of error which seem worthy of notice, and find none of them to be well founded.

The judgment is affirmed.

CONNECTICUT FIRE INS. CO. v. OLDENDORFF et al.

(Circuit Court of Appeals, Ninth Circuit. March 16, 1896.)

No. 222.

CONTRACTS—RELEASE OF JOINT DEBTOR—FAILURE TO REVIEW JUDGMENT.

An action was brought against two of three joint obligors in a bond and the representatives of the third, who had died. One of the defendants defaulted, but no judgment was entered against him. The others defended, and separate judgments in their favor were entered, on different days. After the time for suing out a writ of error on the first judgment, which was in favor of one of the surviving obligors, had expired, the plaintiff sued out a writ of error on the other judgment, in favor of the rep-

representatives of the deceased obligor. *Held* that, the failure of the plaintiff to sue out a writ of error on the first judgment within the time limited having made that judgment final, it operated as a release of the defendant in favor of whom it was taken, and hence, within the rule that a release of one joint obligor is a release of all, it operated as a release of the defendants in the other judgment, and that the writ of error should be dismissed.

In Error to the Circuit Court of the United States for the District of Oregon.

Milton W. Smith, for plaintiff in error.

Frank V. Drake and A. H. Tanner, for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action at law, brought by the plaintiff in error against the defendants in error upon a joint bond given by E. Oldendorff & Co., as principal, and Frank Botefuhr and John Brendle, as sureties, for the faithful performance of the duties of the principal in the bond as the agent of the plaintiff in error for Multnomah county, Or. The defendants Mary Tynan and August Stoldt are the personal representatives of John Brendle, deceased. E. Oldendorff, the principal in the bond, made default, but no judgment has been entered against him. The case was regularly tried before a jury as to the other defendants, and a verdict rendered in their favor. Separate judgments for costs were entered in favor of defendant Botefuhr on the 27th day of June, 1894, and for defendants Mary Tynan and August Stoldt on July 11, 1894. On January 5, 1895, a petition for a writ of error was filed, setting forth the judgment in favor of defendants Mary Tynan and August Stoldt, and praying for the issuance of a writ of error therefrom to this court. The writ of error was, on the same day, allowed as prayed for in the petition.

The defendant Botefuhr moves to dismiss the writ of error upon several grounds, among others, that he is not a party named in the petition for writ of error, that he is not a party to the judgment certified to this court, that a judgment was entered in his favor on June 27, 1894, and that the writ of error herein was not sued out within six months after the entry of said judgment in the circuit court. It is therefore perfectly clear that there is no writ of error as against the judgment rendered in favor of Frank Botefuhr. None could have been sued out against said judgment upon the date when the petition for the writ was presented, because more than six months had elapsed after the entry of said judgment. Section 11 of the act creating this court provides:

"That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed." 23 Stat. 829.

It has been repeatedly held by the supreme court, under the provisions of section 1008 of the Revised Statutes of the United States, that the time begins to run from the date of the entry of the judgment. *Brooks v. Norris*, 11 How. 204; *Mussina v. Cavazos*, 6 Wall.

355; *Polleys v. Improvement Co.*, 113 U. S. 82, 5 Sup. Ct. 369. The various circuit court of appeals cases, with reference to the provisions of section 11 of the act creating this court, speak with no uncertain voice as to the practice. "The United States circuit court of appeals has no jurisdiction in a case where more than six months intervene between the entry of judgment and the day on which the writ of error is sued out." *Coulliette v. Thomason*, 50 Fed. 787, 1 C. C. A. 675; *U. S. v. Baxter*, 51 Fed. 624, 2 C. C. A. 410; *Union Pac. Ry. Co. v. Colorado Eastern Ry. Co.*, 54 Fed. 22, 4 C. C. A. 161; *Stevens v. Clark*, 62 Fed. 321, 10 C. C. A. 379; *White v. Bank*, 71 Fed. 97, 17 C. C. A. 621. The motion to dismiss as to Botefuhr is well taken, and must be allowed.

The granting of this motion as to Botefuhr necessitates like action as to the motion of defendants Tynan and Stoldt, which is based upon the ground, among others, that a release as to one of the joint obligors upon the bond releases all. The failure of the plaintiff to sue out its writ of error within six months after the entry of the judgment against Botefuhr makes that judgment final, and operates as a release to Botefuhr from all liability upon the bond. If the plaintiff had brought all the defendants before the court, to correct the judgments which were adjudged in favor of defendants severally, within the time allowed by statute, the action of the court below could have been reviewed; but the writ of error seeks only to review the judgment as to two of the defendants. The action being joint as to all, the defendants before the court have the right to object to any review of the case on the merits, upon the ground that their co-defendant has not been brought before the court to share in the costs, if any were to be adjudged against them. The objection here made stands substantially upon the same plane, and is based upon the same reason, as if, though the action had been originally brought against the two defendants, or had been brought against all, and a judgment had thereafter been rendered against one of the joint obligors. In either event, objections based upon the ground that all the joint obligors must be proceeded against jointly would have to be sustained.

In *Freem. Judgm.* § 231, it is said:

"Whenever two or more persons are jointly liable, so that, if an action is commenced against any less than the whole number, the nonjoinder of the others will sustain a plea in abatement, and judgment against any of those so jointly bound merges the entire cause of action. The cause of action being joint, the plaintiff cannot be allowed to sever it against the objection of any of the defendants. By taking judgment against one, he merges the cause of action as to that one, and puts it out of his power to maintain any further suit, either against the others severally, or against all combined."

Numerous authorities are cited in support of this text.

In *Sessions v. Johnson*, 95 U. S. 347, and *U. S. v. Ames*, 99 U. S. 35-44, the court said:

"Even without satisfaction, a judgment against one of two joint contractors is a bar to an action against the other, within the maxim, 'Transit in rem judicatam'; the cause of action being changed into matter of record, which has the effect to merge the inferior remedy in the higher. *King v. Hoare*, 13 Mees. & W. 504. Judgment in such a case is a bar to a subsequent action against

the other joint contractor, because, the contract being merely joint, there can be but one recovery; and, consequently, the plaintiff, if he proceeds against one only of two joint promisors, loses his security against the other, the rule being that by the recovery of the judgment the contract is merged, and a higher security substituted for the debt."

In *Suydam v. Barber*, 18 N. Y. 468, the court said:

"According to the common law of this state, a judgment against one of several joint debtors, obtained in an action against him alone, is a bar to an action against the others. *Robertson v. Smith*, 18 Johns. 459; *Pierce v. Kearney*, 5 Hill, 82; *Olmstead v. Webster*, 8 N. Y. 413. It is held to be a bar upon the ground that, by the recovery of the judgment, the promise or cause of action as to the party sued has been merged and extinguished in the judgment, 'by operation of law, at the instance and by the act of the creditor.' This is plainly founded upon the nature and force of our law, and not upon the idea that the creditor is deprived of his right for any other reason than that, by the first suit and judgment, he has placed himself in a position where he is unable, legally, to assert or enforce his demand."

In the present case, the plaintiff, by its own act, has released one of the joint obligors of all liability, and is now seeking to enforce its rights against the others after the cause of action has been released as to one "by operation of law, and at the instance and by the act of the creditor." The general rule that a release of one of several joint obligors operates as a release of all is well settled. 20 Am. & Eng. Enc. Law, 751, and authorities there cited. There are several exceptions to this general rule, which need not be noticed, as this case does not come within any of the recognized exceptions of the adjudged cases.

The motion of Tynan and Stoldt is sustained. The writ of error is dismissed. The respective defendants are entitled to judgment for their costs.

SPIRO v. FELTON.

(Circuit Court, E. D. Tennessee. March 20, 1896.)

No. 995.

1. EVIDENCE—INJURY CAUSING DEATH—TENNESSEE STATUTE.

In an action for damages for an injury causing death, brought, under the Tennessee statutes (Mill. & V. Code, §§ 3130, 3134), for the benefit of the widow or next of kin of the deceased, evidence of the number and ages of the children of the deceased is competent.

2. PRACTICE—SETTING ASIDE VERDICT—WEIGHT OF EVIDENCE.

The federal courts have no power to set aside a verdict because against the weight of evidence, however decided that weight may be, if any evidence has been given which would have rendered it improper for the court to direct a verdict.

Ingersoll & Peyton, for plaintiff.

Chambers & Head, for defendant.

CLARK, District Judge. It is urged as ground for a new trial in this case that the court allowed plaintiff to prove the number of and ages of the children. It is certainly true that, as a general proposition of law, such evidence would not be relevant. As the right of action given in cases like this for death of a person is, under the statute (Mill. & V. Code, § 3130), "for the benefit of his widow or

next of kin, free from the claims of creditors," and as by the act of 1883, c. 186 (Code, § 3134), damages are also given to the parties for whose use and benefit the right of action survives, from death consequent upon an injury, it seemed to me that this evidence was competent, under the authority of *Railroad Co. v. Mackey*, 157 U. S. 93, 15 Sup. Ct. 491. I had occasion, in another suit, to pass upon this objection.

Another objection is that there was error in the admission of the testimony of Babcock as to the condition of the track at the place where the accident happened, at the time of Babcock's examination of the place. I think this was competent, with the explanation of the court, under which it went to the jury; that is, that it was admitted merely as a circumstance tending to show the condition of the track at the time of the accident, and that it was the condition at such time that affected any question in the case. I think it is clear that, in view of the question to which the jury was restricted in the court's instruction, this proof could have cut no possible figure in the case. There was no material point in the case whatever respecting the condition of the track.

It is, again, said there was error in the admission of testimony to the effect that a chain was used on the cars of other companies across the opening of the rear guard rail of the caboose to a freight train. As the declaration alleged the absence of this chain as negligence, I think the proof was competent, as tending to show that such chains were used by other roads. The competency of this proof, and its weight, were different questions. As the court distinctly said to the jury, in the charge, that the absence of this chain could be no ground of recovery against the defendant company, it is impossible to think that this testimony had any effect on the case, even if its admissibility should be considered doubtful.

It is said, too, that the court should have directed a verdict for the defendant, as proof for both the plaintiff and defendant showed such contributory negligence on the part of the deceased as prevented any recovery. If the court should have given peremptory instruction for the defendant, it is no answer to this objection to say that no motion for such instruction was made; for in *Society v. Llewellyn*, 7 C. C. A. 579, 58 Fed. 940, no such motion had been made in the court below, nor was any such motion the basis of any assignment of error. Nevertheless, the circuit court of appeals for this circuit (Judge Taft giving the opinion) said that it was the duty of the court to have given such instruction, and the judgment was reversed upon this as well as one other ground. But I do not think, on the proof in this case, the court could properly have withdrawn the case from the jury by positive direction; and this brings us to the last objection taken, which is that the verdict is against the weight of evidence.

This is a question that has given this court great trouble, not only in this but other cases; and I shall be very glad indeed when the circuit court of appeals for this circuit shall have occasion to pass judgment upon this question, so that this court may have an authoritative general rule, at least, in the determination of this ques-

tion. I wish to say, in the outset, that I think the decided weight of the evidence, both as to quantity and quality, shows that the deceased came to his death as the result of his own negligence, in not getting up and going out of the train when it stopped at his point of destination, and that he had ample time to have done so, if he had used reasonable care and diligence on his own part. I think the proof shows, by the same decided weight, that the accident to him is due to the fact that he remained in the caboose, engaged in conversation, until, after ample time to have left the car, the train was started in a backward motion in its regular operations, and that the deceased was thrown therefrom by reason of being on the rear platform while the train was in such motion, and most likely when it stopped moving backward and let out the slack, or when it started south a second time. But, although entertaining this view of the evidence, I do not feel that I can lawfully set aside the verdict on that ground alone. I desire not to be misunderstood about this proposition. The question here is one of the weight of the evidence. It is not a question of there being no evidence to support the verdict, misconduct on the part of the jury, error in the charge of the court, or in the admission or rejection of evidence, or of the many other grounds on which a new trial may be granted; but the question is, when no other valid ground of rejection to the verdict exists, can the court set aside the verdict alone upon the ground that it is against the weight of the evidence, however decided the preponderance may be? It is to be remembered that the practice in the courts of the United States is different from that of the state court. In this court, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, the court may withdraw the case from the jury and direct a verdict. The terms in which this rule is stated differ somewhat in different cases, although the underlying principle remains the same. Examples of this difference in the form of statement of this rule may be seen by comparing *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, reaffirmed in *Railroad Co. v. Griffith*, 159 U. S. 611, 16 Sup. Ct. 105, with *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85, and *Southern Pac. Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 338. If, then, the evidence is such that a verdict returned in opposition to it would be set aside by the court, it is the duty of the court, in the first instance, to direct the verdict. It seems to follow logically and necessarily that if the evidence is not so conclusive that the court can thus withdraw the case from the jury, and is compelled to submit the case to the jury, that the court is then not at liberty to set the verdict aside as against the weight of the evidence. It seems to me that the right to do so is inconsistent with the right and duty to give a positive direction for the same reason before the verdict. It occurs to me that in any case it would be idle to say that the court must submit the case to the jury because it may not lawfully direct a verdict, and that, having submitted the case to the jury, it then can effect the same result, practically, as by direction, in setting it aside as opposed to the evidence. In *Pleasants v. Fant*, 22 Wall. 116, the court said:

"In the discharge of this duty, it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether, on all the evidence, the preponderating weight is in his favor (that is the business of the jury), but, conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case, of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that, if the jury should find a verdict in favor of plaintiff, that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should so say to the jury. In such case the party can submit to a nonsuit, and try his case again, if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or, if he has done his best, he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury,—such a case as a jury might justifiably find for him a verdict."

The rule is substantially stated in *Cruikshank v. Bank*, 26 Fed. 584, and in *Stewart v. Railroad Co.*, 45 Fed. 21. Judge Wheeler, discussing this point on motion for a new trial, said:

"The constitution and laws expressly require that, in this court, trials shall be by jury, unless waived, and provide that no fact tried by jury shall be otherwise re-examined than according to the rules of the common law. Amendments art. 7; Rev. St. § 649. The verdict may, according to the rules of the common law, be examined to see if it is contrary to the evidence, without evidence, or the result of passion or prejudice. * * * If the case must be submitted upon the evidence, the verdict cannot be set aside as contrary to the evidence without re-examination of the fact tried by the jury, which is expressly prohibited. The fact cannot be re-examined in search for passion or prejudice, more than for any other purpose. If the court differed from the jury in opinion about the fact, as to which nothing is intimated, that, of itself, would afford no ground for setting aside the verdict. It would interfere with the exclusive province of the jury secured by the constitution."

What has been said with reference to the cases just cited sufficiently indicates my view of the want of power in this court to set aside a verdict because against the weight of evidence, however decided that weight may be. This is the second trial in this case. On the first trial I would have withdrawn the case from the jury on the ground of contributory negligence on the part of the deceased, except for the testimony of the witness Ridsen. On the second trial both sides of the case had been strengthened,—that of plaintiff slightly, and that of defendant decidedly. Nevertheless, I felt that in view of the testimony of the same witness Ridsen, with some slight corroboration, I could not rightly direct a verdict, notwithstanding the great weight of the evidence introduced by defendant. And, unless I should give such direction, it is not likely that the result of this case will ever be different from what it is; and it is certain that the verdict is a very moderate one, if the plaintiff is entitled to recover at all.

I have been thus particular to state the view I take of my right and duty upon this motion, and of the rule under which I am acting; for, while my action in granting or refusing the new trial is not the

subject of review, if I refuse to exercise the discretion to grant a new trial under an erroneous view of the law and of my duty in the matter, this, I think, is an error which is the subject of review. *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50. It is only when the court, in the exercise of its discretion to grant or refuse a new trial, does so upon all competent evidence, and under a correct view of the law, that its judgment is not the subject of review; and when, instead of leaving it to be presumed that the court below acted under a correct conception of the law, that court distinctly states on record the view of the law by which the court was controlled, no reason is perceived why this is not subject to review on writ of error. For reasons indicated, the motion for a new trial is denied.

TEBBETS et al. v. MERCANTILE CREDIT GUARANTEE CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. March 17, 1896.)

1. CONTRACTS—INTERPRETATION—CREDIT INSURANCE POLICY.

A contract by which a corporation, though called a "guarantee" or "surety" company, undertakes, in consideration of premiums paid, to indemnify the other party to such contract against losses by uncollectible debts, is not a contract of suretyship, but a policy of insurance, and, as such, subject to the rule that any ambiguities in the policy drawn up by the insurer, who makes his own conditions, are to be resolved against the draftsman.

2. CREDIT INSURANCE—INITIAL LOSS—INTERPRETATION OF POLICY.

The M. Guarantee Co. issued a policy of credit insurance to T. & Co., insuring them, in consideration of a premium paid, against losses in their business during the year 1893. The contract consisted of T. & Co.'s application, in which they stated the amount of their gross sales and deliveries for the preceding 14 months at \$622,835, and their total losses during the same period at \$1,323, and which contained certain "Special Terms and Conditions," and of the company's policy, in the opening clause of which the company agreed to purchase from T. & Co. an amount not exceeding \$15,000 of uncollectible debts, arising during 1893, in excess of one-half of 1 per cent. of their total gross sales and deliveries, subject to the conditions below. There were 13 such conditions besides the "Special Terms" of the application, which were incorporated into the policy, and included a provision that "the contract is issued on the basis that the yearly sales and deliveries of the insured are between \$1,800,000 and \$2,500,000." *Held*, that the latter clause was not a stipulation that the total sales and deliveries, on which the one-half of 1 per cent. was to be computed, must amount to at least \$1,800,000, but that T. & Co. were entitled to recover from the insurer their losses, not exceeding \$15,000, in excess of one-half of 1 per cent. on their actual total of sales and deliveries during the year.

In Error to the Circuit Court of the United States for the Southern District of New York.

This case comes here on writ of error to review a judgment of the circuit court, Southern district of New York, in favor of defendant in error, who was defendant below. The action was brought on a policy of insurance against business losses or "uncollectible debts," issued by the defendant to the plaintiffs. The total amount of uncollectible debts for which it was claimed the defendant was liable under the policy, without deducting the "initial loss" to be borne by the plaintiffs, was \$8,016.56, and they were adjusted by defendant

at that sum. The total gross sales and deliveries made by the plaintiffs during the period covered by the policy amounted to \$778,015.08. Plaintiffs contended that the initial loss to be borne by them was one-half of 1 per cent. of that sum, which amounts to \$3,890.07, and they asked judgment for the balance of loss, viz. \$4,126.29. The defendant insisted that the initial loss, under the terms of the policy, was \$9,000,—a sum greater than the total loss, as adjusted. The circuit court sustained defendant's contention, and directed a verdict in its favor.

Albert Stickney, for plaintiffs in error.

A. J. Dittenhoffer, for defendant in error.

Before PECKHAM, Circuit Justice, and LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). One question only is presented under this writ of error, and it arises upon the construction of a written instrument. Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by insurer and insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, have naturally tended to make the forms of policy crude and difficult of interpretation.

One of these policies, differing in many respects from the one under discussion in this case, was before this court in *Guarantee Co. v. Wood*, 15 C. C. A. 563, 68 Fed. 529. Of a clause ambiguous in its phraseology and contradictory of other paragraphs in the contract, the court said:

"As that contract is a voluminous document, prepared by the company, any ambiguity in its phraseology should be resolved against the draftsman. * * * If the particular clause requiring interpretation cannot be brought into harmony with the rest of the contract, and the instrument considered as a whole is ambiguous touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured."

In *Wallace v. Insurance Co.*, 41 Fed. 742, the United States circuit court for the district of Iowa expresses the same principle in this language:

"A contract drawn by one party, who makes his own conditions, will not be tolerated as a snare to the unwary; and if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured."

In *Wadsworth v. Tradesmen's Co.*, 132 N. Y. 540, 29 N. E. 1104, the court says:

"If this policy is so framed as to promise a payment of \$4,000, and then to impair the promise by the introduction of subsequent and obscure clauses, difficult to be understood, or requiring expert knowledge for their comprehension, we should adopt that construction which we think the insurer had reason to suppose was understood by the insured."

In the light of the well-settled principle of law expressed in these authorities, the contract under consideration must be construed.

The cases cited by defendant in error holding that a surety is "a favorite of the law," and that a claim against him is *strictissimi juris*, have no application. Corporations entering into contracts like the one at bar may call themselves "guarantee" or "surety" companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such.

The material parts of the contract under consideration are as follows. First comes the application of the assured:

"No. 2,008.

Amount, \$15,000.

"The Mercantile Credit Guarantee Company of New York.

"Head Office, 291 Broadway, New York.

"Contract expires *Dec. 31, 1893*.

"Indemnified stands $\frac{1}{2}$ of 1%.

"Fee, \$472.50.

"The undersigned hereby applies to the Mercantile Credit Guarantee Company of N. Y. for a contract to purchase from him uncollectible accounts in the sum of fifteen thousand dollars, for one year from *Dec. 31, 1892*, in the usual form of contract issued by the company, and upon the terms and conditions therein specified, and for that purpose selects the Bradstreet Co. Mercantile Agency as his informant and guide, as designated in said contract, and states that he is engaged in the business of *cottons & woollens, at 72 Bedford St., Boston, Mass., and 75-77 Worth St., N. Y.*, and that the amount of his gross sales and deliveries of merchandise for cash and on credit, and the percentage of losses on the same, for the *14 months* preceding the *1st day of Dec., 1892*, were, respectively, as follows:

Gross sales for year ending	day of.....	\$
" losses not exceeding.....		\$
Gross sales for year ending	day of.....	\$
" losses not exceeding.....		\$
Gross sales for year ending	day of.....	\$
" losses not exceeding.....		\$

"Remarks.

"Cotton sales, Sept. 1/91, to Dec. 1/92, \$662,835.65.

"Gross losses, Weis Bros., Galveston, Texas, \$479.69.

" " M. J. Henry, N. Y., \$844.03.

"Goods sold 2%, 10 days and 30 days; special a/c, 4 months.

"This contract to cover all goods billed since Oct. 1/92, not provable under U. S. Credit System Co.'s contract No. 3,909, Series H, Class E. Have proved no excess on either cotton or woolen goods under the U. S. Credit System Co. contract in 1892. Our woolen sales in 1892 were small, and form no basis for an estimate of probable losses in 1893.

"Boston, Dec. 13, 1892.

Tebbetts, Harrison and Robins."

This application is a printed form. The parts italicized and all subsequent to the word "Remarks" were originally blank, and have been filled in with ink, presumably before the application was finally presented for action. On the reverse side of the application are a number of so-called "Special Terms and Conditions." In the record they cover $3\frac{1}{2}$ printed pages. The first few lines are all that are material here. They read as follows:

"(Gum this margin to the contract.)

"Form No. 7. Special Terms and Conditions of Contract. No. 2,008.

"(1) This contract is issued on the basis that the yearly sales and deliveries of the indemnified are between \$1,800,000 and \$2,500,000 dollars, and shall only," etc.

The parts italicized were originally blank, and have been filled in with ink. The material parts of the policy itself are as follows:

"No. 2,008.

\$15,000.

"The Mercantile Credit Guarantee Company, in consideration of the sum of \$472.50, hereby agrees to purchase from *Tebbets, Harrison & Robins, of * * ** an amount not exceeding *fifteen thousand* dollars of uncollectible debts owing for merchandise sold and delivered in the regular course of business between *Dec. 31, 1892, at 12 o'clock noon, and Dec. 31, 1893, at 12 o'clock noon*, on the total gross sales and deliveries made during said period in excess of one-half of one per cent., subject to the terms and conditions printed below and attached hereto."

The italicized parts were originally blank. Then follow, in the body of the policy, 13 terms and conditions and the execution clause. Upon a blank space left in the body of the contract is pasted an exact copy of the special terms and conditions of form No. 7, as above set forth.

The opening statement of what the consideration is, and of what the company agrees to do in return for such consideration, is awkwardly phrased, but, without resort to anything outside of the policy, expresses the following agreement: The company will buy of the assured—i. e. will pay to the assured—the amount of certain uncollectible debts. These uncollectible debts must be such as are owing for merchandise sold and delivered during the year 1893. The amount of such debts which the company will pay must be a part of the whole amount of debt arising on the total gross sales and deliveries made during the year. It must also be debt in excess of one-half of 1 per cent. on such total gross sales; and in no event will the company pay more than \$15,000. In other words, of the total uncollectible debts arising on sales and deliveries during the year, the assured is first to bear an initial loss to the amount of one-half of 1 per cent. on his total sales and deliveries during the year; and the residue of uncollectible debts the company is to buy from the assured, up to the limit of \$15,000. It is not disputed that this is precisely what the first clause of the contract provides, nor that, if it stood alone, such would be the obligation which the company assumed. Moreover, it is unambiguous. Crude and complicated though its phraseology is, it is susceptible of no other construction. It is, however, qualified by the words "subject to the terms and conditions printed below, and attached hereto." This clause imports into the contract both the 13 general terms and conditions printed in the body of the policy, and also the special terms and conditions of form 7, which are attached to it. The only question presented here is whether these terms and conditions, or any of them, so qualify the contract expressed in the opening sentence of the policy as to change the amount of the initial loss from one-half of one per cent. of the total gross sales during the year to some other sum.

The only clause which it is contended has this effect is the special condition above quoted, and which reads as follows:

"This contract is issued on the basis that the yearly sales and deliveries of the indemnified are between \$1,800,000 and \$2,500,000 dollars."

The defendant insists that this is a stipulation on the part of the insured that during the year 1893 his total gross sales and deliveries shall be, at least, \$1,800,000, and that the one-half of 1 per cent. of initial loss shall be calculated at least on that sum. The plaintiffs insist that this is merely an estimate as to the amount of the plaintiffs' probable sales in the future, and supplies a basis for an estimate of plaintiffs' probable losses in the future. It will be noted that the form of application contains blanks manifestly intended to be filled with statements of the total sales and total losses for three years preceding the application. These, as plaintiffs contend, would furnish data from which to make an estimate of probable sales and losses for the ensuing year. These blanks are not filled in plaintiffs' application, possibly because the firm had not been in business for three years. A statement of their sales and losses in the cotton business for 14 months is given, with the addition that their woollen sales in 1892 were small, and form no basis for an estimate of probable loss in 1893.

In support of their respective contentions, counsel have presented arguments based on the grammatical structure of the special condition. On the one side, it is urged that the clause reads "on the basis that the yearly sales 'are' between," etc.; not "have been." On the other side, it is urged that the phrase beginning, "this contract is issued on the basis," etc., refers to the issuance or inception of the contract, rather than to its construction; that the word "yearly" carries the idea of a series of years; that the use of the word "are," instead of "shall be" or "are to be," imports a present expectation, not a future stipulation. Arguments based merely upon grammatical construction, however, are of little aid towards the interpretation of this contract. If its draftsman possessed any appreciation of grammatical niceties, he has left no trace of it apparent upon the face of the document. The special condition is so phrased that it is susceptible of interpretation either way; and there are difficulties about accepting either interpretation. If it be construed as a statement of what it was estimated would be the range of total sales for the year, it is manifestly an arbitrary estimate, greatly in excess of what the experience of the 14 prior months apparently warranted; and no good reason is suggested why any such mere "estimate" should be inserted in the body of the contract at all. The representations of the insured as to what his past sales and losses had been were already made a material part of the contract, by a general condition providing that "fraud, concealment, or misrepresentation in obtaining this contract * * * shall render this contract absolutely void." On the other hand, while it is manifest that, in order to make insurance business of this kind practicable, some definite initial loss must be borne by the insured, it nowhere appears that such initial loss may not with perfect safety be proportioned to the total gross sales, for, presumably, the gross losses would vary

as the gross sales. And, in fact, even on defendant's construction of the phrase, the initial loss is a variable quantity. The basis provided for is that the yearly sales are "between \$1,800,000 and \$2,500,000." If they be \$1,800,000, the initial loss would be \$9,000. If they be \$2,000,000, the initial loss would be \$10,000. If they be \$2,500,000, the initial loss would be \$12,500. Moreover, if the clause be construed so as to import a stipulation that the business done shall not be less than \$1,800,000, it must be construed as importing also a stipulation that the business done shall not exceed \$2,500,000,—a most extraordinary agreement for any business man to enter into, and certainly one not to be read into this contract by any doubtful language. Under defendant's interpretation, if the initial loss is to be in no event, however small the sales, less than \$9,000, the initial loss can in no event, however great the sales, exceed \$12,500. The result would be that, although the sales should run up to \$4,000,000, the insured would be required to bear an initial loss, not of \$20,000 (one-half of 1 per cent. of the gross sales), but of \$12,500 only, the same amount he would be required to bear if his sales were only \$2,500,000, although the increase in total sales necessarily increased the total losses. It is hardly conceivable that an insurance company would enter into such a reckless stipulation, and no such meaning is to be given to the policy upon any doubtful language.

We have, then, in the contract, a positive and unambiguous agreement on the part of the company to pay losses (to the amount of \$15,000) in excess of one-half of 1 per cent. on total sales. The only other sentence in the policy which it is claimed modifies this definite agreement is one which is itself ambiguous, equally susceptible of a construction favorable to the company and of one favorable to the insured. Under the rule laid down in the authorities above quoted, the ambiguous sentence is to be given the meaning which the insurer had reason to suppose the insured would attach to it; and that is such a meaning as would not operate to contradict or modify to his disadvantage the precise and unambiguous promise that the initial loss should be one-half of 1 per cent. of the total gross sales and deliveries for the year 1893, or, as expressed in the very beginning of the application, "Indemnified stands $\frac{1}{2}$ of 1%."

The judgment of the circuit court is reversed, and new trial ordered.

UNITED STATES v. JAEDICKE et al.

(District Court, D. Kansas, First Division. March 30, 1896.)

1. RES JUDICATA—CRIMINAL AND CIVIL SUITS—ACTION ON OFFICIAL BOND OF POSTMASTER.

The acquittal of a defendant under an indictment for making false and fraudulent returns, as postmaster, of the business done at his office, for the purpose of increasing his compensation, is not a bar to an action by the United States upon the bond of such defendant, as postmaster, to recover the amount found due to the government from defendant, upon the adjustment of his accounts, as shown by the same returns.

2. EVIDENCE—ACTION OF GOVERNMENT DEPARTMENTS.

In an action by the government on the official bond of a postmaster, a transcript from the treasury department, attached to the petition, showing an order of the postmaster general withholding commissions from such postmaster, and allowing him a salary, and showing the adjustment of his accounts in accordance therewith, is not conclusive as to all action in the matter by the post office or treasury departments, but the defendants should be permitted to show that other action was taken, if deemed material to their defense.

W. C. Perry, for the United States.

David Overmeyer and Eugene Hagan, for defendants.

FOSTER, District Judge. This is a civil suit, brought on an official bond, to recover judgment against the defendants in the sum of \$527.49. The petition alleges:

That August Jaedicke was postmaster at Hanover, in this state, from May, 1889, to April, 1892, and that the above-named defendants, in April, 1889, executed their bond to the said plaintiff in the sum of \$6,000, conditioned for the faithful performance of official duties by said Jaedicke as such postmaster. That said post office at Hanover was a post office of the fourth class, and that the compensation of said postmaster was the whole of the box rent collected at said office, and the commission upon the amount of canceled postage due stamps, and on postage stamps, official stamps, stamped envelopes, postal cards, and newspaper and periodical stamps canceled on matter actually mailed at said office, and on amounts received from waste paper, dead newspapers, printed matter, and twine, sold at the following rates, to wit: On the first \$100 or less per quarter, 60 per centum; on all over \$100, and not over \$300, 50 per centum; and on all over \$300, 40 per centum,—the same to be ascertained and allowed by the auditor in the settlement of the accounts of said postmaster upon his sworn quarterly returns. That said August Jaedicke was required by law to make quarterly returns to the post-office department, showing the business transacted at his office, and that said defendant did make quarterly returns during the time he held said office. That the postmaster general being satisfied that said August Jaedicke, in his quarterly statements, had made false returns of the business transacted at said Hanover post office, under the authority vested in him by law (20 Stat. 141), on February 7, 1894, issued an order withholding commissions on the returns of said August Jaedicke, and allowed him as compensation, in place of commissions and box rent, the sum of \$145 a quarter from May 21, 1889, to March 31, 1892, and directed the auditor of the treasury for the post-office department to adjust the accounts of the said August Jaedicke, postmaster, in accordance with said order. That defendant's accounts were so adjusted by the auditor, and there was found due the United States from said August Jaedicke the sum of \$527.49, for the payment of which sum demand has been duly made on said defendants, and payment refused.

The defendants admit the making by Jaedicke of quarterly returns to the post-office department, and assert:

That said returns were made in accordance with the law, and in proper form; and that the same were made honestly and in good faith, and contained a correct statement of the business of said Hanover post office during said period; and that the same were transmitted to the post-office department, and were received by the auditor of the treasury of that department, and were by the postmaster general and the said auditor examined, found to be correct, and were duly approved. "That, after the same had been found to be correct and approved, a salary was allowed the said August Jaedicke as postmaster, based upon a per cent. of the cancellation of stamps, as required by the act of congress, and which said salary was duly and formally paid to said August Jaedicke out of the treasury of the United States, under the directions of the postmaster general and the said auditor."

For a further defense, defendants allege:

"That on the 27th day of April, 1892, at a term of the district court of the United States of America, in and for the First division of the district of Kansas, a grand jury, duly impaneled at said term of court to inquire into offenses committed against the laws of the United States, returned an indictment against the said defendant August Jaedicke, which said indictment embraced twelve counts, and each count of said indictment named a separate and distinct offense against the said defendant August Jaedicke. That the charge in each count contained in said indictment was that the said August Jaedicke did make and return to the auditor of the treasury for post-office department, for the purpose of increasing his compensation, false and fraudulent returns of the number and value of stamps canceled by him as postmaster, and while acting as such, during said period named in the petition herein. That said returns, made at the end of each quarter, by the said August Jaedicke, were false and fraudulent, in this: that they contained a larger amount than was in truth and fact canceled at said post office by him while acting as postmaster. That the quarterly returns upon which the said August Jaedicke was indicted, as aforesaid, were the same identical ones designated and embraced in the petition herein, and that he made no other or different ones during said period of time. Defendants further state that to said indictment the said August Jaedicke, when arraigned, pleaded not guilty. That afterwards, to wit, on or about the 16th day of April, 1894, a jury was duly and formally impaneled in said case, to try the said defendant on said charges contained in said indictment. That testimony was submitted to the said jury in support of said charges contained in said indictment, and among other things submitted to the jury as testimony were the identical quarterly reports embraced in the petition herein. That after hearing all of said testimony and the instructions of the court, and after due deliberation, the said jury returned a verdict of not guilty against the said defendant upon the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth counts of said indictment. That an order by the said court was immediately thereupon entered discharging the prisoner, without day, and releasing him from custody as to the ten counts in said indictment. Defendants further allege that on or about the 10th day of December, 1894, the said defendant August Jaedicke was, in the manner above set forth, duly and formally tried upon the eleventh and twelfth counts of said indictment, and was duly acquitted."

To this answer, plaintiff moves to strike out so much of the first defense as sets forth the auditing and approval of the quarterly returns by the postmaster general and the auditor of the treasury, and the allowance and payment of the salary to August Jaedicke based on said returns. To the last defense, plaintiff files a general demurrer, that the same does not constitute a legal defense to plaintiff's petition.

The motion to strike out is based on the idea that the transcript from the treasury department attached to the petition contains and is conclusive of all action had in the matter by the post-office department or auditor of the treasury; but the answer does not rest on that assumption, but asserts that certain things were done and performed, and a certain salary allowed and paid to Jaedicke. Without deciding at this time how far the government may be estopped to make this demand, and the postmaster general to adjust the compensation of the defendant Jaedicke, as was done in this case, it is proper that defendants have an opportunity to prove their assertions in that behalf, and the motion to strike out must be overruled.

The chief controversy is on the demurrer. Did the indictment, trial, and acquittal of the defendant Jaedicke, in the criminal prosecution, bar the plaintiff from maintaining this suit? It is insisted

by the defendants that the matter is *res judicata*. The identity of the quarterly returns referred to in this suit, and those on which the indictments were based as being false and fraudulent, and trial and acquittal had, is not disputed. Ordinarily, public prosecutions do not bar civil actions relating to the same matter. Usually, the parties are different, and the evidence of a different nature. Wells, *Res Adj.* § 420; 21 *Am. & Eng. Enc. Law*, 239.

In the case at bar the parties are the same, and the defendants contend that the evidence and the facts to be proven are the same. The case chiefly relied on to sustain this contention is *Coffey v. U. S.*, 116 U. S. 436, 6 Sup. Ct. 437. That case was a proceeding in rem, wherein the government sought to declare a forfeiture of certain distillery products and property, for violation of sections 3257, 3450 and 3453 of the Revised Statutes. Those sections denounced a fine and imprisonment for a violation of their provisions, and also for the forfeiture of the property, etc. The forfeiture is a part of the punishment for the violation of the law, and the court holds that an acquittal in a criminal prosecution under those sections barred civil proceedings to forfeit the property. The court say:

"Nevertheless, the fact or act has been put in issue, and determined against the United States, and all that is imposed by the statute as a consequence of guilt is a punishment therefor."

The forfeiture, as well as the fine and imprisonment, was imposed by the statute as a punishment in consequence of guilt. So says the court, and this proceeding amounted to a second trial, to secure a part of the penalty imposed as a consequence of guilt.

Again, the court says, at bottom of page 444, 116 U. S., and page 437, 6 Sup. Ct.:

"So, the facts cannot be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In *U. S. v. McKee*, 4 Dill. 128, Fed. Cas. No. 15,688, it was sought to hold the defendant in a civil action for a penalty denounced as part punishment for a conspiracy to defraud the government out of the tax on distilled spirits. The court held such penalty was a part of the punishment denounced for the crime, and the civil suit was barred by the criminal proceeding.

In *Stone v. U. S.*, 12 C. C. A. 451, 64 Fed. 670, which was a civil suit to recover for timber cut from government land, after the defendant had been acquitted on a criminal charge, the rule is laid down thus:

"One of the safest rules for courts to follow in determining whether a prior judgment between the same parties concerning the same matters is barred is to ascertain whether the same evidence which is necessary to sustain the second action, if it had been given in a former suit, would have authorized a recovery therein."

The court then points out the difference in the testimony required to convict in the criminal case and to recover judgment in the civil action. In the former case it was necessary for the government to prove that the defendant did unlawfully, willfully, and feloniously

cut and remove trees growing upon said land, whereas in a civil suit the plaintiff had only to prove title to the land, the value of the timber taken, and that defendant received and converted the timber to his own use. In the criminal case it must appear that the defendant did the act with the intent and purpose to defraud the government. In the civil case the defendant might have been an innocent trespasser, or a purchaser from the trespasser, and be liable for the value of the timber taken.

From these decisions it is apparent that if this suit is to recover a penalty or forfeiture denounced by the law as a punishment in whole or in part for the crime of which this defendant has been tried, or if the testimony or the facts necessary to be proven in the two cases are the same, then the former acquittal is a bar. The authority conferred on the postmaster general is as follows:

"That in any case where the postmaster general shall be satisfied that the postmaster has made a false return of business it shall be within his discretion to withhold commissions on such returns and to allow any compensation that under the circumstances he may deem reasonable." 20 Stat. 141.

This does not imply that the postmaster general shall impose a penalty or forfeiture upon the recreant postmaster as a punishment; but, inasmuch as the returns are false, they cannot be used as a basis to fix the compensation, and, of necessity, some other plan must be adopted. The arbitrary power is given the postmaster general to fix the compensation, and, in doing so, he has to consider the circumstances, and determine what is reasonable,—i. e. what would be right and proper,—approximating what the postmaster would have received if his returns had been correct; and this whether the returns were false from inadvertence, incompetency of himself or his assistant, or for the purpose of fraudulently increasing his compensation.

The criminal provision of the statute reads as follows:

"And any postmaster who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation, under the provisions of this or any other act, shall be deemed guilty of a misdemeanor," etc.

In the criminal case it was necessary to prove that the returns were not only false, but that they were falsified by the defendant, and with the fraudulent intent of increasing his compensation beyond the amount allowed him by law. The amount sued for in this case is not a forfeiture or penalty, but simply a sum improperly withheld by the defendant in excess of his legal compensation. Therefore, neither the facts to be established nor the testimony to be adduced are the same as required in the criminal prosecution.

The motion to strike out part of the answer of defendants is overruled, and the demurrer to the last defense is sustained.

LEHMAN v. CITY OF SAN DIEGO.

(Circuit Court, S. D. California. November 18, 1895.)

No. 555.

1. MUNICIPAL BONDS—VALIDITY.

Charter power "to borrow money on the faith and credit of the city" gives no authority to issue negotiable bonds for money so borrowed. *Brenham v. Bank*, 12 Sup. Ct. 559, 144 U. S. 173, *Merrill v. Monticello*, 11 Sup. Ct. 441, 138 U. S. 673, and *Ashuelot Nat. Bank of Keene v. School Dist. No. 7 of Valley Co.*, 5 C. C. A. 468, 56 Fed. 197, followed.

2. SAME—ISSUANCE AFTER REPEAL OF CHARTER.

Bonds issued by the president and clerk of the board of trustees of a city, after the charter under which they purport to have been issued has been repealed, are void even in the hands of an innocent holder, although, without any fraudulent intent, they were antedated as of a date when the law was still in force.

3. SAME—ISSUANCE UNDER VOID ORDINANCES—RATIFICATION BY LEGISLATURE.

Certain ordinances of a city providing for the issuance of bonds were invalid, but the state legislature thereafter passed an act legalizing, ratifying, and declaring them valid, and providing that all bonds issued and to be issued in accordance with their provisions should be legal obligations of the city. *Held*, that the effect of the act was to make the ordinances part and parcel of the statute, so that the method of issuing the bonds prescribed in the ordinances, namely, by a resolution of the board of trustees directing when and to whom the bonds should be issued and delivered, must be strictly followed, and a disregard thereof rendered the bonds void.

This was an action by A. Lehman against the city of San Diego to recover upon certain bonds and coupons issued by the board of trustees of said city.

S. O. Houghton, for plaintiff.

H. E. Dolittle and T. L. Lewis, for defendant.

ROSS, Circuit Judge (charging jury). The real questions in this case are questions of law, and the law of the case, as declared by the court, you must accept, and return your verdict accordingly. If a wrong conclusion is reached,—if any error is committed,—the responsibility rests with the court, and not with you.

The bonds and coupons sued upon are claimed by the plaintiff to have been issued under and by virtue of the authority conferred upon the board of trustees of the city of San Diego by the thirteenth subdivision of section 10 of an act of the legislature of the state of California approved March 7, 1872, which reads:

"To borrow money upon the faith and credit of the city; but no loan shall be made without the consent to such loan of a majority of the real estate owners of the city residing therein previously obtained."

The bonds sued upon, and the coupons which were attached thereto as parts thereof, and which are also sued upon, are negotiable instruments, and were, as shown by the undisputed evidence, issued for the purpose of carrying out a contract made between a "Citizens' Committee of Forty" of San Diego and Col. Thomas A. Scott. The court instructs you, under the authority of the decision of the supreme court of the United States in the cases of *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, and *Mer-*

rill v. Monticello, 138 U. S. 673, 11 Sup. Ct. 441, and of the decision of the circuit court of appeals for the Eighth circuit in the case of Ashuelot Nat. Bank of Keene v. School Dist. No. 7 of Valley Co., 5 C. C. A. 468, 56 Fed. 197, that the bonds so issued were unauthorized by the charter of the city of San Diego approved March 7, 1872.

In respect to the bonds numbered 150, 151, 152, and 153, issued to Frankenthal & Co., the court instructs you, as matter of law, that as the evidence shows, without conflict, that they were not, in fact, issued until after the passage of the act of the legislature of the state of California approved April 1, 1876, to reincorporate the city of San Diego, and establishing another charter for it, and repealing all former acts and parts of acts in conflict with its provisions, including the act of March 7, 1872, by virtue of which the bonds themselves recite that they were issued, those bonds, together with the coupons attached thereto, are not valid obligations of the defendant city. Having been, according to the uncontroverted evidence, in fact issued by the president and clerk of the board of trustees of the city after the law under which they purported to have been issued had been repealed, and having been falsely antedated as of a date when that law was in force, and at a date when the persons who signed them as president and clerk of the board of trustees were not in truth such officers, they partake of the nature of forgeries, however honest the intentions of the parties may have been, and notwithstanding the fact that the president and clerk acted by direction of the board of trustees, and are no more valid in the hands of an innocent holder than would be a forged promissory note in the hands of an innocent holder. The purchasers of negotiable bonds of a municipality must always take notice of the official character of those who execute the bonds they buy, and the board of trustees was certainly without power to direct the issuance of the bonds after all semblance of statutory authority for their issuance had been repealed.

In respect to the coupons sued upon which constitute a part of bonds 146, 147, 148, and 149, issued to Bowers, the evidence is without conflict that they were issued at the time they bear date, to wit, October 4, 1875, which was prior to the repeal of the act under which they purport to have been issued.

As the court has already said to you, there was no original authority in the board of trustees for the issuance of such bonds. But the contention is further made on the part of the plaintiff that, even if there was no original authority for their issuance, yet the authority was conferred by the act of the legislature of the state of California approved February 24, 1874, entitled "An act to legalize certain bonds of the city of San Diego, and to provide for the payment of the interest thereon and for the redemption thereof," the first and second sections of which are as follows:

"Section 1. Charter Ordinance number 7, passed by the board of trustees of the city of San Diego on the 16th day of September, A. D. 1872, and the election held in said city in accordance with the provisions of said ordinance

on the 27th day of September, A. D. 1872, are hereby legalized, ratified, confirmed, and declared valid to all intents and purposes.

"Sec. 2. Charter Ordinance number 22, passed and approved by the board of trustees of the city of San Diego on the 3rd day of February, A. D. 1873, is hereby legalized, ratified, confirmed, and declared valid to all intents and purposes, and all bonds already issued or that may hereafter be issued under and in accordance with the provisions of said Ordinance number 22, are hereby declared to be legal and valid obligations of and against said city, and the faith and credit of said city is hereby pledged for the prompt payment of the same annual interest of said bonds so issued or to be issued under the provisions of said Ordinance number 22, and for the redemption thereof according to the tenor and effect of said bonds and the coupons thereto attached."

The two ordinances of the city of San Diego so confirmed are as follows:

"Charter Ordinance No. 7.

"Be it ordained by the board of trustees of the city of San Diego, that an election be held on Friday, the twenty-seventh day of September, A. D. 1872, in the said city of San Diego, in the manner and at the places hereinafter specified, to determine whether or not the said board of trustees and their successors in office shall issue bonds of the said city of San Diego, for the purpose of carrying out the agreement made by the 'Citizens' Committee of Forty' with Col. Thomas A. Scott, the president of the Texas and Pacific Railway Company, not to exceed the amount of one hundred and fifty thousand dollars, in gold coin of the United States of America, said bonds to bear date of the day of issuance, and to be made payable twenty years after date, and to be redeemable at the option of the said board of trustees, or their successors in office, at any time after the expiration of three years from the date of issuance; said bonds to bear interest at the rate of ten per cent. per annum, in like gold coin, semiannually, from the date of issuance, and to be issued in denominations of not less than five hundred nor more than one thousand dollars, at such times and in such manner as said board of trustees may direct. Every qualified voter of the said city of San Diego who desires to vote for the issuance of said bonds shall be entitled so to vote, by placing a ballot in the ballot-box of the city ward in which he is entitled to vote, with the words, 'For the bonds—Yes,' written or printed thereon; and those who desire to vote against the issuance of said bonds shall, in like manner, place a ballot in such ballot-box, with the words, 'For the bonds—No,' written or printed thereon. Said election shall be held on said twenty-seventh day of September, A. D. 1872, between the hours of ten o'clock a. m. and seven o'clock p. m., in the several wards of the said city of San Diego. The polling places and the officers thereof shall be as follows, to wit: * * *.

"Passed at a regular meeting of the board of trustees of the said city of San Diego, this sixteenth day of September, A. D. 1872.

"[Seal.]

W. J. McCormick, President.
"E. G. Haight, Clerk."

"Charter Ordinance No. 22.

"Section 1. That the said board of trustees issue bonds of the said city of San Diego, for the purpose of carrying out the agreement made by the Citizens' Committee of Forty with Colonel Thomas A. Scott, the president of the Texas Pacific Railway Company, not to exceed the amount of one hundred and fifty thousand dollars, payable in gold coin of the United States of America.

"Sec. 2. That said bonds be issued and bear date as of the first day of January, A. D. 1873, and be made payable at the office of the city treasurer of said city, in twenty years from and after said date, and to be redeemable at the option of the said board of trustees or their successors in office, at any time after the expiration of three years from said date of issuance.

"Sec. 3. That said bonds bear interest at the rate of ten per cent. per annum from the date of issuance, payable in like gold coin semi-annually, on the first day of July and January in each year, at the office of the treasurer of said city.

"Sec. 4. That said bonds be issued (at the option of said board of trustees) in denominations of not less than five hundred nor more than one thousand dollars, and to such person or persons, and at such time or times, as said board of trustees may, by resolution, direct."

By Ordinance No. 7, it will be observed, the proposition the qualified voters of the city of San Diego were called upon to determine by their votes was whether or not the board of trustees and their successors in office should issue bonds of the city for the purpose of carrying out the agreement made by the Citizens' Committee of Forty with Col. Thomas A. Scott, not to exceed in amount \$150,000, "said bonds to bear date of the day of issuance, and to be made payable twenty years after date, and to be redeemable at the option of the said board of trustees, or their successors in office, at any time after the expiration of three years from the date of issuance."

Section 1 of Ordinance No. 22 provided that the board of trustees of the city issue bonds for the purpose of carrying out the agreement made by the Citizens' Committee of Forty with Col. Thomas A. Scott, not to exceed in amount \$150,000; and section 2 of that ordinance provided:

"That said bonds be issued and bear date as of the first day of January, A. D. 1873, and be made payable at the office of the city treasurer of said city, in twenty years from and after said date, and to be redeemable at the option of the said board of trustees or their successors in office, at any time after the expiration of three years from said date of issuance."

Notwithstanding this manifest conflict in the provisions of the two ordinances in respect to the time when the bonds should bear date, and the consequent difference in respect to the time within which they should be redeemed, the act of the legislature of California of February 24, 1874 (St. 1873-74, p. 155), undertook to legalize, ratify, confirm, and declare valid all of the provisions of each of those ordinances. In other respects, however, there was no conflict between the two ordinances regarding the mode and manner of issuance of the bonds. Ordinance No. 7, providing for the election to determine whether bonds should be issued or not, declared they should bear interest at the rate of 10 per cent. per annum, in gold coin, from the date of issuance, "and to be issued in denominations of not less than five hundred nor more than one thousand dollars, at such times and in such manner as said board of trustees may direct." And Ordinance No. 22, providing for the issuance of the bonds, provided that they should bear interest at the rate of 10 per cent. per annum from the date of issuance, and "that said bonds be issued (at the option of said board of trustees) in denominations of not less than five hundred nor more than one thousand dollars, and to such person or persons, and at such time or times, as said board of trustees may, by resolution, direct."

Inasmuch as, under the authorities to which reference has been made, none of the bonds or coupons in suit were authorized by the charter of the city of date March 7, 1872, whatever authority, if any, the board of trustees of the city of San Diego had in the premises was derived under and by virtue of the act of Feb-

ruary 24, 1874, confirming the provisions of Ordinances 7 and 22, thereby making those provisions of the ordinances a part and parcel of the statute, and thus constituting the prescribed mode the measure of the power. This was clearly the view taken by the supreme court of California in its decision in the case of McCoy v. Briant, 53 Cal. 249, in respect to the identical bonds now under consideration, where it said that:

"The authority to issue the bonds is derived exclusively from Ordinances numbers 7 and 22 of the trustees of the city, which were subsequently ratified and validated by the act of the legislature of February 24, 1874."

As the court there also said:

"The two ordinances, as ratified by the act of the legislature, prescribed definitely and precisely the mode, and the only mode, in which the bonds could be issued and delivered, to wit, by a resolution of the board of trustees, directing when and to whom the bonds were to be issued and delivered. Nor can this requirement be regarded as merely directory, a violation of which would not impair the validity of the bonds. On the contrary, it was intended as a protection against an abuse of its power by the board of trustees, and to prevent a fraudulent or unauthorized delivery by the clerk to a person not entitled to receive the bonds. Under the terms of the ordinance, no bond could be issued or delivered, except upon a resolution of the board appearing upon its minutes or the record of its proceedings, thus furnishing a most important safeguard against fraud and an abuse of power. Every person dealing in bonds is bound, at his peril, to inquire whether they were issued in the mode prescribed; and, as the mode is the measure of the power," the court declared the bonds would be void in the hands of a holder for value without actual notice, if issued in any other mode.

The court there cited, in support of its conclusion, a number of authorities, among them Dill. Mun. Corp. §§ 372, 373, where it is declared to be a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract, and that, where the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation.

Giving to the act of the legislature of February 24, 1874, the force and effect claimed for it on the part of the plaintiff, it gave to the provisions of Ordinances Nos. 7 and 22 the force and effect of statute law. The mode and manner of issuing the bonds being thus plainly prescribed by force of the statute, it is clear that no subsequent action of the board of trustees could change it, by confirmatory resolution or otherwise.

For the reasons stated, the court instructs you, as matter of law, that all of the bonds and coupons sued upon are void in the hands of the plaintiff, and you are therefore instructed to return a verdict for the defendant.

Verdict for defendant.

ORVIS v. WELLS, FARGO & CO.

(Circuit Court of Appeals, Second Circuit. March 19, 1896.)

1. CONTRACTS—AGENTS—UNDISCLOSED PRINCIPALS.

An agreement between two brokers, each acting for an undisclosed principal, does not give rise to two distinct contracts, one between the brokers and the other between the principals, but to one contract only, and separate satisfactions cannot be obtained from both broker and principal for a cause of action arising out of such contract.

2. PRINCIPAL AND AGENT—SUBMISSION TO ARBITRATION—RATIFICATION.

One W., acting for an undisclosed principal, made a contract with one B., acting in the same capacity, for the sale to B. of 500 shares of mining stock; the contract being expressly declared to be governed by the laws of the New York Mining Stock Exchange, of which both W. and B. were members. A controversy afterwards arose over an offer of performance of the contract made by W., which B. claimed to be insufficient; and this controversy was submitted to the officers of the exchange, under its rules, and was decided against B., who was directed to accept W.'s offer of performance and pay the price of the stock. B.'s principal, O., thereupon furnished him with the necessary funds. B. paid for and received the stock, and delivered it to O., who accepted it. O. subsequently brought an action against W.'s principal for damages sustained through the alleged failure to perform the contract. *Held*, that any cause of action for breach of the contract was barred by the submission to the arbitration of the officers of the exchange, which, if not originally authorized by O., was subsequently ratified by him.

3. ARBITRATION AND AWARD—MISCONDUCT OF ARBITRATOR—HOW AVAILED OF.

Held, further, that O. could not, without rescinding or disaffirming the award, and while retaining its fruits, avoid its effect, as a bar to the original cause of action, by showing misconduct of one of the arbitrators.

In Error to the Circuit Court of the United States for the Southern District of New York.

Frederick S. Parker and Herman Aaron, for plaintiff in error.

Allan McCulloh, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On July 22, 1881, William T. Whiting sold to Duncan F. Blount, by an agreement in writing, 500 shares of the capital stock of the Cheyenne Consolidated Mining Company, at one dollar per share, "payable and deliverable, at seller's option, within thirty days." The contract was expressly declared to be governed by the laws of the New York Mining Stock Exchange, of which each party was a member. In this transaction, Whiting was the broker of Wells, Fargo & Co., and Blount was the broker of the plaintiff, Charles E. Orvis. Wells, Fargo & Co. guaranteed the performance of the contract. Under the rules of the exchange, deposits of margin are required to be made in case the market price of the stock moves from the contract price. After July 22d the stock rose in value, and, under repeated calls for margin, Wells, Fargo & Co. deposited \$4,000. When the stock reached \$15 per share, Whiting, the defendant's broker, refused to deposit more margin. On July 20, 1891, the stock reached \$20 per share, and Blount notified Whiting that he would buy the stock in under the rule of the ex-

change which provided that in case of default of one party the other party may buy or sell the stock at the business room of the exchange, upon notice to the other party of the intended time of sale or purchase. Whiting still refusing to add to his margin, Blount bought the stock in for \$10,000. The defendant had "deposited" in the office of the Cheyenne Consolidated Mining Company, with instructions to transfer to Blount or his assigns, as a fulfillment of the contract, 300 shares of Cheyenne Gold-Mining stock, and a "call" for 200 shares of Cheyenne Consolidated Mining Company stock, due at a later day, and had caused Blount to be notified of such deposit, and refused, through its broker, to pay the sum of about \$9,500 which was alleged to be due upon its breach of contract. A rule of the exchange provided that it was the duty of the arbitration committee to take cognizance of, and exercise jurisdiction over, all matters of difference between members of the association, and their decision was binding, subject to an appeal to the governing committee. The dispute between Blount and Whiting, under this contract, was brought before the arbitration committee, which decided against Blount, and directed him to pay the \$500 specified in the contract, and to take the "call" for 200 shares, and the 300 shares of stock which had been tendered. This award was sustained by the governing committee. After the final decision, Orvis furnished Blount with \$500 to pay for the stock which had been "deposited"; the payment was made; Blount received the stock, and delivered it to Orvis, who accepted it. The margins which had been deposited were repaid to Wells, Fargo & Co. Orvis thereupon brought an action at law against Wells, Fargo & Co. to recover the damages, amounting to \$9,497.67, with interest from July 19, 1881, which he alleged he had sustained through the defendant's breach of contract for the sale and delivery of the 500 shares of mining company stock. Upon the trial the circuit judge directed a verdict for the defendant, and to reverse the judgment upon the verdict the present writ of error was brought.

The theory of the plaintiff is that out of the transaction two distinct and different contract obligations arose, viz. the obligation of the brokers, who were ostensible principals, and the contract between the plaintiff and defendant, who were undisclosed principals, and that the extinguishment, by award or otherwise, of the broker's liability, did not affect the contract between the plaintiff and defendant. While it is true that a party to a contract may elect to sue the ostensible principal, or the actual and undisclosed principal, when he is disclosed, yet there are not two different contracts, for a breach of which he can obtain satisfaction from each of the respective parties. In this case, Blount, who was Orvis' agent, submitted the questions in dispute under this contract to arbitration. If, when he first submitted the case, he did not act under Orvis' authority, the submission, the arbitration, and the award were ratified by his principal, who complied with the provisions of the award, paid the amount due, and accepted the stock, which was declared to constitute a good delivery. It is difficult to see how the acts of an agent can be more fully ratified by his principal, and how a valid

award can be a more complete bar to a suit upon the original cause of action, for the award has been performed by the plaintiff, who has received and accepted stock in discharge of the apparent principal's liability under the contract, which stock he apparently has neither returned nor offered to return. The old cause of action for a breach of contract has disappeared, because, by the acceptance of the stock and the payment of the purchase price, he has waived the right to insist that there was a breach.

But it is said that the award was invalid by reason of the misconduct of one of the arbitrators. It is true that a court of equity has the power to set aside an award by reason of the fraud or fraudulent conduct of the arbitrators, and while, at common law, fraud was not a defense to an action at law upon the award, yet, in many of the states, fraud of the arbitrators is a defense to such an action. 2 Greenl. Ev. § 78; *Power Co. v. Gray*, 6 Metc. (Mass.) 131, 169. In this case, however, the award has been performed, and the plaintiff is suing upon the original cause of action, without attempting to rescind or disaffirm the award, but is retaining its fruits. He retains that which he received in satisfaction of the alleged breach of contract, and seeks a new satisfaction. If a party wishes to disaffirm or rescind a contract because it was vitiated by fraud, he must return, or offer to return, the property which he received under the contract. *Kellogg v. Denslow*, 14 Conn. 411. The judgment of the circuit court is affirmed, with costs.

ST. LOUIS S. W. RY. CO. v. HOLBROOK.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1896.)

No. 411.

1. FEDERAL RECEIVERS SUED IN STATE COURTS—CONCLUSIVENESS OF JUDGMENT.

The authority given by the act of March 3, 1887, to sue federal receivers without previous leave of the appointing court, makes a judgment obtained against such receivers in a state court, for personal injuries, conclusive as to the right of the plaintiff therein and the amount of his recovery; and it is immaterial that, according to the state procedure, the case was tried without a jury, because neither party demanded a jury. *Dillingham v. Hawk*, 9 C. C. A. 101, 60 Fed. 495, followed.

2. LIENS OF RECEIVERSHIP—DAMAGE BY NEGLIGENCE.

When mortgage creditors ask a court to take possession of railroad property and operate it through receivers, they thereby consent to have all the liabilities resulting from such operation, including damages to persons by negligence, take precedence of their prior contract liens.

Pardee, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Charles S. Todd, George Clark, and Sam H. West, for appellant.
W. P. McLean and Hiram Glass, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

McCORMICK, Circuit Judge. At the suit of the trustee, representing the mortgage bondholders of the St. Louis, Arkansas & Texas Railway Company in Texas, the railroad and other mortgaged property of that corporation was taken into the possession of the circuit court, and placed in the hands of receivers to operate the railroad pending foreclosure proceedings. These proceedings came to final decree July 24, 1890, ordering a foreclosure and sale of the railroad and other mortgaged property. In this decree it was provided that:

"The purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase, in addition to the payments which may be ordered by the court of the sum bid, take the said property upon the express condition that he or they will pay off, satisfy, and discharge any and all claims now pending and undetermined in either of said courts, accruing prior to the appointment of the receivers herein, or during the receivership, which may be allowed and adjudged by either of said courts as prior in right to said final mortgages, together with all such interest as may be allowed; and also upon the further express condition that he or they will pay off, satisfy, and discharge all debts, claims, and demands, of whatsoever nature, incurred, or which may hereafter be incurred, by said receivers, and which have not been, and shall not hereafter be, paid by said receivers or other parties in interest herein. * * * And jurisdiction of this cause is retained by this court for the purpose of enforcing the provisions of this article of this decree. And the court hereby reserves the right to resell the said premises upon failure to comply within twenty days with the provisions of this or any order of the court touching the performance by the purchaser or purchasers of the terms and conditions of said sale."

A sale was made under this decree. This sale was confirmed by a decree passed January 9, 1891, in which it was provided that, upon the purchaser complying with the terms and conditions therein made, the special master commissioner should execute and deliver to the purchaser a good and sufficient deed of and to all the property, rights, and franchises of the defendant railway company, subject, however, to all the terms and conditions and provisions of the final decree of foreclosure and sale. On May 11, 1891, the circuit court ordered its receivers to deliver the property to the purchaser, providing in that order that:

"Said property, nevertheless, shall be delivered to and received by said Louis Fitzgerald, purchasing trustee, or his assigns, subject to and charged with such claims and demands against said receivers, incurred or arising out of the maintenance or operation of said railway companies by them during the period of their receivership, as may be undisputed, or, if disputed, such claims or demands as upon intervention now pending, or hereafter to be filed herein, within the time hereinafter limited, shall be adjudged by this court or the U. S. circuit court for the Eastern district of Texas, at Tyler, to be paid; * * * as also such judgments as may hereafter be rendered by either of said courts in which this cause is pending in favor of any intervener or intervention now pending and undetermined, or which may be filed prior to the 1st day of December, 1891; * * * and upon the condition that such liabilities and obligations of either of said companies, when so recognized and adjudged, may be enforced against said property in the hands of said purchaser or his assigns, to the same extent as they could have been enforced if said property had not been surrendered into the possession of said purchaser or his assigns, and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the obligations and liabilities aforesaid, so recognized by either of said courts, resume possession of said property. It is further ordered that all claims and demands of every nature

arising out of the operation and management of the railway property herein involved, when any lien upon the funds derived by the sale, or upon the property sold, is claimed, whether against said receivers or the mortgagor companies herein, shall be presented and prosecuted by intervention in this court, or in the U. S. circuit court for the Eastern district of Texas, at Tyler, prior to the 1st day of December, 1891, and all such claims or demands as may not be presented on or before the date last above mentioned, by intervention as aforesaid, shall be declared stale, and shall not be a charge upon, or enforced against, the property herein ordered to be delivered to said Fitzgerald or his assigns."

On April 11, 1893, a decree was passed discharging the receivers. In that decree the following provision was made:

"Saving and excepting, however, from the operation of this decree, all claims that may have been, or may hereafter be, established by this court as legal demands against the receivers and the property in their hands; and, as to such demands, the court here now reserves custody and control of the property and effects heretofore in the hands of such receivers, with a reservation of the right and power to hold said property and effects in the custody of the court, and to apply the same, or the earnings thereof, or so much thereof as may be necessary, for the satisfaction and payment of all indebtedness incurred by the said receivers and established by the orders of this court, including all costs of court. And it is further ordered by the court that all previous orders and decrees in this cause herein made, wherein any special provision may have been ordered and decreed with reference to any special matter or thing be, and the same shall remain, unaffected by the terms of this order of final discharge."

On June 8, 1889, while the circuit court, by its receivers, at the suit of the mortgage creditors, was operating the railroad, the appellee received severe personal injuries, which he charged were caused by the negligence of the servants of the receivers in operating trains on their railroad. On September 14, 1889, he began an action against the receivers, in the state court, on this claim. The receivers appeared and answered. On November 10, 1890, this action went to judgment in favor of appellee, R. W. Holbrook, and against the receivers, for the sum of \$10,000. In Texas such actions (all civil actions) are tried without a jury, unless a jury is demanded by one of the parties. In this action neither party demanded a jury, and the case was heard and tried on its issues of fact, as well as of law, by the judge. A writ of error to the court of civil appeals was sued out, but was dismissed by that court because the writ was not taken in time. So that the judgment of the state court was subsisting, unreversed, unsatisfied, and valid, when appellee's intervention was heard in the circuit court. That court held that the judgment of the state court was conclusive as to the fact, and as to the amount of appellee's just claim against the receivers, and that the claim was a charge on the property acquired by the appellant under the decrees above mentioned. The assignment of errors presents these two questions: (1) Was the judgment of the state court conclusive as to the right of the plaintiff therein to recover, and as to the amount that should be recovered? (2) Is the claim thus established a charge on the property acquired under the decrees of the court?

The first of these questions was directly presented to this court, at a former term, in the case of *Dillingham v. Hawk*, 9 C. C. A. 101,

60 Fed. 495, and was answered in the affirmative. Without expressly approving all of the reasoning of the opinion, which did not then receive the full concurrence of all the judges rendering that decision, we adhere to the conclusions then expressed as to the sound construction of the third section of the act of March 3, 1887. In the state court in which appellee's action went to judgment, the parties had the right to have their case submitted to a jury, on a demand therefor. They chose to not demand a jury. Section 649 of the Revised Statutes of the United States provides for trying issues of fact in civil cases by the court, without the intervention of a jury, and the finding of the court upon the facts has the same effect as the verdict of a jury. And, where the submission of a civil case is made without the stipulation in writing, the judgment cannot be questioned, if it is warranted by the pleadings. The analogies, therefore, would seem to indicate that where parties could try their issues before a jury, and choose to try them without a jury, the finding of fact and judgment of the court should have at least the same effect as the verdict of a jury.

The second question, we think, must also be answered in the affirmative. The reasoning in the opinion in the *Kneeland Cases*, 136 U. S. 89, 10 Sup. Ct. 950, the review therein of the former decisions of that court, and the conclusions announced on the issues involved in that case, seem to require that, when mortgage creditors ask a court of equity to take possession of such property and operate it, they consent to have all the liabilities resulting from such operation take precedence of their prior contract liens which they are seeking by the proceeding to enforce. And can a court which in a law case would adjudge damages against a railroad corporation, in favor of one who had suffered personal injuries by the negligence of the corporation in the operation of its road, refuse or omit to require such compensation to be made when the injury is caused by the negligence of those to whom the court has to intrust the operating of the mortgaged property? As such business must be done, from the nature of the case, more or less of such liability must be incurred. It is a necessary part of the running expenses of all railroads, and while such roads are being operated by the mortgage creditors, or by the court in their interest and at their instance, such running expenses must take precedence of their mortgage liens. On this paramount equity, as well as on the particular terms of the decrees of the court under which the appellant acquired and holds the property in question, it is bound to pay appellee's judgment, or to have it executed on the property. The decree appealed from is affirmed.

PARDEE, Circuit Judge, dissenting.

FEARING v. GLENN.

(Circuit Court of Appeals, Second Circuit. March 12, 1896.)

1. LIMITATION OF ACTIONS—FEDERAL COURTS—STATE STATUTES.

Under Rev. St. § 721, state statutes of limitation are to be regarded as rules of decision in actions at law in the federal courts, unless otherwise provided by act of congress or treaty, although such statutes are expressly limited to actions brought in the courts of the state.

2. SAME—RESIDENTS OF OTHER STATES—NEW YORK CODE.

Under the New York statute (Code Civ. Proc. § 390), an action brought by a nonresident of the state against one who was a resident of Rhode Island at the time the cause of action accrued, and who has never since been a resident of New York, is governed by the statute of limitations of Rhode Island, as construed by the highest courts of that state.

3. SAME—RUNNING OF STATUTE—COMMENCEMENT OF ACTION.

By the statute of Rhode Island, an action is commenced, so as to stop the running of limitation, when the writ is issued, though it is not served until after the expiration of the limitation period. *Hail v. Spencer*, 1 R. I. 17, followed.

4. SERVICE OF PROCESS ON CORPORATIONS—WHO IS "CASHIER."

A mere employé in the office of a local agent of an express company is not a cashier of the company, within the meaning of a statute authorizing service to be made on the "cashier or treasurer" of a corporation.

5. CORPORATIONS—RESIGNATION OF DIRECTORS.

The Virginia statute giving stockholders authority in general meeting to remove any director and fill the vacancy, but providing that unless so removed the directors shall continue in office until the next annual meeting of the stockholders, "and until their successors shall be appointed," does not prevent a director from resigning at any time. *Briggs v. Spaulding*, 11 Sup. Ct. 924, 141 U. S. 132, followed.

6. SAME.

A director of an ordinary business corporation can resign orally or in writing unless there is some provision to the contrary in the charter or by-laws.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error by George R. Fearing, the defendant in the court below, to review a judgment entered upon the verdict of a jury rendered by the direction of the trial judge. The action was brought to recover of the defendant two assessments or judicial calls upon the stockholders of the National Express & Transportation Company, a corporation of the state of Virginia, ordered by decrees of the circuit court of Henrico county, Va. The complaint proceeded upon two causes of action, the first being founded upon the call ordered December 14, 1880. The defendant, among other defenses, interposed that of the statute of limitations. Another issue litigated upon the trial was whether the Virginia court by whose decrees the assessments were ordered acquired jurisdiction of the action in which the decrees were made. Upon the trial the defendant requested the court to direct a verdict in his favor, as to the first cause of action, upon the ground that it did not accrue within six years before the commencement of the action. This request was refused, and thereupon the defendant requested to go to the jury upon several propositions of fact involved in the question whether the Virginia court acquired jurisdiction in the action. The trial judge refused these requests, and directed the jury to find for the plaintiff in both causes of action.

Joseph H. Choate (George Zabriskie and George W. Wickersham, of counsel), for plaintiff in error.

Burton N. Harrison (Arthur H. Masten, of counsel), for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge (after stating the facts as above). The statute of limitations was not a bar to a recovery on the first cause of action. It is not disputed that the cause of action accrued, and the statute of limitations began to run, at the time of the assessment or judicial call ordered by the decree of the Virginia court, which, as to the first cause of action, was December 14, 1880. The defendant at that time resided in the state of Rhode Island, and since 1872 has not been a resident of New York; and the action, not having been brought by a resident of this state, should have been commenced within the time limited for bringing like actions by the law of Rhode Island. This is the rule of limitation prescribed by the statute of this state which provides that "where a cause of action * * * accrues against a person, who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representatives, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the state." Code Civ. Proc. § 390. By the laws of Rhode Island, actions founded upon causes of action like the present must "be commenced and sued within six years next after the cause of such action shall accrue, and not after." Gen. Laws 1896, p. 810. The writ in the present action was issued, and placed for service in the hands of the United States marshal for the Southern district of New York, December 4, 1886, and was not served upon the defendant until December 16, 1886, two days after the expiration of six years from the time when the cause of action accrued.

It has long been settled that the courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. In *McCluny v. Silliman*, 3 Pet. 270, it was held that this rule was a necessary consequence of the provision of the judiciary act of 1789 (now section 721 of the Revised Statutes) that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States, except where treaties or acts of congress otherwise provide. It is quite immaterial that the state statute only prescribes the rule of limitation for actions brought "in a court of the state." All of the various provisions relating to the limitation upon the time of bringing actions are, by necessary implication, addressed only to actions brought in the courts of the state. These are the only actions as to which they could have any operation, and their operation upon the rights of litigants in the federal courts depends solely upon the force of federal authority.

It was the obvious purpose of the statute to substitute in behalf of defendants, residents of other states when the cause of action accrued, sued in this state by a nonresident, the law of their re-

spective domiciles, in lieu of the law of this state in respect to the limitation of the time of bringing actions. It operates in the present case to make as the law of the forum the statute of Rhode Island. By that statute, as construed by the highest court of Rhode Island, an action is commenced, so as to save the running of the bar, when the writ is issued, notwithstanding service is not made upon the defendant until after the expiration of the six years. *Hall v. Spencer*, 1 R. I. 17. It follows that the present action was commenced within the six years, and the defense of limitation is unavailing.

Concededly, if the Virginia court, by whose decree the assessments sought to be enforced against the defendant were ordered, did not acquire jurisdiction of the action in which the decree was made, the plaintiff took nothing by that decree; and, the decree being a nullity, the present action was without foundation. Concededly, also, that court did not acquire jurisdiction unless the service of process for the commencement of the suit was properly made either upon Mr. Poiteaux, as cashier of the express company, or upon Mr. Anderson, as one of its directors. According to the evidence at the trial, Mr. Poiteaux was merely an employé in the office of the local agent of the company at Richmond. Such an employé is not a cashier, in the sense of the statute which permits service of process upon the "cashier or treasurer" of a corporation. The more serious issue at the trial was whether Mr. Anderson was a director in November, 1871, when the process was served upon him. Although the evidence showed that he was chosen a director at the meeting of the board of directors held November 1, 1886, to fill a vacancy created by the resignation of a previous director, and tended also to show that he participated as a director in the proceedings of that meeting, his own testimony upon the trial was to the effect that he resigned soon after, and probably at the conclusion of the meeting, having consented merely to act temporarily and formally. At the close of the evidence, after a motion for the direction of a verdict for the defendant had been denied, the defendant asked to have the case submitted to the jury with instructions to the effect that the plaintiff was not entitled to recover unless the process of the Virginia court was served upon a person who at the time was a director of the express company; that Mr. Anderson was not bound to serve as a director for the unexpired term of his predecessor; that it was not necessary that his resignation should have been formally accepted by the directors; and that, if the jury believed that he had ceased to be a director previous to the service of the process upon him, the service was insufficient. It seems to have been the view of the trial judge that, by force of a provision of the statute of Virginia relating to corporations, Mr. Anderson continued a director, notwithstanding his resignation, because his successor was never chosen. That provision reads as follows:

"The stockholders in general meeting, or any other appointing power, as the case may be, may remove any director and fill the vacancy caused by such removal; but unless so removed the directors shall continue in office until

the next annual meeting of the stockholders, and until their successors shall be appointed."

Similar provisions are common in charters and acts of incorporation. They are generally supposed to be but declaratory of the common-law rule that directors hold over after the expiration of their original terms, in the event that their successors have not been elected, or have not qualified. *Angell & A. Corp.* § 142; *Thorington v. Gould*, 59 Ala. 461; *Olcott v. Railroad Co.*, 27 N. Y. 546; *Dam Co. v. Gray*, 30 Me. 547; *Currie v. Assurance Soc.*, 4 Hen. & M. 315; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274. We are not aware of any adjudication holding that such a provision operates to preclude the resignation of a director. The case of *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, in which the question was considered by the supreme court, is a direct and controlling authority to the contrary. The court used this language:

"We do not understand that because section 5145 of the Revised Statutes provides that directors shall hold office for one year, and until their successors have been elected and qualified, this prohibits resignations during the year."

In *Bartholomew v. Bentley*, 1 Ohio St. 37,—a case where the charter of a bank provided that directors should remain in office until successors should be elected,—the court held that those who had been elected, and whose successors had never been chosen, had nevertheless ceased to be directors, in view of facts indicating their abandonment of office.

A director of an ordinary business corporation is not a public officer, but is merely an agent of the shareholders, selected, conformably to the organic law of the company, to represent them in the management of its affairs. Unless there is some provision in the charter or by-laws to the contrary, like the agent of an ordinary partnership, he can renounce his agency at will, can manifest his purpose by oral notice as well as by a formal written resignation, and can terminate the relation without the assent of his principal.

The testimony of Mr. Anderson, although inconclusive, was sufficient to authorize the jury to find, not only that he had resigned previous to the time of the service of process upon him, but that it was understood by his associates, when he was chosen, that he would only serve at that meeting of the board. In *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49, the question of fact, whether Mr. Anderson was a director when served, was considered by this court upon the evidence in the record then before us; and we thought the evidence sufficient to indicate that he was, especially in view of the consideration that the resort to equity was without foundation unless the fact were true. But the evidence was conflicting, as it is here. The request of the defendant to go to the jury, and for appropriate instructions by the court in respect to the effect of Mr. Anderson's resignation and of service of process upon him, sufficiently saved his rights, notwithstanding he had previously asked for the direction of a verdict.

We conclude that there was a question of fact which should have been submitted to the jury, and that it was error to refuse the

instructions prayed for by the defendant and to direct a verdict for the plaintiff. This conclusion renders it unnecessary to discuss the correctness of other rulings at the trial which have been challenged by the assignments of error.

The judgment is accordingly reversed.

BELEY et al. v. NAPHTALY.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

No. 251.

1. PUBLIC LANDS—RULINGS OF SECRETARY OF INTERIOR—REVERSAL BY SUCCESSOR.

The ruling of a secretary of the interior finally disposing of an application to purchase public land may, on a reasonable application, be reconsidered and reversed by his successor, when no steps have been taken looking to the conclusion of the proceedings, in accordance with the original decision. *Noble v. Railroad Co.*, 13 Sup. Ct. 271, 147 U. S. 165, and *U. S. v. Stone*, 2 Wall. 537, distinguished. *New Orleans v. Paine*, 13 Sup. Ct. 303, 147 U. S. 261, followed.

2. SAME—REJECTED MEXICAN GRANTS—RIGHT OF OCCUPANT TO PURCHASE.

Under section 7 of the act of July 23, 1866, one who purchased in good faith the title of a supposed Mexican grantee while the claim was being prosecuted before the tribunals authorized by our government to settle such titles, and who continued in possession of the land, had a preferred right of purchase from the United States, although the claim was finally rejected, on the ground that no grant was in fact ever made by the Mexican government.

3. SAME—ASSIGNABILITY OF RIGHT OF PURCHASE.

The preferred right of purchase given by this statute is assignable, and a valid assignment may be taken even by one having notice of the final rejection of the claim.

4. SAME—CONCLUSIVENESS OF PATENT AS AGAINST TRESPASSERS.

As against mere intruders who have ousted plaintiff from the peaceable possession of a rejected Mexican grant, for which he has obtained a patent as a preferred purchaser under the act of July 23, 1866, § 7, the patent is conclusive; and it cannot be collaterally attacked by evidence offered for the purpose of showing that he was not entitled to the benefit of the act.

In Error to the Circuit Court of the United States for the Northern District of California.

This was an action by Joseph Naphtaly against Julius Beley and others to recover possession of various parcels of land in Contra Costa county, Cal. Plaintiff recovered a judgment in the circuit court, and defendants sued out this writ of error.

H. F. Crane and Philip Teare, for plaintiffs in error.

A. L. Rhodes, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and MORROW, District Judge.

ROSS, Circuit Judge. This action was brought by the plaintiff (defendant in error here) to recover the possession of various lots and parcels of land described according to the public surveys of

the United States, situated in Contra Costa county, Cal., and also damages for the withholding thereof, the plaintiff relying for title thereto upon two patents issued by the government of the United States, pursuant to an approved application by him to purchase the lands under and by virtue of the seventh section of the act of congress of July 23, 1866, entitled "An act to quiet land titles in California" (14 Stat. 218). That section provides:

"That where persons, in good faith and for a valuable consideration, have purchased land of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same after having such lands surveyed under existing laws at the minimum price established by law, upon first making proofs of the facts as required in this section, under regulations to be provided by the commissioner of the general land office."

The bill of exceptions recites that on the trial, after introducing the patents in evidence, the plaintiff proved that, when he was in the quiet and peaceable possession of the lands, the defendants entered thereon, and ousted the plaintiff therefrom, and have since withheld the lands from him; that the plaintiff also proved the rental value of the premises; and that it was then admitted by the counsel for the defendants that, at the time of the issuance of the patents, the lands in question were public lands of the United States, subject to sale under its laws, and "that defendants did not propose to connect themselves in any manner or form with the title of the United States to the premises described in the complaint herein (and in the patents), or any part thereof, either by certificate of purchase, patent, or anything of the kind."

Confessedly, therefore, the defendants are mere naked trespassers. As such, they claimed the right in the court below to attack the validity of the patents issued to the plaintiff in the action, and, for that purpose, offered in evidence the following documents: First. The application of the plaintiff to purchase the lands from the United States, under and pursuant to the provisions of the seventh section of the act of July 23, 1866, which application set forth, among other things, that the lands were included within the exterior limits and formed part of a grant made by the Mexican government in the year 1844 to Inocencio, José, and Mariano Romero, three brothers, who presented their claim thereto for confirmation to the board of land commissioners created by the act of congress of 1851 for the ascertainment and settlement of private land claims in California, which claim was rejected by the commission, and afterwards, on appeal, by the United States district court for California and by the supreme court; that in 1846 or 1847 the Romero brothers partitioned the lands claimed by them under the grant, Inocencio taking that part thereof embraced within a certain inclosure, and including the lands sought to be purchased by the applicant; and that Inocencio Romero used and cultivated the same until December 26, 1853, when he sold and conveyed the same, for value, to Domingo Pujol and Francisco San-

jurjo, who entered into possession of the lands within the inclosure, and used, improved, and continued in the actual possession of those lands, according to the lines of their original purchase, until February 14, 1855, when they sold and conveyed the same, for value, to one J. W. Tice, who entered into the possession thereof, used, improved, and cultivated the same, and continued in the actual possession thereof until August 8, 1859, when he conveyed the same, and transferred the possession thereof to one S. P. Millett; that Millett then entered into the possession of the lands so inclosed, used, improved, and cultivated the same, and continued in the actual possession thereof, according to the lines of the original purchase, until 1868, when he conveyed the same to D. P. Smith, who, in February, 1869, conveyed the same to J. P. Spring, who, in March, 1869, conveyed the same to Martin Clark, who, on May 15, 1876, conveyed the same to the applicant, Naphtaly; that the conveyance to Smith was made, according to the information and belief of the applicant, for the benefit of Millett, and the conveyances to Spring and Clark were made for the benefit of the applicant, who entered into the exclusive possession of the lands, according to the lines of the original purchase made by Pujol and Sanjurjo from Inocencio Romero, according to the information and belief of the applicant; that, according to his information and belief, the applicant and his grantors and predecessors in interest have been in the actual and continuous possession of the lands sought to be purchased by him ever since the year 1847, according to the lines of the original purchase; that on July 23, 1866, there was no adverse claim by any person to the lands, or any part thereof; that they are not mineral lands, and have not been reserved to the United States for any purpose. Second. The record of the Romero claim from the office of the surveyor general of the United States for California. Third. The opinion and decree of the board of land commissioners rejecting the claim. Fourth. The opinion and judgment of the United States district court for the district of California, as reported in 1 Hoff. Land Cas. 219, Fed. Cas. No. 12,029, affirming the decision of the commissioners. Fifth. The opinion and judgment of the supreme court of the United States, as reported in 1 Wall. 721, affirming the decision of the district court. Sixth. The opinion and decision of the commissioner of the general land office rejecting the application of Naphtaly to purchase the lands. Seventh. The opinion and decision of Secretary of the Interior Vilas, as reported in 8 Land Dec. Dep. Int. 144, affirming the decision of the commissioner of the general land office. Eighth. The opinion and decision of Acting Secretary of the Interior Chandler, as reported in 12 Land Dec. Dep. Int. 667, ordering a rehearing of the application to purchase. Ninth. The opinion and decision of Secretary of the Interior Noble on the rehearing, as reported in 14 Land Dec. Dep. Int. 536, approving the application, and directing patents for the lands in question to be issued to the applicant. To each and all of the documents so offered in evidence, the plaintiff objected, on the ground that such evidence was immaterial, incompetent, and irrelevant. The action

of the court below in sustaining the objections, and excluding the documents, constitutes the grounds of the appeal.

Assuming that the defendants, being admittedly mere naked trespassers upon the lands in question, are entitled to attack the patents issued to the plaintiff, we proceed to inquire whether any of the documents offered in evidence tend to affect their validity. Beyond question, the patents are absolutely conclusive in respect to all matters of fact properly cognizable by the officers of the land department. The decisions of the supreme court and of other courts to this effect are so numerous as to render their citation no longer necessary. The real ground of the defendants' contention, however, is that inasmuch as it was found and held by the United States tribunals that no grant was ever made by the Mexican government to the Romeros, nor anything in the semblance of a grant, there was absolutely no case presented by the applicant, Naphtaly, to the officers of the land department, for the application of the provisions of the seventh section of the act of congress of July 23, 1866, and that the disposal of the lands in question to the applicant by virtue of those provisions was beyond the power of the secretary of the interior, because unauthorized by law. It is also contended by defendants that one secretary of the interior has no power to grant a rehearing of a case decided by his predecessor, and that the reconsideration of Naphtaly's application to purchase by Mr. Secretary Noble, and its allowance by him, were, therefore, without authority of law, and void. *Noble v. Railroad Co.*, 147 U. S. 165, 13 Sup. Ct. 271, and *U. S. v. Stone*, 2 Wall. 537, are cited in support of this position; but neither of those cases at all supports it. In *Noble v. Railroad Co.*, the company, desiring to avail itself of the act of congress of March 3, 1875 (18 Stat. 482), granting to railroads a right of way through the public lands, took the steps required by the statute to secure that right. When all of those requirements had been observed, the secretary of the interior was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office of the district where such land was located; and thereupon the granting section of the act became operative, and vested in the company the right of way. The court held that, after this was done, it was beyond the power of a succeeding secretary to revoke the action of his predecessor in office, for the title had already passed to the grantee. In *U. S. v. Stone*, the secretary of the interior undertook to revoke a patent that had been signed by the president, and issued. But where, as in this case, no steps had been taken even looking to the conclusion of the proceedings in accordance with the ruling of the secretary of the interior, there can be no doubt of his power or of that of his successor in office, upon a seasonable application, to reconsider any ruling in respect to the proper disposition of the lands.

As said by the supreme court in *New Orleans v. Paine*, 147 U. S. 261, 13 Sup. Ct. 303:

"Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor

as are the interlocutory decrees of a court open to review upon the final hearing."

See, also, *U. S. v. Schurz*, 102 U. S. 378; *Leroy v. Jamison*, 3 Sawy. 389, Fed. Cas. No. 8,271.

The documents offered in evidence bearing date during the Mexican rule are as follows: (1) A petition, signed by the claimants, and dated at Monterey, on the 18th day of January, 1844, wherein they solicit a grant of a certain tract of land described as a "so-brante" of three adjacent ranchos. (2) Connected with the petition is a marginal decree, of the same date, directing the secretary to report upon the subject, "having first taken such steps as he may deem necessary." (3) Certificate of the secretary, also of the same date, that the governor directs the first alcalde of San José to summon the occupants of the adjacent ranchos, and hear their allegations, and make report of his doings. (4) Report of the alcalde, under date 1st of February of the same year, to the effect that the rancheros mentioned and the petitioners had been confronted, and that the former made no objection to the application; but he also reported that it had come to his knowledge that one Francisco Soto, six or seven years before, had claimed the same tract. (5) Ten days after that document was filed, the secretary reported to the governor that it would seem, according to that report, that there was no obstacle to the making of the grant. (6) Subsequently, however, the governor entered a decree directing the judge of the proper district to take measurements of the land in the presence of the adjacent proprietors, and that he "certify the result, so that it may be granted to the petitioners." (7) Second petition of the claimants, under date of the 21st of March, 1844, in which they stated that the judge of San José had never been able to execute the order of survey, on account of the absence or engagements of the adjacent proprietors, and asked that the governor would grant the tract to them provisionally, or in such manner as he should deem fit. (8) The record contains no order of reference of the second petition, but the secretary, two days after its date, made a report to the governor, expressing the opinion that the former order of survey ought first to be carried into effect; and, when the survey should be made, the suggestion was that the prior claimant and the petitioners should be confronted, in order that the governor might be able to "determine what is best." (9) Final decree of the governor is in the words following, to wit: "Let everything be done agreeably to the foregoing report,"—which concludes the record of the Mexican documents offered in evidence.

The supreme court held, in the case of *Romero v. U. S.*, 1 Wall. 740, that those documents afforded no evidence that a grant or concession of any kind was ever issued by the Mexican government to the Romeros, but that, on the contrary, "the documents, as a whole, fully show that up to the date of the last-named decree no such grant had ever been issued. Survey of the tract," continued the court, "was first to be made, and the parties supposed to be opposed in interest were then to be summoned and heard, as pre-

liminary conditions to the hearing of the application. Record furnishes no evidence of a reliable character that either of those conditions was ever fulfilled. Evidence to show that the survey was made is entirely wanting. First-named claimant was summoned as a witness, and he testified that the pretensions of the prior claimants were overruled and abandoned; but the explanations given by him, in view of the documents in the case, are not satisfactory." The court found the parol evidence tending to show the issuance and existence of the claimed grant to be insufficient to overcome the conclusive nature of the documentary evidence, and, accordingly, affirmed the decree of the district court; thus, finally, in December, 1863, rejecting the claim of the Romeros. Prior to this final rejection, however, Inocencio Romero, to wit, on December 26, 1853, according to the facts as alleged before the officers of the land department, and conclusively passed upon by them, sold and conveyed, for value, to Domingo Pujol, and Francisco Sanjurjo, that portion of the lands embraced within the Mexican claim which was within the inclosure mentioned, and which was set apart to him in the partition of 1846 or 1847, and which, according to the allegations there made and passed upon, he had ever since used and cultivated; and, through subsequent mesne conveyances, the same right and interest passed to S. P. Millett, August 8, 1859, who then entered into the possession of the lands in question, used, improved, and cultivated the same, and continued in the actual possession thereof, according to the lines of the original purchase, at the time of and after the passage of the act of congress of July 23, 1866. At that date (July 23, 1866), the lands in question being public lands of the United States, not reserved for any purpose whatever, and to which no adverse claim of any nature existed, and Millett being a grantee, for value, under Inocencio Romero, and having purchased in good faith while the claim to the land under the alleged Mexican grant was being prosecuted before the tribunals authorized by law to settle such claims, and before its rejection, there can be no doubt, we think, that Millett was entitled to purchase the lands under the provisions of the seventh section of the act of July 23, 1866. It was for the very purpose of meeting and obviating the hardships resulting from the rejection, in numerous instances, of claims to lands under supposed or defective Mexican grants, that this act was passed. It was strictly remedial in its nature, and, as such, should receive a broad and liberal construction, to the end that its purposes be accomplished, and not defeated. Indeed, it is not unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order "to include cases within the same mischief." *Dean of York v. Middleburgh*, 2 *Younge & J.* 196. See, also, *Potter's Dwar. St.* p. 231; *U. S. v. Wittberger*, 5 *Wheat.* 76; *American Fur Co. v. U. S.*, 2 *Pet.* 358; *U. S. v. Hodson*, 10 *Wall.* 395; *White v. The Mary Ann*, 6 *Cal.* 462; *Jackson v. Warren*, 32 *Ill.* 321.

But, certainly, as respects Millett, there is no need to extend the natural meaning of the words of the act of 1866 to bring him within the beneficent provisions of its seventh section. The fact

that it was determined by all of the United States tribunals charged with the duty of deciding the question that there never was, in fact, any grant or concession by the Mexican government to the Romeros, and that their claim to lands under the alleged grant was rejected, does not render the act inapplicable to Millett. When he purchased, in good faith and for value, from an intermediate grantee of Inocencio Romero, the claim was being earnestly pressed before the courts of the United States that there was such a grant, and their records show that there was parol evidence of its actual issuance and existence. Besides, the issuance of a grant was not always essential to the confirmation of such a claim. In the case of *U. S. v. Alviso*, 23 How. 318, the supreme court refused to disturb, and affirmed, the decree of the court below confirming a claim to land where no grant was in fact issued by the Mexican authorities, but where, pending the proceedings by those authorities upon the petition for the grant, the petitioner was given permission to occupy the land, then vacant, which he did for 14 years, during which time he was recognized as its owner, and possessed the requisite qualifications, and no suspicion existed unfavorable to the bona fides of his petition or the continuity of his possession and claim, and where there was no adverse claim. Surely, one who purchased, in good faith and for value, the land under such a claim as that of the Romeros, before its final rejection, is as much entitled to the preferred right conferred by the seventh section of the act of July 23, 1866, as is one who makes a similar purchase under a supposed grant afterwards adjudged to be forged or otherwise fraudulent. It was, as has been said, to meet and obviate the hardships growing out of all such and similar cases, that the act in question was passed.

But before the right conferred by the seventh section of the act of July 23, 1866, upon Millett, could be exercised, a survey of the lands and the filing of the plats thereof by the government of the United States were necessary. It appears from the decision of the secretary of the interior (8 Land Dec. Dep. Int. 144) that the township plats of such survey, embracing the lands in question, were filed in the local land office July 30, 1878, for township 1 S., and on October 5, 1878, for township 1 N. These plats were withdrawn October 24, 1878, restored February 24, 1882, suspended March 9, 1882, and the suspension removed April 16, 1883. On August 10, 1883, Naphtaly filed his application to purchase. Had the preferred right of purchase conferred by the seventh section of the act of July 23, 1866, on Millett, remained in him, certainly he could not have exercised it earlier than July 30, 1878, when the first of the township plats was filed in the local land office. Suppose, while that right thus existed in him, without the power to exercise it, because of the failure of the government to survey the land, Millett had died; would not the right have passed to his heirs? Undoubtedly so. It is equally clear, we think, that it was assignable. It is elementary that every right, title, interest, or claim in lands is assignable or descends to heirs, unless such transfer or descent is prohibited by statute. Co. Litt. 46b; Washb. Real

Prop. c. 1, § 20; *Myers v. Croft*, 13 Wall. 291; *Davenport v. Lamb*, Id. 418. The act of July 23, 1866, places no such restriction, limitation, or condition upon the right therein created. The preferred right of purchase thereby given is analogous to the pre-emption laws of April 12, 1814 (3 Stat. 122), and June 19, 1834 (4 Stat. 678), which right the supreme court held, in *Thredgill v. Pintard*, 12 How. 24, was assignable. The only difference between the two is that the preferred right of purchase given by the act of 1866 is based on conditions precedent, while the right of pre-emption given by the acts of 1814 and 1834 was based on conditions subsequent,—a difference wholly unimportant in determining the nature and extent of the right. In *Lamb v. Davenport*, 18 Wall. 307, the supreme court held that, unless forbidden by some positive law, contracts made by actual settlers on the public lands concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title; and, accordingly, that the right of entry conferred by the Oregon donation act of September 27, 1850 (9 Stat. 496), inured to the benefit of grantees under the prior possessory right. Such authoritative recognition of the assignability, in the absence of statutory prohibition, of such possessory rights and right of pre-emption, is, in our judgment, conclusive in favor of the assignability of the preferred right of purchase given by the seventh section of the act of July 23, 1866. This view was adopted by the secretary of the interior in 1873, and has ever since prevailed in the land department. *Wilson v. Railroad Co.*, Copp, Pub. Land Laws, 471; *Owen v. Stevens*, 3 Land Dec. Dep. Int. 401; *Welch v. Molino*, 7 Land Dec. Dep. Int. 210.

It is true, as urged on the part of the defendants, that Naphtaly purchased with notice of the final rejection of the Mexican claim; but it is equally true that he purchased with knowledge of the act of July 23, 1866, and with a knowledge that, under that act, there existed in his grantor a preferred right of purchase, which was assignable, and which he had the legal right to purchase, and which he did purchase in good faith and for value. In respect to all matters of fact, such as the possession, use, and improvement of the lands, the respective purchases, how and for what made, the patent, as has been said, is conclusive; and holding, as we do, that the preferred right of purchase is assignable, it results that the proffered evidence, had it been admitted, could not have affected the validity of the plaintiff's patents.

We are of opinion, further, that the court below did not err in sustaining the objections to the evidence offered by the defendants. Admitting, as they did, that the lands in question were public lands of the United States, subject to sale under its laws, for which the plaintiff brought into court patents of the United States regular in form, those instruments are absolutely conclusive against any collateral attack by mere intruders upon the lands covered by

them, such as the defendants confess themselves to be. *Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Barden v. Railroad Co.*, 154 U. S. 328, 14 Sup. Ct. 1030; *Buena Vista Petroleum Co. v. Tulare Oil & Min. Co.*, 67 Fed. 226; *U. S. v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948. Judgment affirmed.

SMITH v. NAPHTALY et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

No. 262.

PUBLIC LANDS.

Appeal from the Circuit Court of the United States for the Northern District of California.

This was a bill in equity by Joseph Naphtaly and others against Josiah S. Smith to recover certain lands. A demurrer to the bill was sustained by the circuit court, and a decree entered accordingly. Defendant appealed.

H. F. Crane and Philip Teare, for appellant.
A. L. Rhodes, for appellees.

Before GILBERT and ROSS, Circuit Judges, and MORROW, District Judge.

ROSS, Circuit Judge. From the action of the court below in sustaining a demurrer to the bill in this case, the complainant appealed. The merits of the case are covered by the decision in the case of *Beley v. Naphtaly* (just filed) 73 Fed. 120. It is not necessary to do more than to refer to the reasons there given in support of our judgment affirming that of the court below. Judgment affirmed.

DUDLEY v. FRONT STREET CABLE RY. CO. et al.

(Circuit Court, D. Washington, N. D. March 24, 1896.)

NEGLIGENCE—STARTING STREET CAR.

Plaintiff attempted to board a car on defendant's cable railway while it was standing near a street corner, waiting to take on passengers. The car was crowded, and persons were standing on the platform, and one on the step of the car. Just as plaintiff took hold of the railing of the platform and placed his foot on the step, the conductor (who was inside the car, and did not see plaintiff) gave the signal to go ahead. The car started, and, as it went round a curve at high speed, plaintiff's hold on the railing was broken before he had been able to secure a firm footing on the car, and he was thrown off and injured. *Held*, that the conductor was negligent in failing to ascertain that all passengers were on board before starting the car, and that defendant was liable.

At Law. Action by Christopher B. Dudley against the Front Street Cable-Railway Company, a corporation, to recover damages for personal injury caused by negligence. Findings and judgment for plaintiff.

John Arthur and J. Lindley Green, for plaintiff.
E. C. Hughes, for defendant.

HANFORD, District Judge. I find from the evidence in this case that on the night of November 3, 1894, the plaintiff, while attempt-

ing to get on a car operated by the defendant company, lost his footing as the car started forward, and in consequence the tibia of his right leg was fractured near the ankle joint. The defendant's line of railway curves from Front street into Pike, and runs the length of one block in Pike street, and then curves into Second street. The car was fairly loaded before reaching Pike street, and a stop was made a distance of about 30 feet from the beginning of the Second street curve, to take on other passengers. When the car stopped the plaintiff was some distance away, and in front of the car. He hastened to take the car, and, on reaching it, found the front end fully occupied, and then went briskly to the rear platform, which was somewhat crowded, the inside of the car being full,—so much so that a lady who stepped on the platform just ahead of the plaintiff, was obliged to remain standing on the platform, and one other passenger, unable to get on the platform, was standing on the step, holding on by the hand railing. The conductor was inside of the car, and gave a signal to start, and the car did start quickly, just as the plaintiff took hold of the hand rail and placed one foot on the step. In reaching to seize the hand rail on the forward side of the step, his hand struck the other passenger standing on the step, and he was disconcerted by missing his hold. As the car came upon the curve, its velocity was too great for the plaintiff's strength, he having failed to obtain a secure footing, and the injury resulted as above stated.

It was the duty of the conductor, before giving the signal to the gripman, to look around, and to have seen that all passengers to take passage at that place were safely on board; and failure in the performance of this duty cannot be excused by the fact that the conductor did not actually see the plaintiff. The negligence of the conductor in this regard is clearly established by all the evidence in the case, including his own testimony. The plaintiff was diligent in attempting to get on the car while it was stationary. He may have been lacking in dexterity, but that is not such a fault as to preclude him from recovering damages.

The evidence shows that the plaintiff has expended for surgical treatment and medicines \$120, and has suffered loss of wages by being incapacitated for a considerable time from pursuing his avocation as a laborer, besides suffering physical and mental pain. For these expenditures and loss he is entitled to recover reasonable compensation. He claims, in addition, prospective damages, as compensation for future loss by reason of diminished capacity to earn money. To entitle the plaintiff to recover prospective damages, it is necessary for him to prove with reasonable certainty that his injury is permanent. In this case there is a lack of such proof. The plaintiff himself has testified that since his injury he has not been able, by reason of the weakness of his limb, to perform a day's work, and he believes that he will not become sufficiently strong to perform hard labor. He has been discouraged by reason of his injury, and it is but natural for him to entertain such belief, although it appears from other evidence in the case to be erroneous. The most im-

portant and satisfactory evidence on this point is that given by Dr. R. W. Schoenle, the surgeon who treated the fracture and had charge of the case, which is as follows:

"Q. There was nothing unusual about this case, for that kind of a fracture? A. No; except, perhaps, there was a small piece of bone which had splintered off, about the size of my finger, ready to burst through the muscles and tendons, just underneath the skin,—ready to go through. That is the only unusual part of the case. Q. That is not unusual, either,—a splintered fracture? A. No; excepting that, if this fracture was moved at all, it would have been compound, which would have made it far more serious than it was. Q. If it had been moved. But, as it was not, it was a simple fracture? A. Yes; it was a simple fracture. Q. And the result of the treatment of yourself and Dr. Eames was that you obtained a complete reunion of the limb? A. Yes, sir. Q. Of the bone, I mean. And the operation and its results are among the best that you have obtained in those cases, are they not? A. Considering his age, and having a great deal of laceration of the soft parts, we consider the result very good. Q. The cartilaginous growth which you speak of is only a part of the substance that nature throws in to cause the juncture of the bone, and to heal and restore the parts? A. Yes, sir. Q. The additional growth will finally be fully absorbed, so that the bony matter will be like it was originally, practically, in all respects? A. Well, there will always remain a small lump there. Q. A very little enlargement, so that it will be perceptible, but only so? A. Yes, sir. Q. There is no pain there? A. No; not that I could tell. Q. And the smaller size of that leg is due to the fact that it is not used, and has not been used, as much as the other? A. I suppose so. Q. The exercise of the limb will bring back its normal size, will it not? A. Well, probably so."

It is my opinion that the sum of \$1,000 will be a reasonable compensation for the injury as proved. Let there be findings and judgment accordingly.

SULLIVAN v. McCONNELL.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1896.)

No. 395.

ESTOPPEL IN PAYS.

In a suit brought by the S. Company against S. individually, one of the causes of action was that S. had used the time and labor of the clerks employed and paid by the corporation in the transaction of his private business. In support of the allegations of the complaint, one M. made an affidavit that he knew the allegations on this subject were true, because he was one of the employes of the company, and was required by S. to act as his individual bookkeeper and general clerk, "although said company paid affiant's entire salary." After the filing of the bill a compromise was made settling all the matters in controversy, each party releasing all claims against the other. M. took part in these negotiations as a representative of the company, insisting on the truth of the allegations as to the use of the clerks, etc., without intimating to S. that he claimed compensation from him individually for the services rendered. *Held*, that M. was estopped from thereafter maintaining a suit against S. for such compensation.

In Error to the Circuit Court of the United States for the Northern District of Florida.

This was an action of assumpsit by R. F. McConnell against Martin H. Sullivan to recover money claimed as compensation for services rendered. In the circuit court verdict and judgment were given for plaintiff, and defendant brought error.

J. J. Sullivan, Geo. P. Raney, John A. Henderson, and John Eagen, for plaintiff in error.

W. A. Blount, A. C. Blount, Jr., and J. C. Avery, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge

BOARMAN, District Judge. This is an action in assumpsit begun September 24, 1894, by McConnell against Sullivan. The claim asserted by the plaintiff, McConnell, as stated in his declaration, is that, on September 1, 1894, Sullivan was indebted to McConnell in the sum of \$3,700, for work and labor as bookkeeper, accountant, correspondent, and secretary from February 1, 1890, to March 1, 1893, at \$100 per month, \$3,700. The judgment of the lower court was for plaintiff for \$3,700 with interest. There were three pleas presented by defendant to plaintiff's declaration: (1) The general issue; (2) the statute of limitations; (3) the plea of estoppel, which is as follows:

"That said plaintiff is estopped, and ought not to be permitted, to maintain his said action against this defendant, for the reason that said plaintiff was the secretary and bookkeeper of the Sullivan Timber Company, a corporation organized under the laws of Florida, at the time and for a long period prior to the date of filing of a bill in equity, in this honorable court, by said Sullivan Timber Company, against M. H. Sullivan, defendant herein, on the 22d day of May, 1893, claiming divers sums of money upon various grounds; and among items alleged and claimed, in said bill of Sullivan Timber Company, of M. H. Sullivan, the defendant, is the sum of \$9,151, for salary of clerks and employes, etc., as set out in paragraph 15 of said bill, and alleging that said employes and clerks were occupied in the private business of said M. H. Sullivan, in writing letters, telegrams, etc., while they were paid by the Sullivan Timber Company; and defendant alleges that plaintiff was one of the employes of the Sullivan Timber Company claimed to have been occupied in the business of defendant, and during the same period of time claimed by plaintiff in this suit, and that the plaintiff in this suit furnished the data for said charge in said bill in equity, and made affidavit that same was correct. That afterwards, to wit, on the 7th day of June, 1894, by agreement in writing, all suits pending and matters in controversy between said Sullivan Timber Company and M. H. Sullivan, including suit in equity in this court, in which said item for clerk hire, etc., was claimed, were settled and adjusted, and by the express terms of said agreement each party mutually released the other from all claims of any kind then existing or that should thereafter arise from the organization or operation of said Sullivan Timber Company. And defendant alleges that R. F. McConnell, as secretary of said Sullivan Timber Company, participated in the negotiations leading to said settlement, and signed said agreement in writing aforesaid, as secretary of said Sullivan Timber Company; and defendant alleges that plaintiff's claim in this suit is one growing out of the business relations between said Sullivan Timber Company and defendant, and that same was covered by paragraph 15 of said bill in equity in this court, and settled and adjusted as aforesaid, and that said plaintiff, by reason of the premises, is estopped from asserting a claim in his own right in this suit against this defendant, and this the defendant is ready to verify.

"Wherefore he prays judgment if the plaintiff ought to be admitted against his aforesaid dealings and actions to maintain this his suit against this defendant."

Six assignments of error are presented by plaintiff in error, defendant below. The first, second, third, and sixth relate to matters

which, under the view we take of the case, we do not think it necessary to discuss. The fourth and fifth relate to the defense of estoppel, set up in the third plea.

"(4) The court erred in refusing to give, at the request of the defendant, the following instructions to the jury: 'If the jury believe, from the evidence, that the plaintiff was cognizant of the settlement shown by the evidence to have been made between the Sullivan Timber Company and the defendant, M. H. Sullivan, and that the plaintiff in this suit stood by and permitted such settlement to be made, and did not make or assert any claim against the defendant for compensation for services sued for in this action, you will find for the defendant.'

"(5) The court erred in refusing to give, at the request of defendant, the following instruction to the jury: 'If you believe, from the evidence, that the plaintiff made an affidavit, pending litigation between Sullivan Timber Company and M. H. Sullivan, that said Sullivan Timber Company paid his entire salary, although he did the work claimed in this suit while in the employ of said timber company, you will find for the defendant.'"

These two assignments direct the attention of the court to the only issue presented by the pleadings and record which we will consider. The fifteenth paragraph, referred to in the plea of estoppel as appearing in the bill in equity of Sullivan Timber Company against M. H. Sullivan, is shown in the transcript (Exhibit A) to be as follows:

"(15) The complainant further shows unto your honors that, in the conducting of his private business, it became necessary to said Martin H. Sullivan to have, in and about his office, clerks and employes, and to send and receive telegrams, and to write and receive letters in and about his private business and family affairs, but from November, 1886, to November, 1892, the said Martin H. Sullivan, fraudulently colluding and conspiring with the said W. A. S. Wheeler to defraud complainant, did require and cause to be employed, in the name of, and to be paid by, complainant, clerks and employes to do his (said Sullivan's) private business, and did charge the salary of said clerks to, and caused the same to be paid by, complainant; and the said M. H. Sullivan, further colluding and conspiring with the said W. A. S. Wheeler to defraud complainant, did cause the expenses of the said Sullivan's telegrams and cablegrams and stationery and stamps, and all other office expenses of his, to be paid out of the funds of complainant; and the said salary of the said clerks and employes, and the said office expenses so paid out of the funds of complainant by the said W. A. S. Wheeler, together with interest to February 28, 1893, aggregates the sum of ninety-one hundred and fifty-one dollars (\$9,151.00)."

As is shown on the defendant's second exception, relating to the refusal of the judge to charge as requested,—assignments 4 and 5,—evidence was introduced showing that McConnell made an affidavit supporting the allegations of the bill of complaint filed by the Sullivan Timber Company against M. H. Sullivan, and that, in said affidavit, he said that he had read the said bill, and that the allegations contained in paragraph 15 of said bill were true; that he knew them to be true, because he (the deponent) "was one of the employes of the Sullivan Timber Company, and was required by said M. H. Sullivan to act as his (said Sullivan's) bookkeeper and general clerk, although said company paid affiant's entire salary; and that said Sullivan contributed nothing to the payment thereof." Further evidence was offered showing that, after the said bill had been filed, with the said affidavit of McConnell attached thereto, a compromise was made, adjusting and settling all of the controver-

sies between the parties to the said bill in equity, including matters involved in said paragraph 15; that, during the negotiations and settlements made in pursuance of said compromise, said McConnell was actively acting as one of the representatives of the said Sullivan Timber Company; and that D. S. Troy and J. J. Sullivan were, on the other hand, representatives of the said M. H. Sullivan in discussing, making, and agreeing to the said compromise. The evidence relating to the same exception shows, further, that said McConnell stated and represented to the said D. S. Troy and J. J. Sullivan that he knew the statements in paragraph 15, above set out, were true, because he (McConnell) had rendered most of the services therein described. And there was also testimony, given by said McConnell, in which he claimed to have said to the representatives of the Sullivan Timber Company that any settlement that might be made was not to cover or include the services rendered by him to M. H. Sullivan, individually, and he testified, further, that he had never notified or intimated to "said M. H. Sullivan, or his agents or representatives," that such settlement was not to cover the same, because he never had any conversation with them on the subject. McConnell also denied that he ever made such statements to D. C. Troy or J. J. Sullivan above mentioned. He also testified that there were clerks, employes of the Sullivan Timber Company, who performed services for M. H. Sullivan set forth in paragraph 15, and that "he did not consider himself a clerk or employe," and that said paragraph was not intended to cover his services.

It will be seen that the averments in paragraph 15 allege, substantially, that M. H. Sullivan, individually, had for a period of years been using and appropriating to himself the services of the clerks and employes of the timber company, all of which services belonged to and were the property of the Sullivan Timber Company, and, because M. H. Sullivan had so used and appropriated their services to his individual use, he owed and should pay said Sullivan Timber Company \$9,151 for the said use of the company's said servants, clerks, and employes. At the time of the filing of the suit, and at the time said compromise was made of all the controversies therein, McConnell had never made any demand on M. H. Sullivan for payment for whatever services he might have rendered to Sullivan, and such a demand was never made until a short while before McConnell's suit was filed. It will be seen, from the testimony recited in aid of the third exception, that McConnell states that, at the time he made the said affidavit, he declared that he did not intend, for the matters set out in paragraph 15, to cover the claim which he personally had against M. H. Sullivan, individually, for the services which he had rendered him. He also said that he did not consider himself an employe or clerk of the timber company, and denies that he ever notified or intimated to M. H. Sullivan, or his agents or representatives, that the said paragraph was not to cover his claim against him (Sullivan) individually.

Counsel for defendant in error, in support of the refusal of the judge to charge matters assigned in paragraphs 4 and 5, contends

that the testimony relating to matters shown in said paragraph 15, and to the affidavit of McConnell made in verification of said paragraph, and to the conversation had with Troy and Sullivan, show material issues of fact, which would have been taken from the jury by the court if the judge had charged as requested in paragraphs 4 and 5. Recitals in the bill of exception No. 3 show paragraph 15 and the affidavit attached thereto, and also show testimony, on the part of McConnell, which, under one view of the case, would support the contention of defendant in error's counsel, that, as there is an issue of fact involved, the jury should have had that issue of fact given to them. But, under the view we take of the appellant's plea of estoppel, even though such conflicting statements are shown in the recitals in the said bill of exception, we think that the circuit court erroneously refused to give the instructions embodied in the fourth and fifth assignments. We are led to this view because we think the legal import of paragraph 15 and McConnell's affidavit supporting its allegation was to give notice to M. H. Sullivan that the services rendered to him, individually, by McConnell, were covered expressly or by legal implication in the charges against Sullivan and in the allegations disclosed in the said fifteenth paragraph.

Plaintiff in error's plea of estoppel is founded on the notice, whatever its extent may be, in law, that said paragraph and affidavit imported to Sullivan. Considering the extent of the legal effect of such notice, it seems that McConnell should be estopped from claiming anything from Sullivan for the services which he says he rendered to Sullivan. The purpose of the plea of plaintiff in error's view is to forbid McConnell from charging for any services rendered to Sullivan which are legally covered by or in the charges and allegations of paragraph 15. The said paragraph clearly conveys the idea that the timber company, having become aware of the fact that Sullivan had been appropriating to his own use the property of said company, to wit, the labor of its servants, clerks, or employes, it (the said company) intended to hold, and did therein hold, and charge him with liability to the extent of \$9,151 for his (Sullivan's) appropriation and use of the labor of such said servants, etc. Considering the averments in said paragraph, in connection with the legal import of McConnell's said affidavit, together with the knowledge which Sullivan himself had of the fact that McConnell, while serving him as his secretary, etc., was all the time an employé of said company, and one to whom the said company was paying his entire salary, we think the notice conveyed in said paragraph, enlarged and illustrated, as such notice was, by the facts within knowledge of both McConnell and Sullivan, was broad enough, in its legal effect, to give Sullivan to understand and believe that the company, in making its claim for \$9,151, intended to include, and did include, therein, all of its right, whatever it might in law be, to charge him (Sullivan) for or because he may have, at times, used the labor of the company's servant, McConnell, or of any other of its servants. The correctness of the charge set out in paragraph 15, so far as it shows that certain employes of the timber company worked for Sullivan as his clerks, etc.,

seems to have been known only to McConnell and Sullivan. The legal import of the claim in said paragraph shows that the timber company was suing Sullivan for \$9,151, because he had appropriated and used certain labor of its servants, McConnell and others. Sullivan knew that he had, at times, used his (McConnell's) services, and he knew, too, whether he had, at any time, used or appropriated to himself the labor of any other servant of the company. He was advised by the affidavit that he (McConnell) said that the charge in paragraph 15 included his (McConnell's) services, as one of the servants for whose services he was there being charged by the timber company.

The conflicting evidence, whatever issues of fact it may present, does not show that McConnell, at any time anterior to the institution of said suit, or to the said compromise settlement thereof, ever said anything to any one, except, it may be, to the representatives of the timber company, that said paragraph 15 did not cover his claims, nor that said compromise would not cover the same. In such evidence it appears that McConnell denies that he told Sullivan's lawyers anything about the statements in said paragraph being true, etc., but no one claims that McConnell ever talked with Sullivan or his agents or his representatives about the claim prior to the institution of the said suit or the compromise settlement thereof. In the absence of such knowledge as would have been imparted to Sullivan had McConnell ever set up any claim against him, it is clear that Sullivan, in making the said compromise, was entitled to consider, and be governed therein by, the legal effect and import of said paragraph 15, illustrated, as it was, by McConnell's affidavit. Whatever may have been the said conversation between the Sullivan Timber Company and McConnell, it is clear that McConnell was, as to Sullivan himself, silent, when it was his duty to speak. If paragraph 15 and the said affidavit, according to McConnell's own understanding, did not include or cover his claim against Sullivan, it was clearly his duty, under the circumstances, to speak out what was in his mind to Sullivan. Failing to do this, he was guilty of a concealment, which, in law, amounts, under the circumstances,—among which circumstances may be noted the said affidavit, McConnell's failure at any time prior to the said compromise to demand or in any way claim pay for the services for which he now sues, and his presence as the active representative of the timber company pending the settlement of the claim in paragraph 15,—to intentional negligence of a breach of duty. See 2 Herm. Estop., cited under *Pickard v. Sears*, 6 Adol. & E. 469; *Timon v. Whitehead*, 58 Tex. 290, cases cited.

Under the views we have stated herein, Sullivan was justified, in acting on the legal effect of paragraph 15 and of said affidavit, in believing that the compromise covered and settled whatever claims the timber company or any one else might have had, under the legal import of the allegations in paragraph 15, considered in connection with said affidavit. But it is not necessary, in aid of our purpose to sustain plaintiff in error's defense on the plea of estoppel, to rest

our reasons therefor on the fact that McConnell's conversations with the representatives of the Sullivan Timber Company or with any one else did not charge Sullivan with notice of the claim that McConnell had, for two or three years, in mental reservation, against Sullivan; for we think that said paragraph, together with McConnell's affidavit in verification and explanation thereof, and all the circumstances attending the making of said compromise, should have the effect, in law, of estopping him from prosecuting successfully a claim of which he, subsequently to the making of said compromise settlement, for the first time, gave Sullivan notice.

There was error in the circuit court in refusing to give the special instructions recited in paragraphs 4 and 5. The judgment is reversed, and the cause remanded, with instructions to set aside the verdict and grant a new trial.

SNYDER v. FOSTER.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1896.)

No. 416.

NATIONAL BANKS—LIABILITY OF STOCKHOLDERS—TRANSFER OF SHARES.

One S. subscribed for 50 shares of the stock of a national bank, borrowing the money to pay for them from C., the cashier of the bank. As collateral security for the money so borrowed, he indorsed over the certificate to C., and left it with him. A few months later he sold the stock to C. for the amount of the loan and accrued interest, the certificate remaining in C.'s hands. The bank was solvent at the time, and so continued for five years, during which C. collected the dividends on the stock, as shown by the bank's dividend book, but the stock was never actually transferred to C. on the books of the bank. The by-laws of the bank provided that dividends should be paid to the stockholders in whose names the stock should stand; that certificates should be issued by the president and cashier; and that, when stock was transferred, the certificate should be canceled, and a new one issued. Long after the sale of S.'s stock to C., the bank became insolvent, an assessment was made upon the stockholders, and the receiver of the bank, finding S.'s name as a stockholder on the books of the bank, brought suit against him. On the trial of the suit the foregoing facts were shown. C. was dead at the time of the trial. *Held*, that it might be inferred as a fact, from the evidence, that the bank had notice of the transfer of the stock by S. to C., and the termination of S.'s relation to the bank as stockholder, from which fact the legal presumption would follow that the bank would cause such acts to be done in relation to the transfer as its officers were called on to do, and that the jury should be permitted to draw such inference.

In Error to the District Court of the United States for the Western District of Texas.

Robert G. West, for plaintiff in error.

Benj. F. Fowler, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

BOARMAN, District Judge. Joel W. Foster, receiver of the Cheyenne National Bank of Wyoming, brought suit in the district

court for the Western district of Texas against J. W. Snyder, to recover \$5,000, with interest thereon. Said sums were alleged to be due said bank by defendant as the holder of 50 shares of stock in said insolvent bank by virtue of the law and an order made thereunder by the United States comptroller of the currency, levying an assessment of \$100 per share upon the shareholders of the said bank as provided by sections 5139 and 5151 of the Revised Statutes of the United States, which said sections are as follows:

Rev. St. U. S. § 5139: "The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable, on the books of the association, in such manner as may be prescribed in the by-laws, or articles of the association. Every person becoming a shareholder, by such transfer, shall in proportion to his shares succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired."

Rev. St. U. S. § 5151: "The shareholders of every national banking association shall be held individually responsible equally and ratably, and not for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested therein. * * *" (Remainder of the article omitted as it has no bearing on the questions raised by the assignments.)

In addition to said sections of law we quote the following sections of the said bank's by-laws:

"Sec. 17. The stock of the bank shall be assignable and transferable only on the books of the bank, subject to the restrictions and provisions of the banking laws, and a transfer book shall be provided, in which all assignments and transfers of stock shall be made.

"Sec. 18. The transfer of stock shall not be suspended preparatory to the declaration of dividends, and, unless an agreement to the contrary shall be expressed in the assignment, dividends shall be paid equally to the stockholders in whose name the stock shall stand at the date of the declaration of dividends.

"Sec. 19. Certificates of stock assigned by the president and cashier may be issued to a shareholder, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank, in person, or by attorney; and when the stock is transferred the certificate thereof shall be returned to the bank, and canceled, and new certificate issued."

The evidence shows the order of the United States comptroller directing the said assessment, etc., on the shares of all stockholders of the bank; that Snyder's name appears in the bank's book showing the names of the stockholders. Aside from the bank's books, and the sections of the laws, etc., quoted supra, the only oral testimony offered was by Snyder for himself, it being admitted that the cashier, Collins, and the president of the bank, are dead. Plaintiff in error's testimony shows substantially as follows: That Snyder, in order to obtain money to pay for the 50 shares subscribed to the bank, borrowed \$5,000 on November 19, 1885, from Collins, then the cashier of the said bank; that Snyder sold his said share of stock to Collins individually, on July 6, 1886, for \$5,378.33; that he had collected no dividends thereon; that at the time Snyder became the owner of said shares he indorsed the certificate over to Collins, and left it with him as collateral security for the \$5,000 which he borrowed from Collins; that when Snyder sold his shares of stock to Collins he and Collins were both in the bank's office, and Collins at the time was the cashier as well as a director of the bank; that Snyder's

stock certificate, having been indorsed over to Collins when he borrowed said money from him, remained and was in his hands at the time of Snyder's sale of said stock to Collins; that Snyder moved away from Cheyenne into Texas some time in 1886; that the dividend book No. 1 of the bank shows that Collins, after his said purchase from Snyder, collected two or more dividends for himself on the said 50 shares of stock; that Snyder's said stock certificate is lost; that the bank was solvent at the time of the sale by Snyder to Collins, and remained so five years thereafter; that Snyder never knew that the stock had not been transferred to the bank's books until some time in 1895, when the said assessment now sued on was made against him. It was admitted that the Cheyenne National Bank was a banking corporation under the laws of the United States, and doing business in Cheyenne, state of Wyoming, and the defendant, J. W. Snyder, was a citizen of Texas, at the time this suit was filed. Joel Ware Foster, the plaintiff in this case, was regularly appointed on December 5, 1895, by the comptroller of the currency as receiver of the National Bank of Cheyenne, Wyo., and duly qualified as such. In a book styled "Stock Ledger of the Cheyenne National Bank" the name of John W. Snyder is to be found on page 105, and he is credited with having, on November 19, 1885, 50 shares of the capital stock transferred to him by John W. Collins, the certificate being No. 20.

On this trial, all the evidence having been submitted to the jury, the court directed a verdict for the plaintiff. In aid of his bills of exception, the plaintiff in error has attached thereto all of said evidence. The assignments of error—such of them as we have not included in our ruling herein adversely—are as to the refusal of the court to give certain instructions to the jury. Such refused requests for charges are set out in the following assignments:

Eighth assignment of error: "Said district court erred in not giving the following special charge asked by this plaintiff in error: 'That because the defendant's name may appear as a stockholder in the bank on the stock book, or transfer book of stock, does not make him absolutely liable in this case, because there are circumstances which, if existing, and you believe from the evidence that they do exist, would excuse him from liability. So I charge you that if you believe from all the evidence before you that J. W. Snyder, the defendant, owned the stock in controversy, and before the failure of the bank, in good faith, honestly, and for value, did sell to J. W. Collins said stock, and did, in connection therewith, execute to said J. W. Collins an assignment of said stock in words as set forth on the back of the certificates of stock in use by said bank, a copy of which has been read in evidence before you, and that he, in connection with said assignment, did what he could, and what a reasonably cautious and prudent business man would, do, or would have done, under all the circumstances of the case in evidence, to have said sale (if made) entered on the book of transfer, to relieve himself from all future liability, because of the once ownership of said stock, then defendant would not be liable in this case, and you will find a verdict for defendant.'"

Ninth assignment of error: "Said district court erred in not giving the following charge, asked by plaintiff in error: 'If the jury believe from all the facts and circumstances in evidence that defendant, J. W. Snyder, was the owner of certificate of stock No. 20 for 50 shares of stock for \$100 each in the Cheyenne National Bank, and that on the 6th day of July, 1886, he, in good faith, bona fide, for value, sold said stock to W. J. Collins, and that he, defendant Snyder, did all that a reasonably prudent man would do or would have done, under all the facts and circumstances before you, to have said sale re-

corded or carried into the stock transfer book, then he would not be and is not liable in this case, and you will find a verdict for defendant.' "

Tenth assignment of error: "Said district court erred in refusing to give the following instructions, asked by the plaintiff in error: 'If the jury believe from all the evidence in this case that the defendant, J. W. Snyder, did all that a reasonably cautious and prudent man would do to have the transfer or certificate of stock No. 20 in the Cheyenne National Bank from him to J. W. Collins (if he made a sale thereof) to have the transfer thereof noted and perpetuated on the book of stock transfer, then you will find a verdict for defendant.' "

The defendant in error contends that the facts shown in the record bring the case under the rule laid down in *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, from which we quote as follows:

"As to the 50 shares of stock sold by Comstock to Holmes, September 23, 1873, we think the conclusion cannot be resisted that the transaction was made in contemplation of the insolvency of the bank, and, although both parties may have believed that the bank would ultimately be able to pay all of its debts notwithstanding this transaction, we think that, as against creditors, it was fraudulent in law, and to that extent Comstock is chargeable as a shareholder. The sale of 50 shares in February, 1873, and of the other 50 shares in June, 1873, there is no reason to suppose were not made in entire good faith, and without any expectation on the part of the parties of the insolvency of the bank. Notwithstanding that, Comstock continued to be, upon the books of the bank, the owner of these shares until September 23d and September 24th, when they were respectively transferred. By section 5139 of the Revised Statutes those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities, and succeeding to such rights, except by such transfer. Until such transfer, the prior holder is the stockholder for all purposes of the law. It follows, therefore, that Charles Comstock, in respect to the shares sold by him in February and June, 1873, was the statutory owner on the 23d day of September, 1873. His liability as such stockholder is the same as if he had that day sold and transferred the stock to Ira Holmes; but such a sale and transfer could only have been made that day by Comstock, who was himself a director, in contemplation and actual knowledge of the suspension of the bank. It would operate as a fraud on the creditors,—an effect which the law will not permit. The case is not within the rule laid down in *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61. Here there is no proof, as there was in that case, of the delivery of the certificates to the bank, and the power of attorney authorizing its transfer, with a request to do so, made at the time of the transaction. The delivery was to Holmes, not as president, but as vendee. We are therefore constrained to hold that the decree below, in charging Comstock with liability as the owner of 150 shares, was not erroneous."

The plaintiff in error urges us to apply the rule of law announced in *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61:

"But it will be found, upon careful examination, that in no one of the cases upon which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates thereof to the bank itself, accompanied (where such surrender was not made by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register. The position of the seller in such a case is analogous to that of a grantor of a deed deposited in the proper office to be recorded. The general rule is that the deed is considered as recorded from the time of such deposit. 2 Washb. Real Prop. bk. 3, c. 4, par. 52. Where the seller delivers the stock certificate and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer, the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can do to effect a trans-

fer on the stock register. In the case before us, the personal presence of the defendants at the bank was not required, in order to secure their release from liability as shareholders. Besides, the certificates of stock authorized them to act by attorney. Through their agents, the brokers who sold the stock, and through whom they received the money paid for it, they surrendered the certificates and power of attorney to the president of the bank; he receiving them with knowledge not only that defendants had parted with all title to the stock, and had been paid for it, but also that it had been purchased at public auction by Eager. He knew equally well that the surrender of the certificates and the delivery of the power of attorney and the certificate from the probate court could only have been for the purpose of having it appear, by means of a transfer on the books of the bank, that Whitney's executors were no longer shareholders. The right to have the transfer made, and thereby secure exemption from further responsibility, was secured to the defendants, both by the statute and by the by-laws of the bank. They did all that was required by either as preliminary to such transfer. Nothing remained to be done except for some officer of the bank to make the necessary formal entries on its books. If, when the agents of defendants delivered the certificates and power of attorney to the president of the bank, the latter had given an intimation of a purpose not to make the transfer promptly, or had avowed an intention to postpone action until a sufficient amount of stock was obtained to fill Coburn's order, it may be that the failure of the defendants to take legal steps to compel a transfer would, in favor of the creditors of the bank, have been deemed a waiver of the right to an immediate transfer on the stock register. But no such intimation was given; no such avowal was made. No objection was made to the power of attorney, or to the discharge of the defendants from liability. So far as the record shows, nothing was said or done by the bank's officers to raise a doubt in the minds of the defendant's agents that the transfer would not be made at once. It was suggested in argument that the defendants should have seen that the transfer was made. But we are not told precisely what ought to have been done to this end that was not done by them and their agents. Had anything occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been wanting in due diligence had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. Their conduct was, under all the circumstances, that of careful, prudent business men, and it would be a harsh interpretation of their acts to hold (in the language of some of the cases, when considering the general question under a different state of facts) that they allowed or permitted the name of Whitney to remain on the stock register as a shareholder. We are of opinion that, within a reasonable construction of that statute, and for all the objects intended to be accomplished by the provision imposing liability upon shareholders for the debts of national banks, the responsibility of the defendants must be held to have ceased upon the surrender of the certificates to the bank, and the delivery to its president of a power of attorney sufficient to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser."

There seems to be no conflict in the legal principles announced in the two said cases. They are distinguishable only in their facts. It was conceded by counsel in argument that one or the other of these rules should be determinative of the facts in the pending case. We are not advised as to the line of reasoning upon which the learned judge below directed a verdict for the defendant in error, though it appears that he applied the rule of law in *Richmond v. Irons*, rather than the rule laid down in *Whitney v. Butler*, to the facts in the pending suit. The fact which shows Snyder's name, with his stock not transferred, on the bank books, appears to have been a sufficient foundation, in the view of the receiver, for bringing suit in this case, as well as it did in the two suits cited; but neither of the

authorities which we have cited, nor any which we have examined, have favored the theory that a defendant stockholder could be subjected to an absolute liability merely because his name, with his stock untransferred, was found by the receiver of an insolvent bank, as appears to have been, in this case, in the bank's stock list. In many cases, if not all of them, the courts have been liberal in hearing evidence dehors the bank's books—as they, under well-established rules of evidence, should be, where liability is sought to be imposed against a defendant by a plaintiff's own books—to show such a condition of things as might in law relieve the sometimes unfortunate defendant whose name may so appear. The transcript shows but little direct evidence in relation to the transaction which took place in the bank's office, in which Snyder sold his stock to Collins. If it was the purpose of the court below to limit the jury's consideration in this case only to the direct evidence relating to said transaction, it may be that the court below, seeing no issues of fact disputed in the direct evidence, thought it unnecessary to submit such evidence to the jury. But were there not deductions therefrom, by way of presumptions of fact, which the jury might have reasonably made from the narrow field of direct evidence relating to that transaction for or against either of the parties to this suit?

First. The direct evidence shows: That Snyder, November 19, 1885, borrowed \$5,000 from Collins with which he paid for the 50 shares held by him in said bank. That, having indorsed over his certificate for said shares to Collins, he left the same, so indorsed, with Collins, as security for the loan. That July 6, 1886, in order to pay Collins the said borrowed money, Snyder sold his said shares to Collins for the same sum, with interest added. The evidence shows the said sale was made to Collins, individually, in the bank's office, where Collins was the cashier, and one of the directors; that no fraud is even intimated against Snyder, and all of his relations as a stockholder and director in the bank ceased with said transaction; that his bank book shows an entry of said sum, made therein on the day of the said sale.

Second. The direct evidence shows that while the by-laws provide that the stock of the bank shall be assignable only on the bank's books, etc., they also declare that dividends shall be paid to the stockholders in whose names the stock was standing at the time the dividends were declared; and section 19 of the by-laws makes it the duty of the cashier to issue certificates to the stockholders, which shall be transferable only on the books, etc., and when the stock is transferred the certificate thereof shall be returned to the bank, canceled, and new certificates issued. The evidence shows no fraud on Snyder's part. On the contrary, it shows good faith in him at every step of his in all of his transactions with Collins and the bank. It shows that the bank, in 1886, when Collins bought Snyder's stock, was solvent, and remained so for nearly five years thereafter; that Snyder ceased to be a director when Collins bought his said stock, and all the dividends shown ever to have been declared on Snyder's said shares were collected by Collins, for himself, under the said by-laws; and that Snyder, having moved into Texas, had no knowledge

of the bank, or any of its transactions, for five years or more, after the said sale to Collins. We think from the state of facts which are shown in the direct evidence, supplemented, as it may be, by deductions fairly drawn therefrom, the law will impute notice to the bank, and charge it with such knowledge of such transactions as its executive officer, Cashier Collins, and one of its directors, Collins, possessed, by reason of said sale and transfer of the said shares, made to him as an individual; and that such a state of case will give rise to and be attended by a legal presumption in favor of Snyder that the bank, through its official, would do, or cause to be done, such acts in relation to the transfer of said shares, as its executive officer was required to do in the premises. It was Cashier Collins' duty, in the bank's interest, as well as in his own individual interest, he having become, in good faith, the vendee of the stock, and the certificate therefor having been left with him, either in his official or individual hands, at the time of the said sale to him, to make or cause to be made such a transfer thereof as should have been made on the bank's books. The legal presumption that the bank, at the time of the said sale from Snyder to Collins, had notice and knowledge thereof, from time to time, during the said several years, is strengthened by the further fact that Collins collected for himself two or more of the dividends declared by said bank on said 50 shares. The presumption of law just stated, it may be contended,—and we are disposed to accede to the contention,—would not apply in this case if its history should show that Collins, at the time the said transfer was made to him individually, had an interest in himself, as an individual, at all hostile to the interest of the bank. *Wade*, Notice, § 662; *Bank v. McNeil*, 10 Bush, 54; *Bank v. Cushman*, 121 Mass. 490; *Bank v. Irons*, 8 Fed. 1, and cases cited in note. There is no intimation in the evidence that Collins had any such interest, and such an adverse interest in himself would not, under the evidence, be presumed. On the contrary, reasons suggest themselves why his interest, in order to make his said stock merchantable, etc., must have been in having the stock transferred to himself on the books when he bought it, in an honest transaction, from Snyder. Certainly, in the absence of such a transfer on the bank's books, he could not, under the by-laws of the bank, have been allowed to collect for himself all the dividends shown in the bank's books to have been declared on said shares of stock. We think, under a further line of direct evidence, which consists in a statement taken from the bank's books, to the effect that Collins, continuing to be cashier, collected for himself all the dividends which the books show were ever declared or paid by the bank to any one on said shares, the law will impute notice and knowledge to the bank of the fact that Snyder had ceased to be a stockholder in said bank long before it became insolvent, even though the bank's books now show that he, on November 19, 1885, subscribed for said 50 shares of stock in said bank. We think, too, that the law, under such a state of facts, will presume against the bank and its beneficiaries, in this suit, that Snyder ceased to be a stockholder therein when the bank, presumably with the knowledge disclosed in its own books, paid such said dividends

from time to time to Collins for himself. So if, as a matter of fact, the name of Snyder appears still on the bank's books as a stockholder, the same books may be said to show, as a matter of law, just as conclusive, that he was not a stockholder therein when Collins, under the by-laws, collected said dividends. Either the presumption of law just stated would follow upon the direct evidence, and deductions fairly to be made therefrom, or the law would have to presume fraud gratuitously against Collins. The law on its own motion, in the pending case, should not indulge such a presumption.

At the moment when the sale by Snyder to Collins was made it appears that the said certificate was already indorsed over to Collins, presumably in keeping with the form of the certificates of the bank for such indorsements. It is true, the certificate, at the time of the sale, was in his hands as an individual, but it was also in his hands as the bank's cashier, whose official duty it was, under such a state of case, to make the transfer, or cause it to be made, upon the books of the bank. If Snyder's said several transactions, including the sale of the stock, had been had with the porter of the bank, instead of with Collins, who was the cashier, and all of the said several transactions had taken place in the bank's office, obviously the law would not have imputed notice to the bank, through the porter, of the transaction. But suppose, in a given case, A. had sold his shares of stock in a bank to B., and the sale had taken place in the bank's office, in the presence of the cashier, who at the time, to the knowledge of both A. and B., had in his hands and kept A.'s certificate, indorsed as it was over to B.; then add to that supposition the further facts that at the time of the said transaction the bank was solvent, and remained so for five years thereafter, and that the cashier is dead, and the bank, five years after said sale to B., became insolvent, and the name of A. is found in the books by the receiver thereof remaining as a stockholder of the bank's books,—would such a state of case not fairly be controlled by the rule in the *Whitney v. Butler* case? The receiver herein is vested only with the rights of the bank against Snyder. The law, in his interest, will not impose an absolute liability in Snyder merely because he may have been such a stockholder at one time, or because the receiver, as in this case, found his name remaining in the list of stockholders in the bank's books. If Snyder is liable at all in this suit, it is because at the time he was sued herein he should, under the facts and law applicable thereto, be held, in the interest of the insolvent bank's beneficiaries, as a shareholder in the said national banking association. An analysis of the facts in the pending case shows that Snyder in good faith became the owner of said shares in said bank, and that in such faith he certainly intended to cease his relations thereto as such stockholder; that Collins intended by his purchase of said stock to become the holder and owner of Snyder's said shares; that at the time of said sale to said Collins individually the said certificate No. 20, presumably being properly indorsed for transfer to Collins, was in and remained in the hands of the bank's cashier, with the consent and in the knowledge of the seller, purchaser, and the bank's

cashier. In law the stock ceased to belong to Snyder, and it became the property of Collins. If Snyder, after that sale, had, at a later day, sued the bank to make it pay to him the sums collected by Collins as dividends on said shares, could the bank not have successfully defended itself on the ground that Snyder, so far as the bank was concerned, had sold and transferred the said stock to Collins, who, as the owner and holder of the stock, had rightfully collected said dividends? What else could or should have been done by a prudent, careful, business man, under the state of facts in the pending case, to complete the honest efforts made by Snyder to cease to be, in fact, as well as in law, a shareholder in the said bank? In some respects the facts in this case are stronger for Snyder than for the executors of Whitney in the Whitney-Butler Case. That decision did not turn on the form of authority to make the transfer. It seems to have been the purpose of the court in that case to ground the opinion largely, if not entirely, on the broad doctrine that a shareholder in good faith, who has done all that a prudent business man should do, will not be held responsible for the neglect and carelessness of an officer of the bank. "It is of the utmost importance that the liability of stockholders of national banks should be rigorously enforced, but, on the other hand, the court should not treat them with exceptional severity, and apply to their transfers different rules from those which obtain in other business transactions." *Hayes v. Shoemaker*, 39 Fed. 319; *Young v. McKay*, 50 Fed. 394, and cases cited therein.

We think the transcript shows issues of fact which ought to have been submitted to the jury, and there was error in the court below in directing a verdict for the defendant in error; therefore the judgment of the district court is reversed, and a new trial granted.

PROVIDENT SAVINGS LIFE ASSUR. SOC. v. NIXON.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1896.)

No. 233.

LIFE INSURANCE — FORFEITURE FOR NONPAYMENT OF PREMIUMS — PROOF OF NOTICE.

The New York statute provides that no policy shall be forfeited for nonpayment of a premium when it is due, unless at least 30 days prior thereto a notice of the date when the premium falls due "shall be duly addressed and mailed to the person whose life is insured * * * at his or her last known post-office address, postage paid by the company, or by an agent of such company," etc. 3 Rev. St. (8th Ed.) 1686. To show compliance with this statute, a clerk of an insurance company, testifying by deposition, was asked whether he had "mailed" such a notice, and answered, "Yes," but then proceeded to state what he had done, saying, among other things, that he personally deposited the notice in the general post office, without stating, however, that he had prepaid the postage. *Held* that, even if the word "mailed," when standing alone, is to be considered as implying prepayment of postage, the proof was insufficient, and the deposition was properly excluded.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This is an action by Cora E. Nixon, defendant in error, on two policies of insurance issued by plaintiff in error to the husband of defendant in error, and of which she was the beneficiary. They were respectively for \$5,000 and \$15,000, and the premiums on the former were payable quarterly on the 12th days of March, June, September, and December. That which fell due on the 12th of September, 1890, was not paid when due, nor has it ever been paid. The premiums on the \$15,000 policy were payable annually on the 11th day of October, and that which fell due October, 1890, was not paid. The husband of defendant in error died on the 16th of April, 1891. The defense is a forfeiture for nonpayment of premiums. This defense depends upon the provisions of the New York statute, and the acts of the plaintiff in error under it. The statute (Laws 1877, c. 321) is as follows:

"The people of the state of New York, represented in senate and assembly, do enact as follows:

"Section 1. Section one of chapter three hundred and forty-one of the laws of eighteen hundred and seventy-six, entitled 'An act regulating the forfeiture of life insurance policies,' is hereby amended so as to read as follows:

"Sec. 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, any thing therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for. [3 Rev. St. (8th Ed.) 1685, 1686.]

"Sec. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured in the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given." 3 Rev. St. (8th Ed.) 1687.

To prove the sending of notice under these statutes, the plaintiff in error tendered certain evidence which was excluded by the court below, and this ruling is assigned as error. There are other assignments of error, but they are dependent upon this ruling.

The bill of exceptions shows that one William E. Stevens, whose
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deposition was taken in New York, testified on behalf of defendant as follows:

That his age was 51. That he was New York secretary of the Provident Savings Life Assurance Society of New York, and had been such since 1870. "Q. 3. What officer or employé had charge of the mailing of notices to the policy holders of said society in the months of August and September, 1890, of the amount of quarterly payments or other premiums falling due upon its policies? A. 3. In August, 1890, Harry H. Meeder, a clerk in the employ of the society. In September, 1890, E. Seward Prosser, another clerk of the society. Q. 4. What officer of the Provident Savings Life Assurance Society has, since the 12th day of June, 1886, had charge of the records of the premiums falling due upon policies issued by said society, and the payment thereof? A. 4. I have, and since the date named have had such charge, but the actual work upon these records is done by clerks under my supervision."

After stating when premiums were due, and what premiums had been paid, and that that of September, 1894, had not been, he was asked:

"Q. 11. Were notices of premiums falling due upon said policy sent to Thomas L. Nixon by the secretary? If so, attach to your answer hereto true copies of the notices so sent of premiums falling due June 12, 1890, and September 12, 1890, and give the dates when the same were mailed, if sent by mail. A. 11. Yes, and true copies of the notices referred to are hereto attached, and marked Exhibits D and E. They were mailed, respectively, on May 9, 1890, and August 4, 1890.

"Whereupon counsel for the said plaintiff then and there objected to the answer last above given, on the ground that it had already been shown by the deposition that the said William E. Stevens was not the party who mailed the said notices, and consequently was incompetent to testify. Whereupon his honor, the said judge, sustained the objection, upon the ground that the answer did not state facts within the personal knowledge of the deponent. Whereupon counsel for the defendant excepted to the ruling of his honor, the said judge, and the said exception was by his honor, the said judge, allowed."

And again, after stating that only one premium was paid on policy No. 32,025 (that for \$15,000), he was asked:

"Q. 15. Were the notices of premiums falling due upon said policy No. 32,025 sent to Thomas L. Nixon by the society? If so, attach to your answer hereto a true copy of each notice so sent, and give the date when the same was mailed, if sent by mail. A. 15. Yes. The notice was mailed September 9, 1890. Copies of two forms of notices are attached hereto, and marked Exhibits F and F2. I cannot say positively which form was used.

"Whereupon counsel for the plaintiff then and there objected to the answer last above given, on the ground that it had already been shown by the deposition that the said William E. Stevens was not the party who mailed the said notices, and consequently was incompetent to testify. Whereupon his honor, the said judge, sustained the objection upon the ground that the answer did not state facts within the personal knowledge of the deponent. Whereupon counsel for the defendant excepted to the ruling of the said judge, and said exception was by his honor, the said judge, allowed."

Henry H. Meeder testified he was a clerk of plaintiff in error, and that it was his duty to mail to policy holders notices of payment of premiums about to become due upon their policies from July 28, 1890, to August 8, 1890.

"Q. 4. Did you at any time mail to Thomas L. Nixon, of Tacoma, Washington, notice of the premium falling due on September 12, 1890, upon his policy No. 18,647? If so, attach to your answer hereto a true copy of such notice, including the address thereon, and state when and where you mailed the same. A. 4. Yes. I attach an exact copy of that notice hereto, marked Exhibit 1. I personally deposited in the general post office of New York City, on the 4th day of August, 1890, the original notice of which this is a copy, addressed to Thomas L. Nixon, Tacoma, Washington; that being his last known post-office address. The mailing of such notice was at that time a part of my duty as clerk.

"And thereupon the said defendant further, to prove and maintain the said cause on its part, offered in evidence the copy of the notice of premium falling due September 12, 1890, to which reference was made in the answer of the

said Henry H. Meeder to the fourth interrogatory above set forth, which said copy of said notice is in the words and figures following, to wit:

“Office of the

“Provident Savings Life Assurance Society of N. Y.

“Home Office, No. 120 Broadway.

“New York, Aug. 4th, 1890.

“Take notice that a premium of \$15.85 required to renew Policy No. 18,647 in this society will, if such policy be in force on that day, but not otherwise, become due and payable to the secretary of the society at its office, No. 120 Broadway, in the city of New York, on the 12th day of September, 1890, and if not paid on or before said date the policy and all payments made thereon will become forfeited and void; but this notice is not intended to vitiate any right to paid-up or extended insurance provided for in the policy contract. All premiums are due at the office of the society in the city of New York, but for the convenience of policy holders, payments may be made on or before due dates to an authorized agent having in his possession the society's receipt therefor, signed by the president or secretary. Should you change your post-office address, please notify the secretary of the society in writing.

“Wm. E. Stevens, Secretary.

“N. B.—Agents are forbidden to receive overdue premiums, except within thirty days of the due dates, and then only upon receipt of a certificate of good health. (Form 248.)”

“Whereupon, counsel for said plaintiff then and there objected to the introduction of the said copy of the said notice, on the ground that it was incompetent, irrelevant, and immaterial; that there was nothing in the deposition to show that any postage was prepaid on the said notice; that it was not the evidence that the statute expressly states shall be the evidence of the mailing of the notice; and for the further reason that it did not affirmatively appear that the notice was mailed to the last known post-office address of the said Thomas L. Nixon as it appeared on the books of the company. Whereupon, his honor, the said judge, sustained the objection.”

E. Seward Prosser, a witness whose deposition was taken on behalf of plaintiff in error, testified that he was an insurance clerk in the employ of plaintiff in error; that it was a part of his duty to mail to policy holders notices of payments of premiums about to become due on policies from October 30, 1889, to October 26, 1892, except when absent on vacation or sickness. In answer to a question identical to that put to Meeder, he answered:

“A. 4. Yes. On the 9th day of September, 1890, I deposited in the general post office in New York City a notice addressed to Thomas L. Nixon, Tacoma, Washington. Said notice stated that a premium of \$258.00, required to renew policy No. 32,025, would become due and payable to the secretary of the society at its office, No. 120 Broadway, in the city of New York, on the 11th day of October, 1890, and that, if said premium was not paid on or before said date, said policy would thereupon become forfeited and void. A slight change was made at about this time in the blank form used in these notices, and I cannot swear which was used, but, according to my best knowledge and belief, the form used was one of the two forms hereto annexed, and marked Exhibits 1 and 2, respectively.”

The part of the answer descriptive of the notice was struck out on motion of defendant in error, and to meet the ruling of the court two forms of notices used were introduced in evidence.

Walker & Fitch, for plaintiff in error.

Stanton Warburton, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The statute is explicit as to when and where and how notice shall be sent to the assured that a premium is due. The provision and language is that it "shall be duly addressed and mailed to the person whose life is assured * * * at his or her last known post-office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium." 3 Rev. St. (8th Ed.) 1686. It is contended by plaintiff that his proof shows a compliance with the statute. It does not explicitly, but it is claimed as an inference from the word "mailed"; and that this word implies prepayment of postage is said to be supported by the following cases: *Pier v. Heinrichshoffen*, 67 Mo. 163; *Bussard v. Levering*, 6 Wheat. 102; *Lindenberger v. Beall*, 6 Wheat. 104; *Sanderson's Adm'r v. Reinstadler*, 31 Mo. 483; *Renshaw v. Triplett*, 23 Mo. 213, at page 220; *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382; *Schutz v. Jordan*, 141 U. S. 213, 11 Sup. Ct. 906; *Bank v. De Groot*, 43 N. Y. Super. Ct. 341. But two of these are in point. The others only hold that notice, in the instances mentioned by them, could be given by mail. The fact or necessity of prepayment of postage was not raised. Both appear to have been taken for granted. Indeed, in one case (*Rosenthal v. Walker*) it appeared that postage was prepaid. Page 196, 111 U. S., and page 382, 4 Sup. Ct. In *Pier v. Heinrichshoffen* a notary public made affidavit that he "mailed" certain notices of protest. The testimony was objected to on the ground that he did not state that the postage on said notice was prepaid. The lower court sustained the objection, and excluded the evidence. The appellate court reversed the ruling. The language of the appellate court is as follows:

"Objections are also made to the notice which was given by the notary. The certificates of protest are as follows: 'Due notices of the foregoing presentment, demand, refusal, and protest were put in the post-office at St. Paul, as aforesaid, and directed as follows: Notice for Katharina Amb's, directed St. Louis, Mo.; notice for W. and R. Heinrichshoffen, directed St. Louis, Mo.' And the notary testified, 'I personally mailed such notice in the post office on the 15th day of July, A. D. 1861.' The objection is that he did not say that he had prepaid the postage, and the court instructed the jury that this was necessary. This objection is rather hypercritical. The word 'mailed,' as applied to a letter, means that the letter was properly prepared for transmission by the servants of the postal department, and that it was put in the custody of the officer charged with the duty of forwarding the mail. Indeed, the words, 'put into the post office,' as used by the notary, have a technical significance which is well defined, and they are commonly employed to designate the duty of the holder in giving notice. Since the enactment of the laws requiring all mail matter to be prepaid, these words have been used by this court in the sense of 'mailed.' * * * It sufficiently appears in the present case that the notice was properly directed. The evident and only meaning of the notary's certificate is that the notice was mailed to the defendants at St. Louis, Mo. The judgment will be reversed, and the cause remanded."

In *Bank v. De Groot*, 43 N. Y. Super. Ct. 341, the same question was presented on the same state of facts as existed in the case of *Pier v. Heinrichshoffen*. The language of the court is as follows:

"In corroboration and explanation of the memoranda of the notary it was proved at the trial, and without objection, that the notices of protest were put in envelopes, and directed to the defendant at his place of business, No. 142 Fulton street, New York City, and delivered, thus inclosed and directed, by the notary, whose custom it was to mail such notices in the general post office

of the city of New York. At the trial the defendant did not testify that he failed to receive the notices of protest of the notes. The defendant objected that there was no evidence that the notices were sealed up, and postage prepaid, and when and where they were put in the post office. The statute (3 Rev. St. [5th Ed.] p. 71, § 29) does not require the notices to be sealed up, and the memoranda of the notary in his official register sufficiently designate when and where they were mailed. A question was raised on the argument as to the meaning of the term 'mailed.' The word is usually employed to designate the placing of letters or parcels in a post office, to be delivered under the public authority. The delivery of this class of mail matter is prohibited unless the postage thereon is prepaid. Rev. St. U. S. §§ 3896, 3900. When the word 'mailed' appears as a note or memorandum in the official register of a deceased notary, it is consistent with reason and the actual meaning of the term to presume that it describes what that act in its common and ordinary performance calls for, and more especially is this the case when there is other proof corroborating and explaining entries."

We should be disposed to follow these decisions if the witnesses of plaintiff in error had testified that they had mailed the notices, without adding explanations; certainly to the extent of holding that the testimony should have been submitted to the jury. It is true that William E. Stevens, secretary of the company, testifies that the notices were mailed; but this was hearsay, and properly excluded. The other two witnesses, Meeder and Prosser, testify, as to the point involved, very much alike; and while each, in reply to the question if he had mailed the notices, answered "Yes," each enumerated what he did, and did not include in the enumeration payment of postage. To allow the testimony to be proof of the requirements of the statute would be to relax it too much, and afford opportunity for its evasion. See *Haskins v. Benefit Soc.*, 7 Ky. Law Rep. 371.

The judgment of the circuit court is therefore affirmed.

UNITED STATES v. WINSTON.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1896.)

No. 227.

1. DISTRICT ATTORNEYS—COMPENSATION—MILEAGE.

Mileage is not to be included, as part of the compensation allowed to a United States district attorney, in determining whether such compensation has reached the maximum allowed by statute for his services.

2. SAME—SERVICES OUT OF DISTRICT.

The provisions of the statutes relating to the duties and the compensation of district attorneys are confined to services rendered within their districts, and for services rendered outside such districts, at the request of the attorney general, they are entitled to additional compensation, not limited to the rates fixed by the statutes. Ross, Circuit Judge, dissenting.

3. SAME—CASES TO WHICH UNITED STATES NOT A PARTY.

Fees cannot be allowed to a district attorney, under Rev. St. § 299, for services rendered within his district, in a case to which the United States is not a party, upon the basis of the compensation allowed to special counsel retained by the attorney general, but must be assimilated to some of the fees specifically allowed to district attorneys by Id. § 824.

In Error to the Circuit Court of the United States for the District of Washington.

The defendant in error, plaintiff in the court below, sued the United States on nine causes of action, at the time of the accruing of which he was district attorney of the United States for the district of Washington. The causes of action may be summarized as follows: (1) For services as attorney for the defendants upon the trial, in the circuit court, district of Washington, at the July term, 1890, held at Tacoma, of the case of the Catholic Bishop of Nesqually against Gen. John Gibbon et al., involving the title to the land occupied as a garrison and military post at Vancouver, in this state, \$2,500, in addition to \$2,500 paid to him for said services. (2) For services as attorney for the United States upon the hearing, in the United States circuit court of appeals for the Ninth circuit, at San Francisco, in April, 1892, of the case of the United States against the steam tug Pilot, on appeal from the district court of this district, \$287.21, in addition to \$212.79 paid to him for said services. (3) For services as attorney for the defendant upon the hearing, on appeal, in the said United States circuit court of appeals, in April, 1892, of the case of Duns-muir against Bradshaw, as collector of customs for the collection district of Puget Sound, which was an action to recover a sum of money which had been exacted by said collector as a penalty under a statute of the United States, \$500. (4) For services as attorney for the United States upon the hearing, in said United States circuit court of appeals, in April, 1892, of the case of the United States against Gee Lee, appealed from the United States district court for this district, \$250. (5) For services as attorney for the defendants, in the superior court of the state of Washington for King county, and in this court at a term held at Seattle, in March, April, May, and June, 1893, in two cases against Edwin Bells, as United States Indian agent, and certain officers of the United States army, involving questions as to the right of the government to prevent the building of a railroad across lands which had been allotted and patented to certain Indians pursuant to a treaty made by the United States with the Puyallup tribe (see *Ross v. Eells*, 56 Fed. 855), \$1,500. (6) For actual and necessary traveling expenses in going from his place of abode to the several places at which terms of the United States courts are held in this district, and returning from examinations, before United States commissioners, of persons accused of violation of laws of the United States, between January 1 and May 30, 1893, a balance of \$1,379.84. There was an allegation, in the statement of each cause of action, that the value of the services rendered by the plaintiff was not fixed by the statutes of the United States, and was reasonably worth the sums charged, respectively.

The answer of the United States denied these allegations, but admitted the rendering of the services. As a further defense, the United States alleged as follows: "That, during all the time mentioned in said complaint, the personal compensation of the United States attorney, consisting of fees, per diem, and all other emoluments by law pertaining to said office, including an annual salary, was limited by the statutes of the United States, of which the said plaintiff had full notice and knowledge, to the sum of six thousand dollars per annum, as full compensation and reward for all the services which said plaintiff rendered, or should or might have been required to render, to the United States, or to any officer or agent of the United States, in all cases in which the United States was a party or interested, or in which the said plaintiff should be directed, by the president, the attorney general, or the solicitor of the treasury of the United States, to appear, prosecute, defend, advise, or render any other service whatever, excepting only such services as he might be required to render in suits and proceedings arising under the revenue laws, and for services rendered by direction of the secretary or solicitor of the treasury, on behalf of any officer of the revenue, in any suit against any such officer for any act done by him, or for the recovery of any money received by such officer, and paid into the treasury of the United States, in the performance of the official duty of such officer. (3) That, in suits and proceedings arising under the revenue laws, which should be conducted by said plaintiff, and in which the United States should be a party, the said plaintiff would be entitled to be paid 4 per centum upon all moneys collected or realized in any such suit or proceeding. (4) That, in all cases in which said plaintiff should appear, by direction of the secretary or solicitor of the treasury, on behalf of any officer of the revenue, in any suit against such officer, for any act done by him, or for the

recovery of any money received by him, and paid into the treasury of the United States, in the performance of the official duty of such officer, said plaintiff should receive such compensation as should be certified to be proper by the court in which such suit was brought, and approved by the secretary of the treasury. That, in addition to the amounts in this defense above stated, the said plaintiff was entitled to receive, from the earnings of his office, the necessary expenses of his office, including necessary clerk hire, all to be audited and allowed by the proper accounting officers of the treasury department of the United States." The answer also alleges full payment of said items of charge, and "that none of the suits and proceedings mentioned in the complaint herein were suits or proceedings against any officer of the revenue, for any act done by him as such officer; or for the recovery of any money received by such officer, and paid into the treasury, in the performance of the official duty of such officer, except the case mentioned in the third paragraph of the third cause of action of said complaint, and that as to said suit, the compensation claimed by plaintiff was not certified to be proper by the court in which said suit was brought, and was not approved by the secretary of the treasury. That none of the sums of money claimed by plaintiff in said complaint are for services rendered by him in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States was a party, and in which any moneys had been collected or realized. Wherefore defendants say that the said plaintiff is not entitled to have and recover from them any sum of money whatever, and, having fully answered herein, pray to be hence discharged, and to recover their reasonable costs and disbursements herein expended."

There was an amended complaint filed, containing three other causes of action for balances due for fees and emoluments fixed by statute, for the years 1890, 1891, and 1892, respectively, in the amounts of \$799.71, \$810, and \$490.83. The allegation of the complaint was the same in all the causes of action, except as to the amounts due. Selecting from the first cause of action, they were as follows: "(1) That he is a resident of the city of Spokane, county of Spokane, state of Washington. (2) That, from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant, in and for the district of Washington. (3) That, during his said term of office, to wit, between February 18, 1890, and December 31, 1890, he became entitled to receive from the defendant the sum of six thousand six hundred and nineteen and $\frac{23}{100}$ dollars, as compensation, for fees, salary, disbursements for clerk hire, office expenses, and attendance upon the courts of the United States, and upon commissioner's courts, and for traveling from his place of abode to the place of holding said courts or said examinations; that, of said sum, defendant has paid plaintiff the sum of five thousand eight hundred and nineteen and $\frac{52}{100}$ dollars, leaving a balance due and unpaid plaintiff of seven hundred and ninety-nine and $\frac{71}{100}$ dollars. (4) That thereafter, and before the bringing of this suit, plaintiff demanded payment of the same from defendant, but that defendant has not paid the same, and refuses to pay the same."

The answer of the United States to this amended complaint admitted paragraph 1 of each of the causes of action, but denied all other allegations, except that it had paid plaintiff the amounts stated to have been paid.

The circuit court made findings of fact from the testimony, which may be condensed as follows: That plaintiff was district attorney for the district of Washington from the 19th of February, 1890, to the 30th of May, 1893, and was a resident of the city of Spokane, state of Washington. That he performed the services stated in the first cause of action, and that they were reasonably worth the sum of \$5,000, of which the plaintiff was paid \$2,500, the amount fixed by the attorney general as special compensation, the law providing no specific compensation. That he performed the services stated in the second cause of action, and that they were reasonably worth the sum of \$400, which was allowed by the attorney general, the law providing no specific compensation. That defendant paid plaintiff \$212.79, retaining the balance of \$187.21, claiming that this was in excess of the personal compensation and emoluments plaintiff was entitled to receive for the year in which the services

were rendered. That the services were performed as alleged in the third cause of action, and that the value of the services was not fixed by law, and they were worth \$250, and were fixed by the attorney general at that sum. That it has not been paid, but has been retained on the claim that it is in excess of earnings above the maximum allowed by law for 1892, the year the services were performed. That, for said years, defendant charged plaintiff, as part of his maximum of personal compensation, the compensation allowed by law for travel, on a mileage basis, and that such compensation was in excess of said sum of \$187.21, and said sum of \$250. That plaintiff performed the services as alleged in the third cause of action; that their value was not fixed by law, were worth the sum of \$500, and were fixed at \$310 by the attorney general, and that said sum has not been paid, and will not increase his compensation, for the year, above the legal maximum. That the services alleged in the fourth cause of action were performed as alleged. That they were begun while plaintiff was district attorney, and finished afterwards, and compensation was respectively fixed for them by the attorney general at \$400 and \$600. That congress, since the beginning of the action, has appropriated the said sum of \$600 to pay plaintiff, and he has received the same, but the \$400 has not been paid. That "plaintiff is lawfully entitled to receive and retain the following maximum personal compensation in the way of fees and emoluments for the year 1893, to wit: Fees, \$2,465.75; mileage, \$1,629.60; commissions on proceeds of forfeited opium, \$11.60; clerk hire, printing, and other incidental expenses, approved by the attorney general, \$776.60,—aggregating the sum of \$4,883.55. He has been paid, including the sum of \$600 appropriated for his services in *Ross v. Bells* (Puyallup Indian case), \$3,842.35. There is a balance due him for said year 1893, of \$1,041.20, composed of the sum of \$400, due for special services, before his removal from office, in the *Ross-Bells* case, and of \$641.20, which was withheld by defendant as being in excess of his maximum personal compensation. There was charged against plaintiff, as part of his maximum personal compensation for said year 1893, as mileage, \$1,629.60, which amount is in excess of the amount of \$1,041.20 above referred to. That, during plaintiff's term of office, to wit, February 19, 1890, and December 31, 1890, there was withheld from him, as excess of his maximum personal compensation, the sum of \$566.38, and during the year 1891 there was withheld from him, as excess of his personal compensation, the sum of \$750. In each of said years there was charged against plaintiff, and included in his emolument accounts, as part of his maximum personal compensation, an amount of mileage in excess of said sums, without which there would have been no surplus of earnings above the maximum."

As conclusion of law, the court found and gave judgment for the following sums: \$187.21, balance due on second cause of action; \$250, due on third cause of action; \$400, on fourth cause of action; \$566.38, for fees earned in the year 1890; \$750, for fees in 1891; \$641.20, for fees in 1891,—the same being, respectively, fixed by law, and being withheld as being in excess of maximum.

In 33 assignments the United States assign these findings and rulings as error. The case is presented on the judgment roll alone.

H. S. Foote, U. S. Atty.

J. C. McKinstry, for defendant in error.

Before McKENNA, GILBERT, and ROSS, Circuit Judges.

McKENNA, Circuit Judge (after stating the case as above). We must accept as correct and legal the finding of the court as to the amount of fees and mileage earned by the plaintiff, and the fact that it was by including the mileage the United States made the amounts sued for by the defendant in error to be in excess of the maximum compensation allowed by law. That this could be legally done seems to be the basis of the answer of the United States. In the case of *Smith v. U. S.*, 26 Ct. Cl. 568, the contrary was held, and this decision

has been affirmed by the supreme court of the United States. 158 U. S. 346, 15 Sup. Ct. 846. The latter court, speaking by Mr. Justice Brewer, said:

"While an allowance for travel fees or mileage is, by section 823, Rev. St., included in the fee bill, we think it was not intended as compensation to a district attorney for services performed, but rather as a disbursement for expenses, or presumed to be incurred in traveling from his residence to the place of holding court, or to the office of the judge or commissioner."

It follows from this and from the effect necessary to be given to the finding of the circuit court, that there was no error in allowing the fees earned in the years 1890, 1891, and 1893, to wit, the items of \$566.38, \$750, and \$641.20. This leaves for consideration only the fees allowed in special cases, to wit, *The Pilot* against United States, *Dunsmuir* against Bradshaw, *United States* against *Gee Lee*, and *Ross* against *Eells*.

The services in the first three cases were performed at the request of the attorney general, in this court, and the compensation for them fixed by him. Part of the sum allowed in *The Pilot* against United States was paid, and the balance was retained because it was in excess of the maximum of personal compensation allowed by law. The same reason was given for the non-payment of the fee in *United States* against *Gee Lee*. Why the fees in the other two cases were retained does not appear. However, it is now broadly contended that the fees were illegal, that the services for which they are claimed the plaintiff was compelled to render at the request or direction of the attorney general, and that there is no authority of law for paying him any fee in excess of the fees allowed by law under section 824, Rev. St., and the statutes giving the district of Washington double fees. It is further urged that the findings show the fees allowed are in excess of any fees that could have been allowed by sections 824 and 299 of the Revised Statutes. This contention depends upon the answer to the question whether the provisions of the statute relating to district attorneys are to be confined to services rendered within their districts, or are to be construed as governing services rendered elsewhere, making these as much official as the others. Section 767 of the Revised Statutes provides that:

"There shall be appointed in each district, except in the Middle district of Alabama and the Northern district of Georgia and the Western district of South Carolina, a person learned in the law to act as attorney of the United States in such district. * * *"

By this section the sphere of his duty is his district. He is attorney for the United States within that, and section 771, which defines his duties, repeats the limitation. It is as follows:

"Sec. 771. It shall be the duty of every district attorney to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the secretary of the treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them, or for the recovery of any money exacted by or paid to such officers, and by them paid into the treasury."

Sections 823 and 824 only provided the fees and compensation, stating and enumerating the instances of service, and fixing a fee for each of them. It is not necessary to quote these sections at length, as, manifestly, they are only incidental to our inquiries. It may be observed, however, that the mileage allowed by section 824 is confined to traveling to United States courts in this district. Besides these sections, section 299 must be considered. It is as follows:

"Sec. 299. All accounts of the United States district attorneys for services rendered in cases instituted in the courts of the United States, or of any state, when the United States is interested, but is not a party of record, or in cases instituted against the officers of the United States, or their deputies, or duly appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties, shall be audited and allowed as in other cases, assimilating the fees, as near as may be, to those provided by law for similar services in cases in which the United States is a party."

Special stress is put upon this section by counsel for the United States as fixing the compensation for services rendered by a district attorney outside of his district. But the section is silent as to the locality of the service. Besides, it is but a direction to the officers of the treasury of the manner of auditing an account of certain official services, and, while it gives a measure of their compensation, it does no more. It certainly does not enlarge the powers of a district attorney, or his official scope. It would have strange and confusing consequences if it did. Under it, any district attorney could claim or be compelled to take authority in every district in the country besides the one to which he was appointed. It seems to us, therefore, that all these provisions apply to services of a district attorney rendered within his district, and for services outside of it they prescribe no rule.

The United States also claims that the plaintiff is precluded from recovering, to the extent awarded by the circuit court, by section 3 of the act of June 20, 1874 (18 Stat. 109), which provides that:

"No civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the treasury or property of the United States, beyond his salary or compensation allowed by law: Provided, that this shall not be construed to prevent the employment and payment by the department of justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees."

This statute, like the sections of the Revised Statutes already considered, must be confined to "compensation or perquisites" claimed officially. The words "compensation or perquisites" import this. The provision was, no doubt, intended to give exactness, and confine the remuneration of officers to the fees and compensation expressly allowed by the various and appropriate statutes.

The services in the cases of Ross against Eells were rendered within plaintiff's district. The cases were commenced in a state court, and removed to the federal court. The best view which can be taken of the services is that they are governed by section 299, Rev. St. Even if this be so, defendant in error urges that, notwithstanding, the compensation claimed must be allowed, because (1) the record is silent as to whether the attorney general and the

accounting officers assimilated the fees under section 824, and that these officers must be favored with the presumption that they knew the law and properly performed their official duty; (2) that the only services similar to those for which Winston (defendant in error) seeks a recovery are rendered by attorneys especially retained on behalf of the government in particular cases, and that for such services the attorney general is authorized to fix the amount of compensation, and that in this manner, at least, the fees of defendant in error were correctly assimilated by virtue of section 299. We do not think either position is well taken. We think the record is very clear that the compensation allowed by the attorney general, to wit, \$400, was not allowed in assimilation of any fee provided for by section 824, or that the test of cases under section 299 is what would be allowed to private counsel employed by the attorney general. It follows, therefore, it was error to allow this item, and the judgment must be modified accordingly, and it is so ordered. In all else, it is affirmed.

ROSS, Circuit Judge. I dissent. The items of \$566.38, \$750, and \$641.20, allowed the plaintiff by the court below, and for which he was given judgment, were for fees legally earned by him in the years 1890, 1891, and 1893, respectively, and duly allowed by the accounting officers, but withheld by the treasury department upon the ground that they were all in excess of \$6,000 per annum, the maximum compensation allowed by law to district attorneys. To make up that maximum, however, the officers of the treasury included mileage fees allowed to the plaintiff, exceeding in amount the aggregate of the three items above stated. In *U. S. v. Smith*, 158 U. S. 346, 15 Sup. Ct. 846, it was held that mileage fees constitute no part of the compensation allowed district attorneys for services, from which it necessarily results that the plaintiff was properly awarded, by the court below, judgment for the sums, respectively, of \$566.38, \$750, and \$641.20.

But the amounts awarded the plaintiff in the court below in the cases entitled *The Pilot against United States*, *Dunsmuir against Bradshaw*, *United States against Gee Lee*, and *Ross against Eells*, have no such basis to rest upon. In the first three of these cases, the services for which the plaintiff was allowed compensation were rendered outside of his district, and in this court of appeals at the city of San Francisco. The services were rendered by the direction of the attorney general, which officer fixed the compensation to be allowed the plaintiff for his services in the case of *The Pilot against United States* at the sum of \$400, in the case of *Dunsmuir against Bradshaw* at \$310, and in the case of *United States against Gee Lee* at \$250. In *Ross v. Eells* the plaintiff's services were rendered within the district of Washington, of which district the plaintiff was United States attorney from the 19th day of February, 1890, to May 30, 1893. In March, 1893, two suits were brought in the state court of Washington by one Frank Ross and certain Indians against Edwin Eells and other officers of the United States, in which suits the plaintiff, at the request of the United

States, appeared, and caused them to be removed into the United States court for the district of Washington. Part of the plaintiff's services in those suits were rendered while he held the position of attorney for the government, and a part after his term of office had expired. For the services rendered by him while in office, the attorney general made an allowance to the plaintiff of \$400, which has not been paid, and for services rendered by him after his term of office expired, the attorney general made an allowance of \$600, for which congress subsequently made an appropriation, and which the plaintiff has received.

The questions, therefore, remaining for decision, are whether the plaintiff is entitled to the judgment he recovered in the court below for the respective sums allowed him by the attorney general for his services rendered while in office in his own district in the cases of Ross against Eells and in this court of appeals, in San Francisco, in the cases entitled, respectively, *The Pilot against United States*, *Dunsmuir against Bradshaw*, and *United States against Gee Lee*. And they depend for solution upon the provisions of the statute; for it is clear that, unless there is statutory authority for the claims of the plaintiff, the court is without power to give judgment against the United States therefor. "Fees allowed to public officers," said the court, in *U. S. v. Shields*, 153 U. S. 88, 91, 14 Sup. Ct. 735, "are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officials."

Turning, now, to the provisions of the statute in respect to the compensation allowed district attorneys, we find it provided, by sections 823 and 824 of the Revised Statutes, as follows:

"Sec. 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, to district attorneys, * * * except in cases otherwise expressly provided by law. * * *

"Sec. 824. * * * For examination by a district attorney before a judge or commissioner of persons charged with crime, \$5.00 a day for the time necessarily employed. For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, and for his attendance when the court is held elsewhere, \$5.00 for each day of the term. For traveling from the place of his abode to the place of holding any court of the United States, in his district, or to the place of any examination before a judge or commissioner of a person charged with crime, ten cents a mile for going, and ten cents a mile for returning. When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to attorney's fees herein provided, a counsel fee in proportion to the importance and difficulty of the cause, not exceeding \$30.00."

Sections 825, 826, and 827 of the Revised Statutes, relating, as they do, to fees allowed the district attorney in revenue cases and in suits on official bonds, have no application to the present case, and need not, therefore, be referred to. By section 771 of the Revised Statutes it is provided that:

"It shall be the duty of every district attorney to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the secretary of the treasury, to appear

in behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue, for any act done by them, or for the recovery of any money exacted by or paid to such officers, and by them paid into the treasury."

By the section last mentioned it is made the duty of a district attorney, among other things, to prosecute, in his district, "all civil actions in which the United States are concerned." This requirement is confined to his district, and his compensation, provided for by sections 823 and 824, *supra*, is for services rendered within his own district. None of these provisions of law relate to services rendered by district attorneys outside of their districts. By section 3 of the act passed by congress June 20, 1874 (18 Stat. 109), it is provided that:

"No civil officer of the government shall hereafter receive any compensation or perquisites directly or indirectly from the treasury or property of the United States beyond his salary or compensation allowed by law: Provided, that this shall not be construed to prevent the employment and payment by the department of justice of district attorneys, as now allowed by law, for the performance of services not covered by their salaries or fees."

This proviso, the supreme court held, in *U. S. v. Smith*, *supra*, "authorizes the department of justice to employ and pay district attorneys 'as now allowed by law' for the performance of services not covered by their salaries or fees," but that it cannot be presumed "that congress intended thereby to throw the door open to district attorneys to charge what they deemed to be, or what proved to be, a reasonable sum for the performance of such services, as the proviso especially limits them to the cases in which they had heretofore been allowed to be employed and paid by the department, for services not covered by their salaries or fees." The proviso, the court proceeded to say, "was probably designed to be read in connection with Rev. St. § 299, providing that 'all accounts of the United States district attorneys for services rendered in cases instituted in the courts of the United States, * * * where the United States is interested, but is not a party of record, * * * shall be audited and allowed as in other cases, assimilating the fees, as near as may be, to those provided by law for similar services in cases in which the United States is a party.'"

It is perfectly clear, from the findings of the court below, that the amounts allowed by the attorney general to the plaintiff, upon which the court below proceeded in giving him judgment for services rendered in his capacity of district attorney in his district in the cases entitled *Ross against Eells*, and in this court in the cases entitled, respectively, *The Pilot against United States*, *Dunsmuir against Bradshaw*, and *United States against Gee Lee*, were not assimilated to the fees and compensation provided for by section 824 of the Revised Statutes, referred to in the proviso to section 3 of the act of June 20, 1874, as held by the supreme court in *U. S. v. Smith*, *supra*. The fact that such assimilated fees often may, and in this case will, be very inadequate compensation, cannot justify this court in sustaining a judgment against the United States not justified by the law as it exists.

Whether a district attorney can be compelled to render services for the government outside of his district by the direction of the attorney

general is a question we are not called upon to decide. That the attorney general is at liberty to call upon the district attorney in each district to defend, as a part of his official duty, the interest of the government in any suit there pending in which it is interested, seems to be held in the case of *U. S. v. Smith*. It is also there held that the provision, found in section 363 of the Revised Statutes, authorizing the attorney general, whenever the public interest requires it, to employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and to stipulate with such assistant attorneys and counselors the amount of compensation, does not contemplate that the district attorney himself shall be so employed.

It results from what has been said that the allowances made by the court below to the plaintiff for services rendered in the cases entitled, respectively, *Ross against Eells*, *The Pilot against United States*, *Dunsmuir against Bradshaw*, and *United States against Gee Lee*, were without authority of law, and that the judgment to that extent is erroneous. I therefore think the cause should be remanded to the court below, with directions to modify the judgment in accordance with the views above expressed.

SHIVER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1896.)

No. 315.

In Error to the District Court of the United States for the Southern District of Alabama.

M. D. Wickersham, W. M. Mackintosh, and J. C. Rich, for plaintiff in error.
James N. Miller, U. S. Atty.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. James D. Shiver, the plaintiff in error, prosecutes this writ of error to review a sentence and judgment rendered against him in the United States district court for the Southern district of Alabama upon the hearing and trial of a criminal information charging him with unlawfully cutting and removing timber from the public lands of the United States, and wherein the said Shiver was sentenced to pay a fine of \$240 and the costs of prosecution, and be imprisoned for the period of three months, and stand committed until the payment of such fine; the said imprisonment to commence at the expiration of the period of imprisonment imposed under conviction in a certain case, No. 1,186 of the same term of the court.

There are some nine assignments of error, but the material questions in the case were certified to the honorable supreme court of the United States for instruction as to their proper decision. The answers of the supreme court (*Shiver v. U. S.*, 159 U. S. 491, 16 Sup. Ct. 54) are adverse to the plaintiff in error. The other questions raised by the assignments do not merit consideration. It follows that the judgment appealed from is affirmed.

AUTRY v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1896.)

No. 314.

In Error to the District Court of the United States for the Southern District of Alabama.

This was a criminal information against James Autry, charging him with unlawfully cutting and removing timber from the public lands. He was convicted and sentenced in the district court, and has sued out a writ of error from this court.

M. D. Wickersham, W. M. Mackintosh, and J. C. Rich, for plaintiff in error.
James N. Miller, U. S. Atty.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. The material questions in this case are similar to those presented in the case of Shiver v. U. S. (just decided) 73 Fed. 158, and the ruling must be the same way. Judgment affirmed.

UNITED STATES v. WIBORG et al.

(District Court, E. D. Pennsylvania. February 27, 1896.)

1. NEUTRALITY LAWS—MILITARY EXPEDITION—REV. ST. § 5286.

In order to constitute a military expedition, within the meaning of Rev. St. § 5286, prohibiting the organization, etc., of such expeditions within the United States against the territory of a foreign prince or state, it is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized, according to the tactics, as infantry, artillery, or cavalry; but it is sufficient that they shall have combined or organized, within the United States, to go to the foreign territory and make war on the foreign government, either as an independent body, or in connection with others, and have provided themselves with the means of doing so; and such provision, as by arming, etc., is itself probably not essential.

2. SAME—INDIVIDUAL ACTS.

It is not a crime or offense against the United States, under the neutrality laws, for individuals to leave the country with intent to enlist in foreign military service; nor is it an offense to transport persons out of the United States, and land them in foreign countries, when such persons intend to enlist in foreign armies.

3. SAME—TRANSPORTING ARMS.

Nor is it an offense against the laws of the United States to transport arms, ammunition, and munitions of war from the United States to a foreign country, whether they are to be used in war or not, and the shipper or transporter only runs the risk of capture, seizure, etc.

4. SAME—MEN AND ARMS IN SAME SHIP.

Nor is it an offense against the laws of the United States to transport to a foreign country, on the same trip, men intending to enlist in foreign armies and munitions of war, provided the persons transported have not combined and organized themselves, in the United States, to make war on a foreign government.

5. SAME—AIDING MILITARY EXPEDITION—KNOWLEDGE.

A defendant charged with a violation of Rev. St. § 5286, in aiding a military expedition against a foreign state by transporting it to its destination, cannot be convicted unless he is shown to have known that the persons transported constituted a military expedition.

6. SAME—ACTS BEYOND JURISDICTIONAL LIMITS.

Defendants, who are officers of a foreign vessel, charged with violation of Rev. St. § 5286, in aiding a military expedition against a foreign state by transporting it to its destination, cannot be convicted if it appears that the persons transported were taken on board the vessel at sea, beyond the jurisdiction of the United States, unless it is shown that the defendants left the shores of the United States under an agreement to provide the means of transporting the expedition and to transport it.

This was an indictment, under Rev. St. § 5286, against J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, master and mates of the ship *Horsa*, for beginning and setting on foot, etc., within the United States, a military expedition against the dominions of a foreign prince with whom the United States were at peace. Trial was had February 25–28, 1896.

Ellery P. Ingham and Robert Ralston, for the United States.
Charles L. Brown and Wm. W. Ker, for defendants.

BUTLER, District Judge (charging jury). The defendants having been at the time in question officers of the ship *Horsa*, the first as captain and the others as mates, are indicted jointly and separately, in which indictment it is charged "that within the territory and jurisdiction of the United States they did organize and set on foot and provide and prepare the means for, a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, the Island of Cuba, the said Island of Cuba being then and there the territory and dominions of the king of Spain, the said United States being at peace with the said king, contrary to the act of congress in such case made and provided."

The evidence heard would not justify a conviction of anything more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, etc. To convict them you must be fully satisfied by the evidence that a military expedition was organized in this country to be carried out as and with the object charged in the indictment, and that the defendants, with knowledge of this, provided means for its assistance, and assisted it, as before stated.

Thus you observe the case presents two questions. First, was such military expedition organized here, in the United States? Secondly, did the defendants render the assistance stated, here, with knowledge of the facts?

In passing on the first question it is necessary to understand what constitutes a military expedition within the meaning of the statute. For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniforms, or prepared for efficient service; nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery or cavalry; it is sufficient that they shall have combined and organized here to go there and make war on the

foreign government, and have provided themselves with the means of doing so. I say provided themselves with the means of doing so because the evidence here shows that the men were so provided. Whether such provision, as by arming, etc., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary.

Nor is it important whether they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important.

I have said more on this subject than the facts of this case require simply because of the numerous points presented by the defendants, on which the court is asked to charge. These points I will now dispose of. The court is asked to say:

"(1) It is not a crime or offense against the United States under the neutrality laws of this country for individuals to leave the country with intent to enlist in foreign military service, nor is it an offense against the United States to transport persons out of this country and to land them in foreign countries when such person has an intent to enlist in foreign armies."

As a general proposition this is true, and the point is affirmed.

"(2) It is no offense against the laws of the United States to transport arms, ammunition and munitions of war from this country to any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, ammunitions and munitions of war only runs the risk of capture, seizure," etc.

This is also true. No military expedition would exist in such case.

"(3) It is no offense against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip; that in such case the persons transported and the shipper and the transporter of the arms and munitions of war only takes the risk," etc.

This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the government. If they had so combined and organized and yet intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, they would constitute a military expedition, as before described, and the transportation of such body of persons from this country, for such a purpose, would be an offense against the statute.

The fourth, fifth, sixth, seventh, eighth and ninth points are fully answered by what has been said.

"(10) Even if the jury do find that the men taken on board were an organized military force with officers, as infantry, cavalry or artillery, the jury cannot find the defendants guilty unless the jury also find that the defendants knew that they were such a military organization as infantry, cavalry or artillery, constituting a military expedition or enterprise against the kingdom of Spain."

As before stated, to justify conviction of the defendants the jury must be fully satisfied that the defendants knew that the men constituted a military expedition such as I have described.

The eleventh point has been fully answered by what the court has said.

The twelfth point is a very important point, and is as follows:

"(12) If the jury find that when the defendants left Philadelphia, and until after they had passed beyond the jurisdiction of the United States, they were ignorant of the fact that they were to transport the men in question, with their arms and provisions, and find that the point off Barnegat, where the men in question were taken aboard, was beyond the jurisdiction of the United States, in other words, beyond the three-mile limit, and find that the vessel was sailing under a Danish flag, then and in that case they will find the defendants not guilty."

This point raises the question whether the defendants committed an offense against the statute if the only aid which they furnished the expedition was furnished out at sea, beyond the jurisdiction of this country; and I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction, they did not commit an offense and must consequently be acquitted. They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore. If this is true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted.

If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat.

"(13) It is the duty of the government to satisfy the jury beyond a reasonable doubt that the men and arms and ammunition taken aboard the steamship Horsa was a military expedition or enterprise from the United States against the kingdom of Spain, and also that the defendants knew or shut their eyes to the fact that it was a military expedition or enterprise from the United States against the kingdom of Spain, and if the jury have from the testimony any reasonable doubt upon either of these questions of fact the jury will find the defendants not guilty."

This point is affirmed. I trust the jury understand it. To convict the defendants it is necessary that the government shall have satisfied your minds beyond a reasonable doubt that this was such a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty.

Now did the men taken on board the Horsa off Barnegat constitute a military expedition? In other words, had they combined, organized and armed themselves to go to Cuba and there make war on its government? A rebellion is, and was at the time, in progress in that country. The evidence justifies the conclusion that the men were principally Cubans. They came on board the vessel in a body, and appeared to be acting in concert under an organization or understanding of some description. They were armed, having rifles and cannon, and were provided with ammunition and other supplies. Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish, and if these men were in combination to do an unlawful act what was said by any

of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition. When the vessel reached the coast of Cuba they lowered boats, which had been taken along on their account and for their use, got into them with their arms, ammunition and other provisions, and left the ship, which had undertaken to tow them some distance further, but was frightened off by the appearance of a light which was supposed to be that of a Spanish man-of-war.

That this was a military expedition, designed to make war against the government of Spain, would seem to the court to be free from reasonable doubt. The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only.

If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for the defendants, without going further. If, on the other hand, you find that it was a military expedition, intended to make war against the government of Cuba, then you must pass upon the second question stated, to wit: Did the defendants with knowledge of the fact aid in carrying out its purpose of going to Cuba? They transported the men with their arms, ammunition and provisions. Did they enter upon this service here, with knowledge of the fact that the men constituted a military expedition to fight against the government of Cuba?

I will not dwell on the evidence relating to this question. It has been very fully stated and commented upon by counsel. You will consider the circumstances under which the defendants started from this port, taking extra boats, clearing for Port Antonio, Jamaica, turning off of their course at the breakwater, (at the mouth of the Delaware) going to Barnegat and there taking a large body of men with arms concealed in boxes, and provisions, on board, together with two additional boats, under orders to put the men off with their boats, arms and provisions where they might request. The defendants took them down to the coast of Cuba, extinguishing all lights about the ship as she approached, and there launched the boats and set the men with their arms and provisions adrift to reach the shore somewhere, abandoning the undertaking to tow them further down and hurrying away because of the appearance of a supposed Spanish man-of-war.

Thus you see what the defendants did. From this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its object were, and had arranged and provided for its transportation, when they left Philadelphia or left our shores within the three-mile limit stated. If they were ignorant on this subject until they anchored off Barnegat Light, the point being according to the testimony beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country.

The question, therefore, is, did the defendants understand they were to carry this expedition and had provided for it, and understand what the expedition was before leaving here? As you have

seen, they took on two extra boats before starting and cleared for Port Antonio, Jamaica, and turned off of their course at the break-water, (the captain explaining this, to which explanation you will give whatever weight you deem it to be worth). When the men came to the ship off of Barnegat there is no evidence that the captain or any one of the defendants expressed or exhibited any surprise. It was then manifest that the service required was to carry men and arms to Cuba (the captain says he then so understood it) a most hazardous undertaking. Is it probable that the defendants would have risked themselves and their ship in this service if they had not been prepared for it by previous arrangement, and have done it without demurring or hesitating? Again, is it likely that those in charge of the expedition would have risked bringing the men and the property to that point on the mere chance that the defendant would take the risk of carrying them and the property to Cuba, without arranging for it beforehand? If the defendants had refused, as it was their right to refuse, and it would seem certain, or at least extremely probable, that they would refuse this most hazardous service, if previous arrangement had not been made, what would have been the situation of the men and the property? The expedition would have failed. The men would have been subject to arrest and the property to sacrifice. Is it probable that those in charge of such an enterprise would take the men and property to this point without having secured certain means of transportation for it in advance? The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with knowledge of and provision for what they were about to do.

I now submit the case to you, reminding you of its importance. If the evidence of the defendants' guilt is not entirely clear, they should be acquitted. If it is thus clear, they should certainly be convicted. No sympathy nor prejudice must be allowed to influence your minds in passing on this case. We have nothing to do with the controversies between the people of Cuba and the government of that island. We are concerned only with the execution of the law in this case. We have only to consider whether the statute to which your attention has been called has been violated. It is our duty to see that the law is honestly and justly executed, that is all. The peace and safety of the community so manifestly depend upon the faithful and honest administration of the law that no man can fail to see it. We are suffering to-day as probably no other people suffers from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law.

You will take the case and decide it with a careful regard to the rights of the defendants.

The jury returned a verdict of guilty as to each defendant. Motions for new trial and in arrest of judgment were made March 3, and overruled March 17, 1896, and defendants were then sentenced as follows: Wiborg (master)—Fine, \$300; imprisonment, one year and four months. Peterson (mate)—Fine, \$100; imprisonment, one year. Johansen (second mate)—Fine, \$100; imprisonment, one year.

UNITED STATES v. ALLIS.

(Circuit Court, E. D. Arkansas. December 8, 1893.)

1. NATIONAL BANKS—VIOLATION OF LAWS—FALSE ENTRIES IN BOOKS AND REPORTS.

The "false entry" in the books or reports of a bank, which is punishable under Rev. St. § 5209, is an entry that is knowingly and intentionally false when made. It is not the purpose of the statute to punish an officer who, through honest mistake, makes an entry in the books or reports of the bank which he believes to be true, when it is in fact false.

2. SAME—PRESUMPTION.

If a president or cashier makes a false entry in a report of the condition of the bank to the comptroller of the currency, the jury are authorized to presume, from the false entry itself, in the absence of any explanation or of any other testimony, that he knew it to be false. This presumption results from the fact that it is the duty of the officer who verifies the report to know the condition of the bank, and, if the report is false, there is a prima facie presumption that he knew it.

3. SAME—REQUISITES OF THE OFFENSE.

A false entry, either in the books of the bank or in a report of its condition, is punishable only when the jury find that it was made by the defendant, or by his direction, with the intent, either (1) to injure or defraud the bank, or some other corporation, or some firm or person; or (2) to deceive some officer of the bank; or (3) to deceive some agent appointed or thereafter to be appointed to examine the affairs of the bank. If any one of these intents is present, the offense is complete.

4. SAME—PRESUMPTION OF INTENT.

Where an entry in the books or in a report of the bank's condition is in fact false, the jury are authorized to infer, from the false entry itself, an intent of the defendant to injure or defraud the bank, or some other corporation or individual, or to deceive some officer of the association, or an agent appointed to examine into the condition of the bank, if such would be the natural and probable consequence of the false entry.

5. SAME—FALSE ENTRY BY SUBORDINATE.

A false entry, made in the books or reports of a bank by a clerk, book-keeper, or other subordinate employé, by the command or direction of the president of the bank, is a false entry made by the president; and he is liable to punishment for it, if he gives the direction knowing the entry to be false, or with the intent to defraud, deceive, etc.

6. SAME.

If a false entry in the books or reports is made with a criminal intent, it is no defense that another false entry is also made, which offsets the former entry, with a like intent; but changes of this character are not as strong evidence of an intent to injure or defraud the bank, or to deceive its officers or examiners, as false entries which enable the officer making them to withdraw the funds of the bank without consideration.

7. SAME—FALSE REPORT OF OVERDRAFTS—INTENT.

Every overdraft, whether made by previous arrangement or not, whether secured or not, and whether drawing interest or not, is a loan, and is required by the law and the rules prescribed by the comptroller to be listed and reported as an overdraft. It is, therefore, no defense, to a charge of false entries in respect to overdrafts, that they had been arranged for or secured, or that interest was to be paid upon them by agreement, if such false entries were made with a criminal intent; but, in determining the intent, the jury may consider the testimony of defendant that he considered the overdrafts as loans.

8. SAME—DEFENSES.

If the president of a bank makes or causes to be made false entries in its books, or in reports to the comptroller, with the intent to deceive or defraud, etc., it is no defense that he struggled to save the bank from fail-

ure, and to provide money to pay its depositors, by sacrificing his own property and borrowing money from others.

9. CRIMINAL LAW—DELIBERATIONS OF JURY.

If much the larger number of the jury are for conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of others equally honest and equally intelligent with himself, who have heard the same evidence with an equal desire to arrive at the truth, and under the sanction of the same oath. On the other hand, if a majority are for acquittal, the minority ought seriously ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

This was an indictment against Horace G. Allis for violation of Rev. St. § 5209, in making false entries in the books of a national bank and in reports to the comptroller of the currency of the condition of the bank.

Joseph W. House, Dist. Atty., and J. H. Harrod, for the United States.

Martin & Murphy and John Johnson, for defendant.

SANBORN, Circuit Judge (charging jury). One of the chief characteristics of a good government is the sure and speedy administration of justice. No government can long endure, or ought long to endure, under which the criminal is not speedily and certainly punished, and the innocent as speedily and certainly acquitted and protected. Laws are enacted for the protection of the lives, liberty, and property of the citizen. Penalties are prescribed for their violation, that this protection may be insured. Every good citizen withholds his own hand from the infliction of punishment, and appeals to the courts his government has established to right his wrongs and to enforce the laws enacted for his protection. Nor is the action of the government or its officers, in prosecuting those that they honestly believe to be guilty, properly subject to any adverse criticism or animadversion; nor has there been, so far as I have observed, anything in their conduct in this case that has even savored of persecution or unfairness. If the government has money and officers at its command, and uses them to properly gather and present the evidence against one whom its officers believe to be guilty of a violation of our laws, we ought not, on that account, to be resentful or prejudiced against it; but we should be grateful that we live under a government that has the power and disposition to punish the guilty, for it is only by the punishment of the guilty that the lives, liberty, and property of innocent citizens are preserved. If the courts and juries discharge the duties the law imposes upon them, if with courage and impartiality they punish the guilty and acquit the innocent, contentment and satisfaction and domestic peace prevail. But if they fail in the discharge of these duties; if criminals escape their just punishment, and the innocent are needlessly imperiled; if the property, lives, and liberty of the citizens go unprotected, because the laws are not enforced by juries and the courts,—every man, despairing of obtaining justice through

them, will feel disposed to avenge his own wrongs, and domestic violence and the barbaric rule of the strongest will soon again prevail.

We now come, gentlemen of the jury, to the discharge of one of the most important duties that will ever devolve upon us as citizens. We must determine whether the prisoner at the bar is guilty or innocent of a violation of the laws of this land. We have all, court and jury alike, taken a solemn oath to discharge this duty without fear or favor, according to the law and the evidence. In the discharge of this duty, the court and the jury have different parts to perform; but the honest and faithful discharge of their duties, and the attainment of a just result from this trial, demand of the court the same courage, integrity, impartiality, and zealous determination to do exact justice, regardless of the consequences to the parties, which I have no doubt animate the jury, and will inspire and direct their action. It is the duty of the court to declare to you the law by which this case must be determined, and it is your duty to be governed by that declaration. It is your exclusive province and duty to determine the issues of fact here presented, and the weight and credibility of the testimony of the witnesses, and by your determination of these questions the court will be bound. If, in the course of what the court may say to you, any expression of opinion should drop as to the disputed issues of fact, or the credibility of the testimony of the witnesses, you are not bound by any such expression; but it is your privilege to adopt or disregard it as you may see fit. You are, I repeat, the sole judges of the disputed questions of fact yet to be decided.

The defendant is charged by the government with the commission of heinous crimes. He is presumed to be innocent until his guilt is proved. The burden is on the government to prove the charges it has made. Not only this, but before the defendant can be found guilty of any offense, that offense must be proved by the evidence beyond a reasonable doubt. A reasonable doubt is a doubt founded on a consideration of all the testimony, and based on reason,—such a doubt as would deter a reasonably prudent man from acting or deciding in the most important matters involving his personal interests. If you have such a doubt of the guilt of the defendant under any of the counts of this indictment, after carefully considering all the evidence, you should acquit him of the offense charged in that count; but if you have no such doubt, but are morally certain he is guilty of the offense charged in any count of the indictment, you should fearlessly declare him guilty. It is not necessary, however, that you should be satisfied beyond all possibility or suspicion of doubt that the defendant was guilty before you can convict. Doubts that are not based upon a reasonable and careful consideration of all the evidence, but are purely imaginary, or born of sympathy alone, or of the ingenious suggestions of counsel merely, ought not to be considered, and should not influence your verdict. Possible, imaginary, and sympathetic doubts have no proper place in your deliberations; and if, in your opinion, the offense charged in any count in the indictment is proved beyond

a reasonable doubt, you should return a verdict in favor of the government on that count, regardless of all other doubts.

In a more primitive state of society, men generally kept their money and personal property in their own possession; but in our day it has long been the habit of men of all classes to intrust their money and securities to others for safe-keeping. Banks have been established in the large cities, protected by an efficient police and by secure vaults against the stealth of the thief and the force of the robber, and in these the moneys and securities of the business man and of the capitalist, and the surplus money of the farmer, the mechanic, and the laborer are alike deposited, in the faith that their directors and officers will faithfully preserve and honestly return these deposits, or their equivalent, when called for. A portion of the moneys thus deposited is, in the usual course of business, used to discount commercial paper of the customers of the bank, or to loan to them upon their promissory notes, while a sufficient balance is kept on hand to pay depositors as they call. It is obvious that, under this system, the security of the moneys of the depositors, the interests of the stockholders and the creditors of any bank, and its very existence must depend almost entirely upon the honesty, integrity, care, and prudence of its officers. As the money is in their hands, they can, by a breach of trust and honor, appropriate it to their own use, or to the use of their friends, or, by carelessness and imprudence, they may loan it to worthless borrowers, until it is irrevocably lost. To prevent the possibility of such crimes and misfortunes, as far as possible, is one of the objects of the existence of the national banking law. It is well to note here that no part of that law requires any citizen to become a president or officer of a national bank. No man is compelled by that law to discharge any of the duties prescribed, or to put himself in a place where he can be liable to any of the penalties denounced by that law. But, if he voluntarily assumes the position of a president of a national bank, if he voluntarily takes the control and management of the funds invested in the stock and deposited in the vaults of a national bank, the law requires of him the faithful, honest, and exact performance of the duties it imposes upon such an officer, and imposes proper penalties for its violation. This is, certainly, not unreasonable, in view of the great public interest in safe depositories and solvent banks.

To prevent losses through the carelessness, imprudence, or faithlessness of its officers, every national bank is put under the control of the government by this law, and its officers are required to keep correct books of account, open at all times to the inspection of the proper government officers. The comptroller of the currency is empowered to control and direct the officers and directors of each bank, and, whenever the bank is so conducted as to imperil the safety of those interested in it, and the security of its depositors, it is his duty to wind up the bank, and to preserve any property of value in its control for those justly entitled to it. To furnish the comptroller with the necessary information to enable him to discharge these important duties, the law provides that, at least five times during every year, and on dates to be fixed by him, every

national bank shall make to him accurate and truthful reports of the condition of the bank, which shall show, in detail, and under appropriate heads, its resources and liabilities, in such form as he shall prescribe. The law requires these reports to be verified by the oath of the president or cashier of the bank. Each report is required to be a report of the condition of the bank on a day that is past when the report is called for, and the object of this provision is to prevent the bank officers from changing the character of the resources or liabilities so as to make the showing better than the bank's condition warrants, after the call is made, as might be easily done if the day fixed for the condition of the bank to be shown was subsequent to the call. The law also provides that these reports shall be published in the same general form in which they are made to the comptroller, and from these published reports stockholders, creditors, and depositors learn the condition and probable prospects of the bank. Another section of the law provides that the comptroller shall, with the approval of the secretary of the treasury, and as often as shall be deemed necessary, appoint suitable persons to make examinations of the affairs of the national banks, and these examiners are empowered to make a thorough examination into the affairs of any bank, to examine the bank officials upon their oaths, and to report in detail to the comptroller of the currency the condition of the bank examined.

It is obvious, from this brief review of some of the provisions of this law, that its efficacy must depend very much, and often entirely, upon the truth and correctness of the books of the bank and the report to the comptroller. If they are false, the comptroller, the examiner, and the public are liable to be deceived, the stockholders and depositors are liable to be misled, and the law itself evaded and practically annulled. To prevent the possibility of false books and false reports, the congress, in addition to the requirement that the report shall be verified by the oath of the president or cashier, wisely enacted that "every president, director, cashier, teller, clerk or agent of any such banking association who * * * makes any false entries in any book, report, or statement to the association, with the intent in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association * * * shall be deemed guilty of a misdemeanor" (section 5209, Rev. St.), and punished accordingly. Now, if this provision can be disregarded and evaded with impunity, if false books can be kept, and false reports made to the comptroller, by the officers and agents of the national banks at will, the national banking law will be deprived of much of its utility, and the greater part of its safeguards will be removed. It is this provision that the defendant stands charged with violating. The government charges that this defendant made false entries in three reports to the comptroller, and that he made many false entries in the books of the bank. The evidence is uncontradicted that the three reports in which the false entries were contained were sworn to by Mr. Allis as president of the First National Bank of Little Rock;

that, during the entire year 1892, he was the president of that bank; and that that bank was duly organized under the national banking law of the United States, and was engaged in the business of banking at the city of Little Rock, in this state.

There remain but two questions for you to determine under any of the counts of this indictment that will be submitted to you. They are: First, did the defendant make any of the false entries charged? If you find that he did, then, second, did he make any of them knowingly, with the intent to injure or defraud the bank, or any other body politic or corporate, or individual person, or to deceive any officer of the association, or to deceive any person appointed or thereafter to be appointed by the comptroller to examine the bank?

The "false entry" that is punishable under this statute is an entry that was knowingly and intentionally false when made. It was not the purpose of congress to punish an officer who, through an honest mistake, makes an entry in one of the books or reports of the bank which he believed to be true, when it is, in fact, false. It follows that, in order to convict the defendant, you must find, not only that he made a false entry in one of the books or reports of the bank, but also that he knew that entry to be false when he made it. If, however, you should find that he made a false entry in a report of the condition of the bank to the comptroller of the currency, you are authorized to presume, from that false entry itself, in the absence of any explanation, or of any other testimony, that he knew such entry to be false. This law makes it the duty of the president or cashier of the bank to make a true report of the condition of his bank to the comptroller, and to verify it. It imposes upon the officer who verifies the report the duty of knowing the condition of his bank, and truthfully reporting it. He testifies to the comptroller that the report he makes to him is, in fact, true and correct, and this oath presupposes that he knows whether it is true or false when he takes it, and he cannot afterwards be heard to say that he did not know the facts, unless he was himself mistaken, or deceived, after an honest endeavor to discharge his duty. He cannot keep himself in ignorance, willfully shut his eyes to the truth, or refuse to examine into the true condition of his bank, and to learn whether his report is true or false when he makes it, and thus escape liability. Nor can he intrust his duty and his conscience to his clerk or his bookkeeper, and then escape liability, civil or criminal, on the plea of ignorance. In such a case, the law presumes that he knows what his duty and his oath require him to know. But if, on the other hand, he honestly and faithfully investigates the condition of his bank, and compares it with his report, either alone or with the assistance of his clerk or bookkeeper, and then verifies it in the belief that it is correct, when, through mistake of his own, or some deception practiced upon him by his clerk or bookkeeper, it is false, he is guilty of no offense under this statute, and should not be punished.

Nor is a false entry in a report of the condition of the bank, or a false entry made in the books of the bank, punishable under this statute, unless you also find that it was made by the defendant or by his directions, with the intent either (1) to injure or defraud the

bank, or some other corporation, or some firm or person; or (2) to deceive some officer of the bank; or (3) to deceive some agent appointed or that thereafter is to be appointed to examine the affairs of the bank. But it is sufficient that he made a false entry knowingly, with the intent to deceive an agent that was appointed or that was thereafter to be appointed to examine its affairs, though he did not intend to injure or defraud the bank or to deceive its officers. It is sufficient that he made the false entry knowingly, with the intent to injure or defraud the bank, though he did not intend to deceive the examiner, or all the officers of the bank. It is sufficient that he knowingly made the false entry with the intent to deceive an officer of the bank, though he did not intend to injure or defraud the bank or to deceive the examiner. Moreover, this intent may be inferred from the false entry itself. The law presumes that a man intends the legitimate consequences of his acts, and, if the natural and probable consequence of a false entry in a report or a book of the bank is to deceive the examiner, or to injure or defraud the bank, or to deceive any of its officers, you are authorized to presume, from the entry itself, that it was made with that intent. It is no defense to a wrongful act, knowingly and intentionally committed, that it was done with an innocent intent. Your practical experience and daily observation of the acts and intents of men will materially aid you in determining this question of intention. The intent with which an act is done is often more clearly and conclusively shown by the act itself than by any words or explanations of the actor. Thus, if you found a stranger leading your horse, saddled and bridled, from your barn, in the night, without your permission, and he should explain to you that he did not intend to steal him, but was simply leading him out for exercise, you would undoubtedly infer his intent from his act rather than from his words. If you found a stranger kindling a fire in the hay in your barn or stable, and he should explain that he did not intend to burn the barn or stable, but was simply burning a little hay to warm his hands, you would probably judge of his intent from his act rather than from his explanation. So, in many cases, the actions of men speak their intentions more clearly and truthfully than do their words. In the case before us you have the evidence of this defendant's acts, and his explanation of them. If you find that he made any of the false entries charged, knowingly, you must determine with what intent he did it from the acts themselves, from their natural and legitimate consequences, from his own explanations, and from all the other evidence before you.

There is a decided conflict between the testimony of the witnesses Denny, Yost, and Kupferle, and the testimony of the defendant, upon very material issues in this case. It is your duty to reconcile this conflicting testimony where that is possible; and, where it is not, you should consider the interest these witnesses have, if any, in the issues on trial, and their bearing and apparent candor on the stand, and decide, in view of all the evidence, who has told the truth. It is proper for you to bear in mind, in weighing this evidence, that the testimony of a disinterested witness is more likely to be correct

than is that of a witness who has much at stake in the trial, whenever the testimony of the two witnesses is of equal credibility in other respects.

A false entry made in the books or reports of the bank by a clerk, bookkeeper, or other subordinate employé or officer, by the command or direction of the president of the bank, is a false entry made by the president, and he is liable to punishment for it under this statute, if he gives the direction, knowing the entry to be false, and with the intent explained to you.

Certain notes, made by various parties, have been introduced in evidence, and much testimony relating to them adduced, tending to show that some of them were not entered upon the books of the bank. Mr. Allis has testified that the proceeds of all of these notes were applied to the benefit of the Little Rock Bank, while Mr. Yost has testified, and referred you to entries in the books which, he claims, show, that the proceeds of some of these notes were credited to the individual account of Mr. Allis on the books of the Little Rock Bank, so that that bank really received no benefit from them. These notes, and the testimony concerning them and their proceeds, may be considered by you in determining whether or not Mr. Allis has testified truthfully, and in deciding who was the active manager of the bank in 1892, but beyond that they are not material to the issues in this case, and should not be considered in determining them.

There are 25 counts in the indictment before us, each of which charges a separate offense. The government does not press the 7th, 11th, 20th, 21st, 22d, 23d, and 24th counts, and you need not consider them. The court will call your attention to the offenses charged in the remaining counts, and to a portion of the evidence concerning them, in the order of time. You are not bound to be governed by any statement of the evidence made by the court; but, if your recollection accords with that of the court, you may accept it, and, if it differs from it, you may be governed by your own memory.

By the 13th, 16th, 19th, and 25th counts of this indictment, it is charged, in effect, that the defendant, as president of the bank, knowingly made false entries in one of its books, with the intent explained, by which it was made to appear, on the books of the bank, that on February 3, 1892, the Fourth National Bank of New York became indebted to the Little Rock Bank in the sum of \$5,000, the First National Bank of Chicago in the sum of \$15,000, and the Continental National Bank of Memphis in the sum of \$15,000, by reason of the transfer of these amounts to these three banks, respectively, by the Massachusetts Loan & Trust Company by order of the Little Rock Bank. There are entries on the books of the Little Rock Bank which mean that on February 3, 1892, the three banks named became indebted to the Little Rock Bank in the way charged. It also appears, on the books of that bank, that the Massachusetts Loan & Trust Company was indebted to it in the sum of \$35,000, from some time in August, 1891, until February 3, 1892. The respective officers of the three banks which were charged with the amounts aggregating \$35,000, testified that their banks never received these sums of money, and never became indebted to the Little

Rock Bank on account of them; and one of the officers of the Massachusetts Loan & Trust Company testified that his company never transferred any of these amounts to either of these three banks, and, in fact, that his company never owed the Little Rock Bank at all, and never had any account with it whatever. If you believe the testimony of these witnesses, and it is undisputed, all these entries were false, sham, and misleading, and there never were any such transactions as they indicate.

Mr. Allis testified that the \$35,000 charged to the Massachusetts Loan & Trust Company resulted from a discount by that company of a note of the Electric Street-Railway Company and himself for \$25,000, dated about June 6, 1891, payable to the order of that company, and signed on the back by the Thomson-Houston Company. He says the proceeds of this note, together with the proceeds of a \$10,000 note of like character, Mr. Coffin promised to place to the credit of the Little Rock Bank in the Massachusetts Loan & Trust Company, but that he did not do so. He says that he did not learn that this money was not to the credit of the Little Rock Bank until some time in November or December, 1891, and that he then directed the clerks of the bank to correct the entry. He denies that he ever told Mr. Denny to make the three entries charged in this count of the indictment; and it is claimed, on his behalf, that the fact that they were made while it is admitted that he was out of the state, and about the time when an examiner was here to examine the affairs of the bank, tends to show that these entries were made without his direction. On the other hand, Mr. Littlefield, an officer of the trust company, testified that the note of \$25,000 discounted by his company had no relation or connection with the First National Bank of Little Rock; that the \$25,000 note was negotiated by the Thomson-Houston Company, and the proceeds placed to the credit of that company; and that the \$10,000 note was placed in the hands of the trust company to be delivered to a bank in Reading, at which the Thomson-Houston Company negotiated it. Mr. Denny, the cashier of the Little Rock Bank, testifies that, in the latter part of January, 1892, the defendant directed him to make the false entries of February 3, 1892; that he made them pursuant to that direction; and that, on February 13, 1892, by direction of the directors of the Little Rock Bank, he credited these three banks with the amounts charged to them, respectively, and charged the aggregate amount to the defendant, and the latter never complained of it. It is for you to decide who has told the truth here.

By counts 14 and 15 of this indictment, the government charges, in effect, that on the 22d day of February, 1892, the defendant, as president of the bank, knowingly made false entries in certain books of the bank with the intent explained to you, by which it was made to appear on those books that, on February 22, 1892, the Little Rock Bank became indebted to the defendant in the sum of \$50,000, and that the First National Bank of New York became indebted to the Little Rock Bank in the sum of \$25,000, by reason of the deposit by Mr. Allis of \$25,000 in the First National Bank of New York to the credit of the Little Rock Bank. It admittedly appears, from the

books of the Little Rock Bank, that on February 20, 1892, Mr. Allis had drawn out of the bank \$42,180.65 more than he had deposited in it, and that he then owed the bank that amount. There is a telegram in evidence by which, if it was sent by him, and is correct, he directed the cashier of the Little Rock Bank to charge the First National Bank of New York \$25,000, the Southern National Bank of New York \$25,000, and to credit his account \$50,000. Mr. Denny testifies that, pursuant to this telegram, he charged these banks and credited the defendant with the \$50,000. The officers of the two national banks testify that Mr. Allis never deposited either of these sums of \$25,000 with either of them, and that neither of them ever became indebted to the Little Rock Bank on account of any transaction portrayed by these entries. No witness comes to say that they did, and, if you believe their testimony, these entries were false. There were no such transactions as they represent. The defendant testifies he was in New York on February 20, 1892. In one place, he says that he may have sent the telegram to the bank on that day. In another place, he says that he did not send, and could not have sent, any telegram of the tenor of that in evidence, because he would not order a charge against a bank before the money was actually deposited. You have the telegram in evidence; and Mr. Denny testifies that it was received by him in cipher, that the translation in evidence is a correct translation of the cipher telegram directing these entries, that the original telegram had Mr. Allis' name attached to it, and that he made these entries in obedience to it. You must weigh this testimony, and determine here who is correct. You may properly consider the motives that would probably have influenced either Mr. Denny or Mr. Allis to make or direct the making of these entries,—whether it is more or less probable that the defendant, whose account was largely overdrawn, would direct the making of these entries, by which he received a false credit of \$50,000, than that Mr. Denny would either forge or change a telegram, or make false entries in the books of the bank, by which he apparently gained nothing personally, while his bank gave the defendant this false credit. If you conclude that the defendant did not sign the telegram, the true meaning of which is embraced in the translation of this telegram in evidence, and did not direct these entries to be made, you need not consider these two counts further, but should acquit the defendant of the offenses charged in them. If, however, you conclude that this is a genuine translation of a telegram sent by Mr. Allis, and that the entries were made in obedience to it, what was their effect? It was this: The defendant, Allis, received a false credit of just \$50,000 from the Little Rock Bank, and gave it, in return, the poor privilege of charging two New York banks, on its books, with that amount, which these banks did not owe, and which the Little Rock Bank could never collect from them. And, if he caused these entries to be made, with what intent did he do so? If a customer, or friend of yours, who owed you \$40,000 on account, should come to you, and tell you that he had deposited \$50,000 to your credit in the German National Bank of Little Rock and that he wanted a receipt for the \$40,000 that he owed you, and wanted a

credit for the other \$10,000, and you should give him the receipt and the credit, and should subsequently learn that he had never deposited one dollar in that bank for you, with what intent would you conclude he had made these statements? Would you think it was with an honest purpose, or with some intent to injure or defraud you?

By counts 10, 17, and 18 the government charges, in effect, that on the 1st day of March, 1892, the defendant, as president of the Little Rock Bank, knowingly made false entries in certain books of that bank by which it appeared from those books (1) that the Little Rock Bank became indebted for a demand certificate of deposit in the sum of \$50,000, and that the National Hide & Leather Bank of Boston, Mass., became indebted to the Little Rock Bank in a like amount; (2) that the Little Rock Bank paid its note of \$15,000 to the American National Bank of Kansas City by transferring \$15,000 from the National Hide & Leather Bank to the Kansas City Bank; and (3) that the Little Rock Bank paid its note of \$28,000 to the National Bank of Commerce of St. Louis by transferring \$28,000 of the amount of its credit with the National Hide & Leather Bank to the St. Louis Bank. By count 3 of the indictment, the government charges that, in a report of the condition of the Little Rock Bank at the close of business on March 1, 1892, verified by the defendant as president on March 7, 1892, he, with the intent explained to you, knowingly entered the false statement that that bank had no bills payable, when it then owed the two notes just mentioned, aggregating \$43,000.

The report of the condition of the bank March 1, 1892, does state that the bank then had no bills payable. Mr. Dominick, of the American National Bank of Kansas City, testified that his bank then held a note of the Little Rock Bank on which there was \$15,000 unpaid, and that this note was not paid until March 17, 1892. Mr. Vanvlarcom, of the National Bank of Commerce, testified that his bank then held the note of the Little Rock Bank for \$28,000, which was not paid until March 15, 1892. If you believe this evidence, that report was false in its statement of the bills payable, and there is nothing for you to determine, upon this count, but the knowledge and intent of the defendant in making it; for he has admitted, in his own testimony, that he knew, on March 1st, that these notes were out, and that the holders of them were pressing for payment. The books of the bank do show entries to the effect charged in these counts (10, 17, and 18) under the date of March 1, 1892. The defendant himself admits that he signed the slip directing these entries to be made, and both he and Mr. Yost, the bookkeeper, testified that a certificate of deposit of the Little Rock Bank in favor of the National Hide & Leather Bank and two drafts of the Little Rock Bank on the National Hide & Leather Bank, one for \$15,000 in favor of the Kansas City Bank, and one for \$28,000 in favor of the St. Louis Bank, were drawn, either on the 1st or the 7th of March, and delivered to the defendant, and that these drafts were drawn to pay the two notes. It is admitted, or established by the testimony of the defendant himself, that these drafts were never used to pay the notes,

and that the National Hide & Leather Bank never received the certificate of deposit, and never became indebted to the Little Rock Bank on account of it. In other words, every one of these papers and entries was sham. They never represented any actual transaction that was completed. The certificate and the drafts were never in force, because they were never delivered to the parties in whose favor they were drawn, and the entries portrayed transactions that never in fact existed.

But Mr. Allis testified that he obtained an offer of a loan of \$50,000 from the National Hide & Leather Bank on the certificate of deposit of the Little Rock Bank, and had brought this offer to the attention of his board of directors, who referred the matter to Mr. Kupferle. He says that Mr. Kupferle concluded to take the loan on the 1st of March, 1892, and that he on that day caused these entries to be made, and delivered the certificate of deposit and the drafts to Mr. Kupferle to be sent to the respective banks in whose favor they were drawn. He says that he supposed they were sent, and that the two notes were paid, until after he had verified his report to the comptroller on the 7th of March, 1892, and that he did not learn that they had not been until about March 14, 1892. On the other hand, Mr. Kupferle testifies that he never received the certificate or either of the drafts, and that he never heard of them until this trial. Mr. Yost, the bookkeeper, and Mr. Hays testified that these entries in the books were not made until March 7th or 8th, and that they were made under the date of March 1, 1892, by making interlineations and erasures in the books, and they produce the books showing these interlineations and erasures. Mr. Yost, who received from Mr. Allis the slips, signed by him, which directed these entries, and which, Mr. Allis says, were made on March 1, 1892, testifies that the defendant, on March 6, 1892, directed him to draw the drafts and the certificate, and to make these entries under the date of March 1st. It is for you to decide, in view of the testimony of Mr. Kupferle, Mr. Yost, and Mr. Hays, the interlineations and erasures in the books, and the probable interests of these various witnesses to testify falsely, whether the defendant directed these entries to be made on March 1st, when they bear date, or on March 6th. If you find that he gave the directions on March 1st, you must then consider whether he delivered the drafts and certificate to Mr. Kupferle on that day, and whether or not he believed they were sent forward to the banks, so that he was himself mistaken or deceived when he verified his report on the 7th of March. But, if you find that these entries were directed to be made on March 6th, you will consider their effect, and the intent with which the direction was made. The effect of these entries was: (1) They made the bills payable appear upon the books to be \$43,000 less than they actually were. (2) They made the demand certificates of the Little Rock Bank to appear upon the books to be \$50,000 more than they actually were, thus making the total liabilities of the bank appear upon the books to be \$7,000 more than they actually were. (3) They made the entire resources of the bank appear upon the books to be \$7,000 more than they actually were, by making the amount due from other

national banks that much in excess of the actual amount. These were radical changes, and they entered into the report of March 1st. What could have been the intent in making these changes on the 6th of March, if you find they were so made, if it was not to make the report to the comptroller show less bills payable than actually existed on the 1st of March? If the truth would have answered the purpose as well, why was the truth not told?

By the fourth count the government charges that, in the report of the condition of the bank on March 1, 1892, the defendant made a false entry of \$69,659.29 as the amount due from other national banks, when the amount actually due from them was only \$9,659.29. That this entry was made, and that it was false, is not disputed. Mr. Allis, you will remember, testifies that he did not know of the discrepancy; that he compared a pencil copy of the report furnished by Mr. Yost with the books, and found it correct; and that, when the written report was made, he compared that with the pencil report, and found that they agreed. On the other hand, the bookkeeper testified that this entry was made by the express direction of Mr. Allis, that he made up the figures from the books with him, and inserted them in the report by his direction. It is undisputed that, while the amount due from other national banks was reported at \$60,000 more than it actually was, the amount due from approved reserve agents was reported at \$60,000 less than it was, so that the aggregate amount of liabilities was not actually changed by this false entry. You must determine whether this entry was made by the direction of Mr. Allis. If it was, it is proper for you to consider the fact that it did not change the aggregate amount of the resources or liabilities of the bank, so far as this bears upon the defendant's intent. A change of this character is not as strong evidence of an intent to injure or defraud the bank, as entries in its books that would enable the defendant to draw money without consideration would be; but if such an entry as this is knowingly made with the intent explained to you, it is as much a violation of the law as a more radical change. The law requires the entries to be true. It does not permit the officers of the bank to make false entries, or reports that, in their opinion, are just as good as true ones. Two wrongs do not make a right. It is no defense, for one who takes your horse, that he took another horse from your neighbor, that was just as good, and turned him over to you; and it is no defense for a bank officer, who knowingly makes a false entry in a report, with criminal intent, that he made another false entry to offset it, with like intent.

By the fifth count in the indictment, the government charges, in effect, that the defendant, as president of the bank, made a false entry in his report of the condition of the bank at the close of business March 1, 1892, with the intent explained to you, by which the overdrafts were made to appear \$20,033.09 less than they actually were. The bookkeeper testifies that, in pursuance of the directions given by the defendant at that meeting on Sunday, March 6th, he thereafter changed the books so as to make them show the overdrafts, at the close of business, March 1, 1892, \$20,033.09 less than

the books did show at the close of business on that day, and that, at the same time, he changed the books so as to make the loans and discounts that much more, and that the report to the comptroller was made to correspond to the books so changed. An overdraft occurs when a depositor of a bank checks out more money than he has in the bank. Sometimes the bank permits this to be done without security, and without previous arrangement; and sometimes a previous arrangement to this effect is made, and security for the repayment of that amount is given, and a rate of interest is agreed upon. But every overdraft, whether by previous arrangement or not, and whether secured or not, and whether drawing interest or not, is a loan; and every such overdraft is required, by the law and the rules prescribed by the comptroller, to be listed and reported as an overdraft. It is, therefore, no defense to this charge that any of these overdrafts had been arranged for or secured, or that interest was to be paid upon them by agreements made before March 1, 1892, if you find that this entry was knowingly directed to be made by the defendant, with a criminal intent. Mr. Allis testified that \$20,033.09 of the overdrafts that existed on the 1st day of March were paid by the demand notes of customers taken by him on that day, so that, in fact, the overdrafts were that amount less than they appeared on the books at the close of business on that day. If you find his testimony to be true, this fact is a complete defense to this count in the indictment. If the overdrafts were in fact paid by the notes delivered to the bank, Mr. Allis had the right to direct the books to be changed so as to show the truth, and he had the right to make the report show it. In passing upon the validity of this defense, you will remember the interlineations and erasures in the books, and that Mr. Yost and Mr. Smith testified that the notes did not come to them to be entered upon the books of the bank until the 7th or 8th of March. The only real question under this count is whether these notes were signed and delivered to Mr. Allis on the 1st of March, or not until some later date.

By the eighth and ninth counts in the indictment, the government charges that the defendant, as president of the bank, with the intent explained to you, knowingly made such false entries, in the report of the condition of the bank at the close of business on July 12, 1892, that the report showed the overdrafts to be about \$21,000 less than they actually were, and the loans and discounts about \$21,000 more than they actually were. The report does show the overdrafts to be \$16,766.98 less than they appear to have been by the bank books on July 12, 1892, and it shows the loans and discounts \$16,766.98 more than the books showed them to be. This report was sworn to by Mr. Allis July 18, 1892. The bookkeeper, Yost, testifies that he made and delivered to Mr. Allis a pencil report, showing the condition of the bank at the close of business July 12, 1892, as the books showed it; that Mr. Allis returned it, and directed the report to be made out with the false entries of overdrafts and loans and discounts shown by the report. The defendant says that he did not change the pencil report, that he does not recollect that the verified report did not correspond with the books, and that this \$16,766.98

was the amount of overdrafts, that were considered as loans and discounts, and were secured by deeds of trust. You will remember, here, what the court has already charged you to the effect that every overdraft is a loan, and that, under the law and the directions of the comptroller, it was the duty of the defendant to include all the overdrafts of the bank, secured or unsecured, in his statement of overdrafts. But you may consider his testimony, that he considered them as loans, in determining his intent in making this entry, if you find he directed it to be made.

The bookkeeper, Yost, testified that, on July 12, 1892, the books showed the individual account of Mr. Allis to be overdrawn \$15,684.63; that Mr. Allis, on the 18th day of July, as he believes, directed him to make the books show, under the date of July 12, 1892, that the United States National Bank of New York then became indebted to the Little Rock Bank in the sum of \$49,641.68, and that the Little Rock Bank then became indebted to or received a deposit from the defendant of \$49,641.68. He says he made the necessary interlineations and erasures to accomplish this, and then prepared the report on the basis of the changed books, and the further change of the \$16,766.98 which has been spoken of. The entries, interlineations, and erasures of which he speaks do appear in the books. The bank books also show that, on July 18th, the United States National Bank was credited \$25,000, on July 19th, \$25,000, and on August 6th it was charged \$358.32, thus wiping out this charge of \$49,641.68. The president of that bank testifies that no such transactions as these entries represent were ever had between his bank and the Little Rock Bank; that his bank never owed that bank \$49,641.68 on account of the deposit by Allis at this time. If you believe this evidence, these entries regarding this item were all sham, false, and misleading. If you believe this testimony, there were no such transactions as these entries represent, and there is no truth in them. Their effect was this: (1) They wiped out the defendant's overdrafts of \$15,684.63, and made the books show the overdrafts to be less by that amount than they actually were; and, as the report represented them \$16,766.98 less than these doctored books showed them, the report, if you believe this evidence, stated these overdrafts at least \$32,000 less than they actually were. (2) The false credit thus given the defendant for \$49,641.68 not only wiped out his overdrafts, but placed the surplus, \$33,957.05, to the credit of his individual account, and thus made the individual deposits with the bank appear in the books, and in the report based on the books, \$33,957.05 more than they actually were. (3) They gave Mr. Allis this false credit of \$49,641.68, and enabled him to take that credit from the Little Rock Bank on this entry, upon no consideration but this sham charge against a New York bank, that owed nothing on account of it. Mr. Allis admits that he signed the slips which authorized these entries, but testifies that they were made on July 12, 1892, and not at the later date at which the bookkeeper says he made them. He also testifies that these entries represented actual transactions at the time. What these transactions were he does not explain, nor does he explain why it was that the \$49,641.68 which was thus charged to

the United States National Bank on July 12, 1893, was all credited back to it within 30 days, or why it was that that bank never had any account of the transaction he says these charges represent. If you find that these entries represented actual transactions, as the defendant has testified, you should acquit him on these two counts; but, if you find that these entries were sham or false entries, you should consider the facts that through them Mr. Allis obtained this false credit of \$49,641.68, that the individual deposits of the bank subject to check were thereby made to appear \$33,957.05 more than they actually were, and the overdrafts at least \$32,000 less than they actually were, in determining whether the defendant caused these entries to be made with the intent to injure or defraud the bank, or deceive any of the officers or the examiner. If you find that these entries were knowingly false, and were directed by him, and that the entries of the 22d of February were false, and were directed by him, you may well consider with what intent these two sets of entries, by which a false credit was given to the defendant in the Little Rock Bank of \$99,641.68, for no consideration but the false charges against Eastern banks that owed the Little Rock Bank nothing on account of them, came to be made.

By the first and second counts of the indictment the government charges that the defendant, as president of the bank, made certain false entries in the report of the condition of the bank at the close of business December 9, 1892, which was verified by him December 16, 1892, by which the individual deposits subject to check were stated to be \$100,000 more than they actually were, and the notes and bills rediscounted were stated to be \$100,000 less than they actually were. It is undisputed that these false entries were made in the report. The bookkeeper, Yost, testifies that he made a report in pencil, showing these items as they actually were upon the books, and gave it to Mr. Allis; that he handed it back to him with these two \$100,000 changes made; and that he then made the written report according to this changed report, and the defendant verified it. On the other hand, the defendant testifies that he did not know the report was not right, and that he did not make or direct the changes in the pencil memorandum; that he compared the pencil memorandum with the books, and found it correct, and, after the written report was completed, he compared that with the pencil report, and found these two to be alike. The differences between this report and the books are radical. They were in the two most important items in the report, in the two items most frequently examined and most carefully scrutinized by bankers, examiners, stockholders, depositors, and creditors,—the item of individual deposits subject to check, and notes and bills rediscounted. The change increased the individual deposits subject to check 42 per cent., and decreased the amount of bills and notes rediscounted 45 per cent. It is for you to say whether the defendant knew of or directed this change, or whether so radical a change in these important items was made through his mistake or through a deception practiced upon him.

The court has reviewed the counts of this indictment, and called your attention to some of the important evidence in this case, in

the hope that this might be of some assistance to you in reaching a just verdict. There is much testimony bearing upon many of these counts that has not been called to your attention. You will consider that as carefully and as well as that which has been referred to, and will remember that, whatever may have been said by the court, you are the exclusive judges of the questions of fact and of the credibility of the witnesses. The charges you are trying are the making of false entries. The defendant has testified that, when the Little Rock Bank was in financial distress, he exhausted his own property and his credit to save it from disaster. He says that he made every possible effort to induce his friends to loan him money to save this bank from suspension. He testifies that his individual account was used by himself and the other officers of the bank to carry unpaid subscriptions for it that had been forced upon him. If you find that Mr. Allis knowingly made any of the false entries charged with the intent explained to you, it is no defense for him that he struggled to save the bank, or to provide the money to pay its depositors by borrowing the money from others. It is no defense against one crime that the defendant did not commit another. But if you find that the false entries were made by his direction, you may and ought to consider this testimony of the defendant carefully in deciding whether or not he caused those entries to be made with the intent to injure or defraud the bank, or any corporation, firm, or person, or with the intent to deceive any of its officers or any examiner appointed or thereafter to be appointed by the comptroller.

On the other hand, the defendant is not on trial here for embezzlement, or abstraction or misapplication of funds, or for wrecking the bank. The evidence of credits and of moneys he obtained from this bank is before you for the purpose of aiding you to determine who caused the entries in question to be made in the books and reports, and if you should find that the defendant made them or caused them to be made, and that they were false, then to assist you in deciding whether or not the defendant, who by the entries of February 22 and July 12, 1892, if you find they were false, obtained this false credit of \$99,641.68, on false charges against Eastern banks, that owed the Little Rock Bank nothing on account of them,—whose account, if you believe the uncontradicted testimony of Mr. Hays, was overdrawn, in amounts varying from a few dollars to over \$40,000 184 days out of 222 days between February 2 and December 10, 1892,—and who testifies that he owed the bank about \$40,000 when it failed, made any of these entries knowingly, with any intent to injure or defraud the bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the bank, or any examiner appointed or thereafter to be appointed to examine its affairs. For this purpose, and for no other purpose, should you consider this evidence.

It is not necessary, in order to convict the defendant, that you should find him guilty of all the 17 offenses charged in the counts of this indictment submitted to you. If you have no reasonable doubt that he knowingly caused any one of the false entries charged in any of these counts to be made, with the intent explained to you,

it is your duty to find him guilty. On the other hand, if there is no one of the offenses charged in any of these counts that you do not find him to be guilty of beyond a reasonable doubt, it is your duty to acquit him.

The jury retired, and, after they had deliberated for 24 hours, the court recalled them, and inquired if they had reached a verdict, to which the jury, through their foreman, responded that they had not. The court then asked if there was any portion of the charge of the court that it would be of assistance to them to have re-read, to which the foreman of the jury replied that there was a portion of the charge that was not fully understood by all the jury,—that portion in reference to the weight of the testimony of the witnesses. The court thereupon re-read that part of the charge which related to the conflict and weight of testimony of the witnesses.

After re-reading that part of the charge, the court further charged the jury as follows:

This is an important case. The trial has been long and expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive. The court is of the opinion that the case cannot be again tried better or more exhaustively than it has been on either side. It is therefore very desirable that you should agree upon a verdict. The court does not desire that any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And, although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to 12 men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. In the present case the burden of proof is on the United States to establish its case beyond a reasonable doubt, and if, upon any count of the indictment submitted to you, you have a reasonable doubt, based upon the evidence, of the guilt of the defendant, you ought to acquit him on that count. But, in conferring together, you ought to pay proper respect to each other's opinions, with a disposition to be convinced by each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought

seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows. In order to acquit the defendant of the 17 charges submitted to you, you must consider all of them, and find that he is not guilty of any of them. On the other hand, if you find that he is guilty of any one of them, you should return a verdict of guilty. You may conduct your deliberations as you choose, but I suggest that you now retire and carefully consider again the evidence relating to a few counts,—for instance, the fourteenth and fifteenth, or the eighth and ninth,—and to call your attention to them more clearly I will again read to you that portion of the charge relating to the claims of the parties concerning these four counts.

After re-reading the portion of the charge relating to the eighth and ninth and fourteenth and fifteenth counts of the indictment, the court made the following closing remarks to the jury:

Of course, gentlemen of the jury, you must consider all the other parts of the charge heretofore read to you also. I have simply called your attention to these four counts, thinking, possibly, that I might assist you in arriving at a just conclusion. The court and jury are here to come to a just and righteous result. No doubt you are as anxious to reach it as am I. So anxious is the court that, having spent now two weeks in the trial of this cause, I am willing to stay here another, if by that means we may be able to reach a just and proper result in this trial. You may retire.

The jury returned a verdict of guilty on the fourteenth count of the indictment, upon which verdict the defendant was sentenced to imprisonment for the term of five years. A writ of error was sued out to the supreme court, where the judgment was affirmed. See *Allis v. U. S.*, 155 U. S. 117, 15 Sup. Ct. 36.

"ZANTE CURRANTS."

In re WISE, Collector.

(Circuit Court, N. D. California. March 26, 1896.)

No. 12,102.

1. CUSTOMS DUTIES—APPEAL FROM BOARD OF GENERAL APPRAISERS—AUTHORITY OF COLLECTOR.

Under the fifteenth section of the customs administrative act of June 10, 1890, a decision of the board of general appraisers as to the classification of imported goods is subject to review in the circuit court on an application in behalf of the United States, which application may be made by the collector without first obtaining authority from the secretary of the treasury.

2. EVIDENCE—USE OF DICTIONARIES.

Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 13 Sup. Ct. 881, 149 U. S. 304, followed.

3. CUSTOMS DUTIES—CONSTRUCTION OF TARIFF LAWS.

The rule is well settled that, in interpreting a name or expression applied to articles upon which duties are laid, congress uses such terms in their ordinary commercial sense, rather than in their distinctive or technical sense.

4. SAME.

Whether an imported article is or is not known in commerce by the word or terms used in the act imposing the duty is a question of fact for the jury, and not a question of construction; and, in the case of an appeal from a decision of the board of general appraisers, it must be determined by the court as a question of fact.

5. SAME.

Where congress has designated an article by a specific name, and imposed a duty upon it, general terms in the same act, though sufficiently broad to comprehend such article, are not applicable to it. The article will be classified by its specific designation, rather than under a general description.

6. SAME—ZANTE CURRANTS.

"Zante currants," as used in paragraph 217 of the act of August 28, 1894, applies to the small, seedless raisins grown on the mainland of Greece, in the Archipelago, and other places in the Levant, and is not confined to currants raised only in the Island of Zante. The use by congress of the capital letter "Z" in the word "Zante" is of no significance in the construction, since grammatical propriety alone requires it.

7. SAME—REVIEW OF BOARD OF GENERAL APPRAISERS' DECISION.

The rule stated in some of the cases, that the court will not reverse the decision of the board, even if against the weight of the evidence, where there is sufficient evidence to warrant its finding, has little if any application to cases in which additional testimony of an important character is taken in the circuit court, and where the ultimate and decisive question is as much one of law as of fact.

An application and petition were filed by the collector of customs for the port of San Francisco for a review, under section 15 of the customs administrative act of June 10, 1890, of the decision of the board of United States general appraisers in relation to the classification and duty on certain currants imported by S. L. Jones & Co. The board of general appraisers held that the currants imported were not Zante currants, and therefore did not come within the provision of paragraph 217 of tariff act of August 28, 1894, commonly known as the "Wilson Bill," but did come within the provisions of paragraph 489, and were not subject to duty as being not otherwise provided for.

H. S. Foote, U. S. Dist. Atty., and Samuel Knight, Asst. U. S. Atty.

A. P. Van Duzer, for importer.

MORROW, District Judge. This is an application and petition by John H. Wise, collector of customs of the port of San Francisco, for a review of the questions of law and fact involved in the decision of the board of United States general appraisers at the port of New York in the matter of the classification of an importation of 500 barrels of currants at the port of San Francisco under the act of congress entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," approved August 28, 1894, and commonly known as the "Wilson Bill." The currants were imported on March 19, 1895, from Liverpool, on board of the

British ship Drumburton, and were invoiced as "plum pudding, label J, currants," and were so entered at the customhouse. They came originally from Patras, Greece. Thereafter, on April 12, 1895, the collector of customs classified said currants as "Zante currants," and as dutiable, under paragraph 217 of the act of congress above referred to, at the rate of 1½ cents per pound. The importers entered their protest against this ruling of the collector, and appealed to the board of general appraisers then on duty at the port of New York, claiming that said article was not Zante currants, but currants grown in the provinces of Greece, on the mainland, and therefore free of duty, as dried fruit not otherwise provided for, and that said currants were not known commercially as raisins or dried grapes. The board of general appraisers decided in favor of the importers. To reverse this decision the collector brings the question before this court, under section 15 of the customs administrative act of June 10, 1890, for a review, and for a construction of law respecting the classification of said currants, and the duty, if any, imposed thereon.

It is objected at the outset that this court has no jurisdiction of this matter, for the reasons—First, that the decision of the board of general appraisers is final; and, second, that the collector had no authority from the secretary of the treasury to bring the matter into this court for a review of the decision of the board. These objections are disposed of by the language of section 15 of the customs administrative act of June 10, 1890, which provides as follows:

"That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the secretary of the treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided in section fourteen of this act, as to the construction of the law and facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them, may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States, within the district in which the matter arises, for a review of the questions of law and fact involved in such decision."

Nothing is said about first obtaining authority from the secretary of the treasury to bring the matter within the jurisdiction of the circuit court, and it is evident that no such authority is required.

The collector of customs claims that the currants in question are Zante currants, and that they are expressly included in paragraph 217 of the present tariff act, which reads as follows: "Plums, prunes, figs, raisins, and other dried grapes, *including Zante currants*, one and one-half cents per pound." The importers contend that the currants are not Zante currants, but that they are provincial currants,—that is, that they come from Patras, Greece, on the mainland, and not from the Island of Zante,—and are therefore covered by paragraph 489, which places on the free list "fruits, green, ripe, or dried not specially provided for in this act." The evidence now before the court for its consideration consists (1) of the testimony and exhibits introduced before the board of general appraisers, and incorporated in their return to the order of this court of July 17, 1895, directing them to transmit the record of said matter, and the evidence taken by them therein, together with a certified statement of the facts in-

volved in the case, and their decision thereon; (2) of the testimony and exhibits introduced in this court before the special referee in San Francisco.

Without entering into a minute consideration as to the effect and sufficiency of the evidence taken before the board of general appraisers at New York, it is sufficient to say that it is completely overcome by the evidence taken in this court, before the referee. Eight witnesses were called by the protestants in New York. Several of them professed to have more or less knowledge concerning Zante currants, but none of them appeared to be experts. They certainly were not expert viticulturists or horticulturists; nor, so far as their testimony shows, had any of them made a special study of the Zante currant, or of currants in general. Several of them admitted that they were not experts, and knew but little about Zante currants. Such knowledge as they did possess appears to have been acquired in the course of dealing in dried fruits, and by reason of importations made of currants; and, while sufficient for the ordinary purposes of trade, it cannot be said to be sufficiently competent to be accepted as binding expert testimony. Four of the witnesses identified a sample of the importation as being, not a Zante currant, but a Patras currant from the mainland. Four other witnesses testified that the expression "Zante currants" was understood to mean currants from the Island of Zante alone, and not from the mainland. All these witnesses were subjected to little, if any, cross-examination. One witness, in the course of his examination, stated that a Zante or Patras currant was a fruit other than a grape. This was clearly an error, and is completely and conclusively overcome and refuted by the unanimous testimony of all the witnesses, both for the government and for the importers, who testified in this court before the referee. The testimony taken before the referee is in marked contrast to that given before the board at New York. Most of the witnesses on the part of the government, some 23 in number, were experts, in every sense of the word, and proved themselves thoroughly conversant with the Zante currant, not only botanically, but commercially as well. Among them were professors of viticulture and horticulture at the State and Stanford Universities, several experienced vineyardists and growers of raisins, and also dealers and importers of the Zante currant on this coast. Some of them testified that they had made experiments in the growing of Zante currants in this state. They were subjected to a rigid cross-examination. The protestants produced but three witnesses, one of whom was the importer, and all of whom displayed a conspicuous want of knowledge upon the subject. Such opinions cannot stand, as against the positive statements of the experts in the case, who have made the question one of actual study, observation, and experiment. It would prolong this opinion to an unwarrantable length to rehearse the testimony given. It preponderates largely to the effect that the term "Zante currants" is a well-known commercial expression among importers, dealers, and growers of raisins, and relates to and comprehends a kind of raisin made from a small, seedless grape grown not only on the Island of Zante, but also, and to a much greater extent,

on the mainland of Greece, and other neighboring localities. "Zante currants" is simply its English name. It derives the name of "currants" from the fact that in times past it was shipped from the city of Corinth, Greece. In German it is called "Korinthen"; in French, "raisin de Corinthe"; in Spanish, "pasas de Corinto." It is a raisin grape, as distinguished from the shrub currant, with which its name may be confounded, but from which it is entirely distinct; the former belonging to the grapevine family, or *vitis vinifera*, of plants, the latter to the shrub, or ribes. A Zante currant, on the vine, is a small-sized grape. When picked and dried, it is a "dried grape," or kind of raisin, whose popular and commercial designation is "Zante currants." In the Century Dictionary, "currant" is defined as "A very small kind of raisin or dried grape imported from the Levant, chiefly from Zante and Cephalonia, and used in cooking." Precisely the same definition is given in Webster's International Dictionary, issue of 1890. In the Encyclopedia Britannica (Ed. 1877) the following definition is found: "Currant. The dried, seedless fruit of a variety of the grapevine, *vitis vinifera*, cultivated principally in Zante, Cephalonia, Ithaca, and near Patras, in the Morea." In the Standard Dictionary of the English language, published in 1895, a "currant" is defined to be "a small, seedless raisin imported from the Levant, and called usually 'dried currants' and 'Zante currant.'" While it is true that dictionaries are not, of themselves, evidence, still they may be referred to "as aids to the memory and understanding of the court." *Nix v. Hedden*, 149 U. S. 304, 307, 13 Sup. Ct. 881, and cases there cited. It may be interesting, in this connection, to refer briefly to the testimony of Dr. Gustav Eisen, curator of the Academy of Sciences, of San Francisco, an acknowledged authority on viticulture and horticulture, who testified that he had made the Zante currant one of the objects of his researches and studies. He gave the following account of the history of that grape or vine:

"The first time we hear of the Zante currant is about the year 1333, when we know, from some manuscripts and other publications in England, that there was considerable trade carried on between the Venetians and the English in Northern Europe, generally, in a fruit that was known as the 'raisin of Corinth.' That fruit trade in 'Corinth' or 'Corinths,' as they are known in several European languages to-day, was carried on for several hundred years, until the time when the Turks conquered Greece. Then it was to their interest to prevent the foreign traders from entering the gulf of Corinth. That was some time in the sixteenth century. * * * In other words, the Zante currant was originally only grown on the mainland of Greece, and shipped from the town of Corinth. The principal growth was along the Gulf of Corinth. After the Turks conquered Greece the trade in currants died out completely. Then the currant was, later on, introduced to the Island of Zante, in about the middle of the sixteenth century,—1550 or 1560, or thereabouts,—* * * in order to create a new industry for the islands. Since that time the currants have been known generally as 'Zante currants,' regardless of their place of growth. For a long time afterwards there were no currants grown at all, or at least there were no currants shipped from the mainland of Greece. That is of much later date, when the currant was again reintroduced from Zante to the mainland of Greece. But during the last few years, the trade and cultivation of the currants have increased enormously on the mainland of Greece, and to such an extent that now the proportion of currants from the mainland is a great many times more than that from the

island. While the island produces about eight thousand tons, the mainland of Greece produces one hundred and forty thousand or one hundred and fifty thousand tons of Zante currants."

E. W. Hilgard, professor of agriculture at the State University, testified that a Zante currant was—

"A raisin made from a small grape which grows in the Ionian Isles, and also in the Archipelago there; also, on the mainland of Asia Minor. They are dried and prepared in various ways, and shipped to the whole world. It is the only region that, so far, has produced this grape to perfection."

Without going further into the evidence, it is enough to say that, as a whole, the following four propositions of fact were, to my mind, conclusively established: (1) That the currants comprising the importation in question, of which Exhibit 1 is a sample, are Zante currants; (2) that Zante currants are a kind of raisins; (3) that Zante currants are grapes dried; and (4) that Zante currants are not the product exclusively of the Island of Zante, but they are produced also on the mainland of Greece, in the Archipelago, and other places, and in much larger quantities than on the island. Being Zante currants, they come within the language of paragraph 217, as above set forth, and are subject to the duty of $1\frac{1}{2}$ cents per pound therein prescribed.

But counsel for the importers claims that the use of the word "Zante" indicates that congress meant to limit the imposition of the duty to currants produced only in the Island of Zante, and that as the importation involved in this case came originally from Patras, in Greece, on the mainland, and is a product of the provinces of Greece, therefore it is not subject to the duty imposed by paragraph 217, but, on the contrary, it is entitled to free entry under paragraph 489, which exempts from duty "fruits, green, ripe, or dried, not especially provided for in this act." In interpreting a name or expression applied to articles upon which duties of importation are laid, it is well settled that congress uses such terms in their ordinary commercial sense, rather than in their distinctive or technical sense. As was said in *Andrews' Rev. Laws*, p. 181:

"It may be asserted, as a general principle, that tariff laws are to be construed according to the commercial meaning of the terms used in them. They are written in the language of commerce, rather than the language of science; and, if resort was not had to the terms and usages of commerce for their interpretation, they would operate with injustice to the importer, and involve the revenue officers in constant controversy."

See, also, to the same effect, the following authorities: *Lee v. Lincoln*, 1 Story, 610, Fed. Cas. No. 8,195; *Two Hundred Chests of Tea*, 9 Wheat. 430; *Barlow v. U. S.*, 7 Pet. 404; *U. S. v. 112 Casks of Sugar*, 8 Pet. 277; *Elliott v. Swartout*, 10 Pet. 137; *Curtis v. Martin*, 3 How. 106; *Tyng v. Grinnell*, 92 U. S. 467; *Arthur v. Morrison*, 96 U. S. 108; *Swan v. Arthur*, 103 U. S. 597; *Schmieder v. Barney*, 113 U. S. 645, 5 Sup. Ct. 624; *Drew v. Grinnell*, 115 U. S. 477, 6 Sup. Ct. 117; *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240; *Arthur v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. 714; *Robertson v. Salomon*, 130 U. S. 412, 9 Sup. Ct. 559; *Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55; *Earnshaw v. Cadwalader*, 145 U. S. 247, 12 Sup. Ct. 851; *Nix v. Hedden*, 149 U. S. 304, 13 Sup. Ct.

881. In *Tyng v. Grinnell*, *supra*, it was said by Mr. Justice Clifford that:

"Tariff laws are passed to raise revenue, and, for that purpose, substances are classed according to the general usage and known denominations of trade. Whether a particular article is designated by one name or another in the country of its origin, or whether it is a simple or mixed substance, is a matter of very little importance in the adjustment of our revenue laws, as those who frame such laws are chiefly governed by the appellations which the articles bear in our own markets, and in our domestic and foreign trade. Two Hundred Chests of Tea, 9 Wheat. 438. Laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense; and this court, sixty years ago, decided that congress intended that they should be so administered and understood. *U. S. v. 112 Casks of Sugar*, 8 Pet. 279. Such laws, say this court, are intended for practical use and application by men engaged in commerce; and hence it has become a settled rule, in the interpretation of statutes of the description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used. *Elliott v. Swartout*, 10 Pet. 151. Congress must be understood, says Taney, C. J., as describing the article upon which the duty is imposed according to the commercial understanding of the terms used in the law in our own markets; and the court held in that case that congress, in imposing the duty, must be considered as describing the article according to the commercial understanding of the terms used in the act of congress when the law was passed imposing the duty. *Curtis v. Martin*, 3 How. 109. Suffice it to say, without multiplying authorities, that the rule of law is settled that the question whether an imported article is or is not known in commerce by the word or terms used in the act imposing the duty is a question of fact for the jury, and not a question of construction; and of course it must, in a case like the present, be determined by the court as a question of fact, the issues of fact, as well as of law, being submitted to the court. *Lawrence v. Allen*, 7 How. 797."

In *Twine Co. v. Worthington*, 141 U. S. 468, 471, 12 Sup. Ct. 55, this principle was thus briefly and succinctly summed up:

"It is a cardinal rule of this court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification, without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied."

The word "commercial," in this connection, is to be understood in its comprehensive sense of buying, selling, and exchange in the general sales or traffic of our own markets. 18 Op. Attys. Gen. 530, 532; *Earnshaw v. Cadwalader*, 145 U. S. 247, 258, 12 Sup. Ct. 851. It is also a rule in the interpretation of revenue laws that:

"Where congress has designated an article by a specific name, and imposed a duty upon it, general terms in the same act, though sufficiently broad to comprehend such article, are not applicable to it; in other words, the article will be classified by its specific designation, rather than under a general description." *Homer v. Collector*, 1 Wall. 486; *Arthur v. Lahey*, 96 U. S. 112; *Arthur v. Stephani*, Id. 125; *Movius v. Arthur*, 95 U. S. 144; *Twine Co. v. Worthington*, 141 U. S. 468, 474, 12 Sup. Ct. 55.

Applying these rules of interpretation to the facts of the case at bar, and it is obvious that the term "Zante currants," used in paragraph 217 of the Wilson act, was employed in its commercial sense, as understood in this country, and applies to all currants of that name or kind, wherever produced in foreign countries, and that it

has no reference, technically, to currants coming alone from the Island of Zante. No restrictions or exceptions as to places are either expressly or impliedly made. The mere fact that the currants comprising the importation in this case bear the name of "Zante," an island in the Archipelago, is of itself devoid of particular significance as indicating that congress meant to tax currants which come only from the Island of Zante. The tariff act, in the enacting clause, applies to "all articles imported from foreign countries." As a matter of fact, the evidence tended to show that much larger quantities of Zante currants, so called, are grown and exported from the provinces of Greece than from the Island of Zante, and that those grown on the mainland are still known, commercially, in this country, as "Zante currants." In other words, "Zante currants" is the commercial name for this variety of grape, when dried into raisins. It would be unreasonable to suppose that congress, in imposing duties on Zante currants in the general language employed, intended to tax those coming from the Island of Zante alone, and not those which come, in much larger quantities, from other localities. Such an interpretation would result in an unfair and unwarranted discrimination between foreign places of produce, which, in the absence of clear and unambiguous words to the contrary, should not be imputed to congress. It is but fair to assume that, had it intended to limit the imposition of import duties on Zante currants grown and exported from that island only, it would have so stated in clear and plain language.

Counsel for the importers claims, however, that the fact that the statute has the capital letter "Z" in the word "Zante" indicates that congress intended that currants from that island alone should be taxed. This argument is without merit. The use of the capital "Z" is of no significance as indicating such an intent as claimed. The observance of grammatical propriety would require the use of the capital. It is a proper name, and it is a well-settled rule of grammatical construction that proper names, used as adjective elements, such as the word "Zante" in the phrase "Zante currants," should retain the capital letter. While it is true that the article in this case derives its name, etymologically, from the Island of Zante, yet, according to the greater weight of the evidence, the term "Zante currants," understood commercially in this country, applies to that article, wherever produced,—whether it be on the Island of Zante, or on the mainland in the provinces of Greece, or elsewhere.

It is further claimed by counsel for the importers that in view of the fact that congress dropped the expression "or other," contained in the provision in the tariff law of 1883 (Morrison act), paragraph 293 thereof, which imposed a duty of one cent per pound on "currants, Zante or other," and also in the provision in the tariff law of 1890 (McKinley act), paragraph 578 thereof, which declared "currants, Zante or other," free of duty, indicates that, in referring to Zante currants in paragraph 217 of the present law, it had reference exclusively to currants grown on the Island of Zante. This was the view which seems to have been taken by the board of appraisers. The opinion of the board contains this language:

"In the tariffs named, 'or other' followed 'Zante.' The omission of these words, the use of the word 'including,' and the specific enumeration of Zante currants in paragraph 217, would indicate that congress excluded from the operation of the paragraph all but Zante currants. If it was the intention to make all currants dutiable, it was very simple to say, 'all other dried grapes including currants,' and not, as it reads, 'including Zante currants.'"

The board found that:

"(1) The goods were not Zante currants; (2) they are not commercially known as raisins or dried grapes."

The appraisers were influenced largely, no doubt, in their conclusions, by the evidence introduced before them tending to show that this importation came originally from Patras, Greece, and that the term "Zante" referred exclusively to currants produced on the Island of Zante. But, as stated above, this evidence was met and completely overcome by the testimony of the experts and other witnesses in this court, who had had superior opportunities for study, observation, and experiment, and were therefore in a much better position to become familiar with and know the Zante currant, and its commercial relation and designation. It is urged, in this connection, that the decision of the board of appraisers should not be reversed where there is a substantial conflict of the evidence. Several cases in support of this position are cited by counsel for the importers; among them, that of *In re Bing*, 66 Fed. 727. The court there held that it would not set aside the decision of the board, even if against the weight of the evidence, where the board had sufficient evidence to warrant its finding. But such a rule can have little, if any, application to a case like the present, where additional testimony of the highest character was taken, and where the ultimate question decisive of the controversy is as much one of law as of fact.

My opinion is that the classification of the article imported and involved in this case as "Zante currants," made by the collector of the port of San Francisco, is correct, and that it is therefore subject to the duty prescribed in paragraph 217, of 1½ cents per pound. The opposite decision, reached by the board of general appraisers, is erroneous, and should be reversed, and it is so ordered.

IN RE BUFFALO NATURAL GAS FUEL CO.

(Circuit Court, N. D. New York. March 13, 1896.)

1. CUSTOMS DUTIES—APPEALS FROM BOARD OF APPRAISERS—FINDINGS OF FACT.
The decision of the board of appraisers, on evidence produced before it, in respect to a question of fact, such as whether a given substance is or is not a mineral, should not be disturbed by the court, if fairly sustained by the evidence, even if the court were inclined to a different opinion.

2. SAME—CLASSIFICATION—NATURAL GAS.

Natural gas, brought into this country from Canada through pipes, was exempt from duty as a crude mineral, under paragraph 651 of the act of 1890, and could not be assessed as a nonenumerated unmanufactured article, under section 4.

This was an application by the collector of the port of Buffalo for a review of the decision of the board of general appraisers sustaining

the protest of the importer and holding that the natural gas brought into this country by pipe line under the Niagara river is a crude mineral and, therefore, exempt from duty under paragraph 651 of the act of 1890. The question has twice been before the board and two opinions have been delivered by them which clearly state the facts and the questions in controversy.

The first opinion was delivered July 10, 1891, and is as follows:

"Sharpe, G. A. We find the facts in this case as follows: The Provincial Natural Gas and Fuel Company, of Ontario, Canada, obtain a product of natural gas from the ground by sinking wells therein, which gas is brought from Canada to the city of Buffalo in pipes under the Niagara river, a distance of about twelve miles. It is sold to the appellants in Buffalo, who, in turn, measure it out and sell it to their customers. Under an opinion of the treasury department (Synopsis, 10,448), the product was assessed for duty by the collector ten per cent. ad valorem under section 4 of the existing tariff. The protest claims that natural gas is free under paragraph 496 as a crude bitumen, or that it is free under paragraph 651 as a crude mineral. At the time of the introduction of this natural gas it was supposed that it could be measured by a meter placed on the American side of the Niagara river, but it is represented to us that practical operations developed the fact that the pressure was about 600 pounds to the square inch, and too great for the endurance of any meter. The collector reports that he was thereupon compelled to resort to the books of the appellants for evidence of the quantity imported, and the bills of the Ontario corporation furnished to the appellants, accompany the entry of the merchandise, showing the number of feet of gas to correspond with the entry, and being approved by the appraiser at Buffalo. The quantity imported was approximately ascertained by the amounts shown to have been burned for the month, as recorded by the several private meters taking the gas from the Buffalo company. By a supplementary report the collector shows that the embarrassment arising from the difficulty of measurement has lately been increased. This natural gas is now furnished for fuel to the city waterworks, and to large manufactories, and no reckoning is kept of the amount consumed, as the contract is made between the parties for an amount of fuel gas sufficient to operate the respective works at a price to be computed by the cost of the coal used during the preceding year. These several consumptions are not measured by meter or otherwise, but a large pipe is run into the furnace of such consumers, and the fuel gas flows in sufficient quantities to fulfill the terms of the contract. The customs officials allege that they are left without data other than the estimates of the company. On this state of things the suggestion is made that the collection of duty upon an article that cannot now be measured, weighed or gauged without depending upon the importer's estimate tends to bring the tariff laws and regulations into disrepute, and that natural gas should be held to be free, and the letter of the department is cited in reference to electricity, transmitted by cable from the Canadian to the American side of the Niagara river to the effect that the same would not be liable to duty. (Synopsis, 10,086.) We cannot sustain the two contentions of the protest that natural gas is free: (1) Because it is a crude bitumen, or (2) because it is a crude mineral. The appellants allege that the introduction of this gas does not affect American industries or interests. If this were legitimate argument for our consideration, we might say that such contention does not seem to be reasonable. Indeed, the papers in the case before us show that it already comes into competition with American gas and coal, and that another company is laying a large main across the Niagara river to connect with the Canadian wells. The papers also reveal the fact that some natural gas is brought to Buffalo from Pennsylvania for consumption, the supply being limited on account of the distance. We are well aware of the fact that this useful agent can only be drawn from the pockets where nature has placed it. This is also true of the precious metals and of the precious stones, and it is not given us to know how soon these repositories may be enlarged, perhaps to so great an extent as to affect existing conditions. Besides, if natural gas can be imported free from the reasons

given in the appellant's argument, why may not gas manufactured from coal subject to duty be claimed to be nondutiable when furnished to consumers by such methods as to make its measurement a matter of difficulty? Nor can we make this difficulty of measurement the ground for holding the article to be free. The method of computation, if not provided for by law, is a method of administration, which intelligent officers will reach under the direction of the department, and for these reasons we hold that natural gas is dutiable at 10 per cent. ad valorem, under section 4 of the existing tariff, as an unmanufactured article not enumerated. The decision of the collector is affirmed."

The matter came again before the board upon a second protest when additional testimony was adduced and new questions of law presented. The opinion was delivered May 20, 1893, and is as follows:

"Wilkinson, G. A. The merchandise is natural gas imported at Buffalo from Canada by mains under the Niagara river, and is used as fuel and for illuminating purposes. It was assessed for duty as a nonenumerated unmanufactured article at 10 per cent. under the act of October 1, 1890, and is claimed to be exempt from duty (1) on the ground that it is not an article within the meaning of the tariff; (2) as crude bitumen under paragraph 496, and (3) as a crude mineral under paragraph 651. In G. A. 744 the board considered and overruled a protest similar to this. But no evidence was introduced in support of the claims, and attention was given chiefly to the first point. We reaffirm the ruling named as to the first and second points, but a lengthy and careful investigation of the subject leads to the conclusion that the third claim in the protest is well founded. The natural gas in question is similar to that produced in Pennsylvania and Ohio, but it was not imported prior to October 1, 1890. Consequently, there are no precedents to serve as guides. Nor does it appear that at or prior to the passage of the present tariff act the dutiable character of natural gas was ever considered in or out of congress. Nor has there ever been any trade or popular designation which would indicate its proper classification for dutiable purposes. It is proper, therefore, to resort to the evidence of scientific experts and to other authorities bearing upon the question. In considering publications it is not believed that the date is of any moment, provided the source is impartial. At the several hearings in New York and in Washington, D. C., the board examined a number of well-known geologists and chemists. While there was conflict in the testimony, the preponderance of the evidence was to the effect that natural gas is a crude mineral. Lexicographers and mineralogists give the word 'mineral,' in its primary and broadest sense, a definition which would embrace natural gas, although their secondary and limited definitions would not. Nothing appears in the tariff, however, to show that congress intended the narrower, and not the broader, meaning. The question has recently been judicially determined in Canada. Section 565 of the municipal act of the dominion empowers a township to lease or sell the right to take minerals under any highway. The town of Gosfield leased this privilege to the Kingsville Gas Company. The Ontario Gas Company asked for an injunction to restrain the sinking of the well, on the ground that natural gas is not a mineral. In his opinion, Judge Street, of the court of common pleas, stated that according to British authorities 'a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give a more limited meaning,' and 'it has been laid down that the word "minerals," when used in a legal document or in an act of parliament, must be understood in its widest signification, unless there is something in the context or in the nature of the case to control its meaning. I think myself bound by the authorities to give to the word, when used in this act, its widest signification.' The motion was argued May 31, 1890. Gas Co. v. Smart, 19 Ont. 591. The case was carried to the court of appeals. Chief Justice Haggerty rendered the decision November 10, 1891. He said in part: 'There was hardly any attempt to rebut or dispute the accuracy of scientific nomenclature in describing minerals as solid, liquid, and gas. The objection

urged was that the legislature (especially at the date of the enactment) could not and did not include natural gas under the term "minerals." I cannot see how we can qualify the words used by the legislature when there is nothing in the enactment to explain or limit their ordinary meaning. On full consideration, I have arrived at the opinion that our learned brother could not properly have come to any other conclusion than that natural gas falls within the meaning of minerals in the statute.' 18 Ont. App. 626-632. In the reports of the census, the United States geological survey, and various state authorities, natural gas is enumerated in the list of mineral products and mineral resources. The 'Statistical Abstract of the United States,' prepared by the treasury department, gives on pages 53-55 a table of 'quantities and values of minerals produced in the United States during the calendar years from 1887 to 1891, inclusive.' In this category, under the heading of 'Nonmetallic' on page 54, natural gas is named third in a list of forty, which includes solids and liquids as well as gas. We find that natural gas is a crude mineral, and sustain the claim that it is exempt from duty under paragraph 651, N. T."

The collector appeals from the conclusion reached by the board in its second decision exempting natural gas from duty.

William F. Mackey, Asst. U. S. Atty., for collector—
Herbert P. Bissell, for importer.

COXE, District Judge (after stating the facts as above). The board of general appraisers have considered the question involved with unusual care. It has been argued before them on two occasions. On the second hearing the evidence was so persuasive as to induce them to change their former ruling and hold that the natural gas in question was entitled to enter duty free. The court sees no reason to disturb this decision. Indeed, it is probable that were the issue to be decided here de novo a similar conclusion would be reached. But this is not the question. Even though the court should reach a different conclusion on the facts it would still be its duty to affirm the finding of the board if fairly sustained by the proof. If this were an appeal from a judgment entered upon the verdict of a jury, or the report of a referee in a common-law action, or of a master or commissioner in a chancery or admiralty suit, would the court grant a reversal upon the ground that the finding was against the weight of evidence? This is the question now to be determined and it is thought that it must be answered in the negative. There are many reasons why this rule should apply in these cases. The board is composed of a body of trained experts constantly passing upon questions of fact arising under the tariff laws and having the great advantage of seeing and hearing the witnesses. Their findings upon the facts should not be lightly set aside. The rule was enunciated soon after the board was organized and has been reiterated in a large number of decisions since. It is said that the question whether or not natural gas is a crude mineral depends largely upon expert opinion. This is true of many controversies and especially those under the tariff laws. It is, nevertheless, a question of fact. For the reason already stated it is not thought necessary to discuss the scientific questions so ably presented by the briefs.

Had it been the intention of congress to impose duty upon this volatile, invisible and imponderable product of nature, which is in-

capable of being gauged, measured or entered at the customhouse as are other imported articles, it is difficult to believe that it would have been left to the "catch-all" clause in question. Although the record does not show that natural gas had been imported into this country prior to the act of 1890 it does show that it was well known at that date and had been an article of commerce for years and, of course, might at any time be brought to the United States from Canada or Mexico. Is it not fair to presume that had the lawmakers believed it subject to duty some definite provision would have been made for it in the statute? Even conceding the question to be doubtful the doubt should be resolved in favor of the importer.

The decision of the board should be affirmed.

UNITED STATES v. DICKSON.

(Circuit Court of Appeals, Second Circuit. March 18, 1896.)

CUSTOMS DUTIES—APPRAISAL—GINGER ALE IN BOTTLES.

In assessing duty on ginger ale in bottles under paragraph 248 of the act of 1894, the provision therein that "no separate or additional duty shall be assessed on the bottles" prevents the collector from adding the value of the bottles to the value of the ale, on the ground that they are coverings, under the administrative act of June 10, 1890. 68 Fed. 534, affirmed.

This is an appeal from a decision of the circuit court, Southern district of New York (68 Fed. 534), reversing a decision of the board of general appraisers which sustained the collector's decision classifying for duty certain imported ginger ale.

Wallace Macfarlane, U. S. Atty.

Edward Hartley, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The appellee imported, September 10 and 18, 1894, certain consignments of ginger ale in bottles.

The tariff act of August 28, 1894, provides as follows:

"88. Green and colored, molded, or pressed, and flint and lime glass bottles holding more than one pint, and demijohns and carboys, covered or uncovered, whether filled or unfilled and whether their contents be dutiable or free, and other molded or pressed green and colored and flint or lime bottle glassware, not specially provided for in this act, three-fourths of one cent per pound; and vials holding not more than one pint and not less than one-quarter of a pint, one and one-eighth cents per pound; if holding less than one-fourth of a pint, forty cents per gross; all other plain green and colored, molded or pressed, and flint, lime and glassware, forty per centum ad valorem."

"90. All glass bottles, decanters or other vessels or articles of glass when cut, engraved, painted, colored, printed, stained, etched, or otherwise ornamented or decorated; * * * provided, that if such articles shall be imported filled, the same shall pay duty, in addition to any duty chargeable upon the contents as if not filled, unless otherwise specially provided for in this act."

"248. Ginger ale or ginger beer, twenty per centum ad valorem, but no separate or additional duty shall be assessed on the bottles."

The appraiser, in ascertaining the dutiable value of the ginger ale, for the purpose of assessing the ad valorem duty, added to the value

of the ale the value of the bottles. The separate duty on bottles provided for by paragraphs 88 and 90 was not assessed. The importer protested, on the ground that the action of the collector was, in effect, the assessing of duty on the bottles additional to that on the ginger ale. Counsel for the government undertakes to defend the action of the customs officers under section 19 of the administrative act of June 10, 1890, which provides that ad valorem duty—

"Shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, * * * including the value of all * * * coverings of any kind and all other costs, charges and expenses incident to placing the merchandise in condition packed ready for shipment to the United States."

Ordinarily, bottles may properly be considered as coverings of their contents, and treated accordingly. But for many years congress has legislated in customs acts for bottles eo nomine as a separate subject of duty. Act March 2, 1861, § 17; Act June 30, 1864, § 9; Rev. St. tit. 33, Schedule B; Act March 3, 1883, par. 133; *Schmidt v. Badger*, 107 U. S. 85, 1 Sup. Ct. 530. When the administrative act of June 10, 1890, was passed, therefore it is not to be supposed that congress was ignorant of the fact that bottles were already, except when specially exempted (Act 1883, §§ 316, 317), specifically dutiable; nor is it to be assumed, in the absence of explicit language to that effect, that congress intended to cumulate duties upon them by taxing them both as bottles and as coverings.

The decision of the circuit court is affirmed.

PRESS PUB. CO. v. MONROE.

(Circuit Court of Appeals, Second Circuit. March 12, 1896.)

1. COPYRIGHT—AT COMMON LAW—EFFECT OF STATUTES.

The passage by congress of the copyright statutes has not abrogated the common-law right of an author to his unpublished manuscript.

2. SAME—SALE OF MANUSCRIPT—RESERVATION OF RIGHTS.

Plaintiff, in 1891, entered into an agreement with the managers of the World's Columbian Exposition to write a poem, to be delivered at the dedicatory exercises of the Exposition. She wrote the poem, and, after submitting it to the proper officers of the Exposition corporation for their approval, which it obtained, she received from the corporation \$1,000, and gave a receipt therefor "in full payment for ode composed by me," such receipt also providing that the corporation should have the right to furnish copies to the press for publication, and copies for free distribution, and to publish the poem in the official history of the dedication; subject to which concessions plaintiff reserved her copyright therein. After this transaction, but before the publication of the poem by plaintiff or the Exposition corporation in any way, defendant, the publisher of a newspaper, without the consent and against the will of the plaintiff and the corporation, obtained a copy of the poem, and published the same in its newspaper. *Held* that, by the terms of the receipt given to the Exposition corporation, plaintiff retained, until the poem should be published by the corporation in one of the specified ways, her common-law right to control the publication of her poem, and the unauthorized pub-

lication by defendant was an infringement of such right, for which plaintiff was entitled to recover damages.

3. EXEMPLARY DAMAGES—INFRINGEMENT OF COPYRIGHT—WANTONNESS.

It appeared from the evidence that defendant, whose newspaper was published in New York, after it had secured a copy of the poem through its agent in Chicago, was informed that the publication of the poem was forbidden on the ground that it was copyrighted; that defendant made inquiries of its agent, and, on learning that the copy in his possession bore no copyrighting words, telegraphed its agent that it would take the chances on the publication. Defendant's managing editor testified that he knew the poem belonged to the Exposition; that he made no inquiry of that corporation as to his right to buy it; that he believed he had the right, under some circumstances, to publish a literary work without the owner's consent; that his conduct in publishing the poem had never been blamed, and, so far as he knew, had been ratified, by the defendant corporation. *Held*, that it was not error to instruct the jury that, if they found the circumstances showed wanton disregard of the plaintiff's rights, they might award exemplary damages, and that a verdict for such damages was justified.

4. SAME—PECUNIARY DAMAGE UNNECESSARY.

The right to award exemplary damages, in a proper case, is not dependent, in the federal courts, upon the proof of actual pecuniary damage.

In Error to the Circuit Court of the United States for the Southern District of New York.

This case comes here on writ of error to review a judgment of the circuit court, Southern district of New York, entered December 19, 1894, upon a verdict for \$5,000 in favor of defendant in error, who was plaintiff below. The action was for damages for unlawfully publishing in the *World* newspaper a poem written by the plaintiff to be delivered on the occasion of the dedication of the Columbian Exposition, or World's Fair, in Chicago. The facts appear in the opinion.

John M. Bowers, for plaintiff in error.

Geo. H. Yeaman, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. At the time when preparations were being made for the opening ceremonies of the World's Fair, or Columbian Exposition, in Chicago, plaintiff, a resident of that city, who was engaged in the literary profession, had published poems and prose writings, and had an excellent reputation as an authoress, was invited by the committee on ceremonies to write and deliver a poem at the dedicatory exercises. That invitation was given March, 1891. The dedicatory exercises were had on October 21, 1892, in the presence of a vast concourse of people. They included the delivery of addresses by orators of well-known ability. No effort was spared to make them effective, and they were, by reason of the event which they commemorated, of exceptional interest to the country at large. For the public utterances of orator or poet who had been selected to speak on that day and in that place, the occasion was unique. The plaintiff accepted the invitation, and after many months of careful work produced an ode of some 400 lines. After it had been shown to the committee on ceremonies, and suggestions made as to changes,

she revised it, reducing its length to about 375 lines, and delivering the final revised version to the committee on September 20, 1892. Fifty-six lines of the ode were lyrical songs, intended to be sung. The original version of the ode was shown to a Mr. Chadwick, who wrote the music for these songs, and the 56 lines were published with the music so composed, in order to properly rehearse the chorus. Except of these 56 lines, there had, down to this time, been no publication of the ode by the plaintiff or by any one else. The copies which were given to the members of the committee on ceremonies and to a so-called "literary committee" were delivered to them solely to enable them to decide whether the poem was one suitable and worthy of their acceptance as the ode to be delivered at the opening exercises. Such a delivery of copies of a literary production is not a publication, and could not prejudice the owner's common-law rights. *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082; *Id.*, 5 McLean, 32, Fed. Cas. No. 1,076.

On September 23, 1892, plaintiff met the acting chairman of the committee on ceremonies, who informed her that the poem was satisfactory, and the matter arranged, and paid her \$1,000, whereupon she signed the following receipt:

"Received, Chicago, the 23rd day of September, 1892, from the World's Columbian Exposition, one thousand dollars (\$1,000) in full payment for ode composed by me.

"It is understood and agreed that said Exposition company shall have the right to furnish copies for publication to the newspaper press of the world, and copies for free disposition, if desired, and also may publish same in the official history of the dedicatory ceremonies; and, subject to the concession herein made, the author expressly reserves her copyright therein.

"Harriet Monroe."

The first question to be determined—and it is the important question in the case—is what property rights to the ode remained to the plaintiff after September 23, 1892. The evidence indicates that the receipt quoted above expressed, item by item, the conditions of the contract between Miss Monroe and the committee, which was not otherwise reduced to writing. The defendant contends that by the first clause of this receipt she transferred to the committee her entire common-law right of property in the manuscript; that the residue of the receipt is a nullity; that it cannot be construed as impairing in any way the full rights of ownership given by the first clause; that the second paragraph was intended only as a reservation of the right to take out a copyright under the United States statute, and was powerless to secure even that, since publication without the statutory copyright notice is authorized, and, the poem being once thus published, all right to restrain future piracy would be lost. We are unable to accept this construction. The whole instrument is to be construed together, and manifestly it contemplates something short of a complete transfer of all right to the committee. A reservation by the author, "subject to the concession herein made, * * * of her copyright in the poem," imports a reservation of common-law as well as of statutory copyright, and it must be made clear, either upon the face of the instrument itself or otherwise by competent proof, that the word "copyright" was used in

some more restricted sense. To the committee was given not only the right to have the poem delivered on the occasion of the dedicatory ceremonies, but also the right to publish it in the official history thereof, and the right to furnish copies for publication to the newspaper press of the world, and the right to furnish copies for free distribution. This was all the committee needed for its purposes, and, having secured all it needed, there is nothing surprising in its leaving all other rights to the author. When the committee chose to avail of its concession, and publish the poem, that act would terminate the common-law copyright, but until publication that right survived, and by the terms of the agreement was not conveyed to the committee, but reserved to the author. Any unauthorized publication would be a trespass upon that right of property, and right of action therefor would still be in the author.

The contention of the plaintiff in error that the passage by congress of the copyright statutes has abrogated the common-law right of an author to his unpublished manuscript is unsupported by authority. These statutes secure and regulate the exclusive property in the future publication of the work after the author shall have published it to the world. But this is a very different right from the ownership and control of the manuscript before publication. "That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted. * * * The argument that a literary man is as much entitled to the product of his labor as any other member of society cannot be controverted, * * * [at least until] he shall have sold it publicly." *Wheaton v. Peters*, 8 Pet. 657, 658. And that common-law right may be enforced in the federal courts whenever diversity of citizenship gives those courts jurisdiction of the parties, irrespective of whatever additional means of redress are provided by section 9 of the act of congress of February 3, 1831, now section 4967, Rev. St. U. S. See *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082; *Id.*, 5 McLean, 32, Fed. Cas. No. 1,076; *Keene v. Wheatley*, 9 Am. Law. Reg. 33, Fed. Cas. No. 7,644; *Palmer v. De Witt*, 47 N. Y. 532. The various assignments of error, therefore, which cover both the refusal of the court to direct a verdict in favor of defendant and also so much of the charge as instructed the jury that plaintiff had property rights which would be trespassed upon by an unauthorized publication of her ode, are unsound.

On September 23d—the day when the money was paid and the receipt signed—the *New York World*, a newspaper published by defendant, received a telegram from one Fay, its agent in Chicago, saying that a copy of the ode could be obtained for \$150, and asking whether it should be paid, and the ode procured. On the next day the managing editor of the *World* directed its purchase, and ordered it sent that afternoon and night to the *World* by telegraph. While the ode was in transit, a message was received from the Associated Press to the effect that it was understood that a copy of the ode had gotten out somehow, and that its publication was forbidden, on the ground that it was copyrighted. Fay was thereupon communicated

with, and replied that the copy which he had did not have any copy-righting words upon it, and that there was no indication upon it that it was copyrighted. Thereupon, and on September 24th, the following dispatch was sent to Fay in Chicago:

"We will take our chances on it. Interview Miss Monroe to-morrow, and get a good talk with her about ode and literature generally. Explain to her that the World could not miss an opportunity to give the public such a grand poem, and tell her how much better to have the World treat it as it will to-morrow, making it the great feature of the day, than to have it peddled around among the little papers.
The World."

The ode was printed in full in the issue of the paper of Sunday, September 25th, with comments upon it, a sketch of Miss Monroe, and what purported to be a portrait of her. Fay was not put on the witness stand, nor was any evidence offered to show how the copy which he bought had been obtained. The court instructed the jury that if they found "it was obtained and sold to the defendant against the mind and will and without the authority and consent of both the Exposition company and Miss Monroe, the act of publication was a wrongful violation of her rights," and that "upon that issue the plaintiff had the burden of proof." The jury were further instructed that in actions of trespass to personal property, or in actions for injury to personal property, when the circumstances showed gross or wanton or malicious disregard by the defendant of the rights of the plaintiff, the jury would have a right to give exemplary damages in excess of any actual loss which was suffered. The testimony in the case warranted the jury in finding that the defendant had reason to know that the poem had not theretofore been published; that it was the wish and intention, both of the Exposition committee and of the plaintiff, to withhold it from publication until, in the language of the circuit judge, "it should be presented to the audience with all the advantages which the enthusiasm of the occasion could give, and unmarred by criticism or comment, either polite or impolite." The managing editor testified that he knew the ode belonged to the World's Fair, and that he made no inquiry of the World's Fair committee as to whether he had any right to buy it or not; that as to the question whether an editor of a newspaper has the right to publish a literary work unless the owner consents to it, he left that matter to be settled by the lawyers; and added, "Under some circumstances, I believe that I have the right, as an editor, to publish the manuscript of a person without that person's consent." This is a restatement of the proposition so frequently advanced, when newspapers happen to be defendants, that the person or property rights of individuals are entitled to receive no consideration at the hands of the public press whenever a violation of those rights may, in the opinion of the editor, promote the entertainment of the purchasers of his paper. Testimony such as this was abundantly sufficient to warrant the jury in finding that the publication of the plaintiff's ode in the World newspaper was the result of "that wanton and reckless indifference to the rights of others which is equivalent to an intentional violation of them." *Railroad Co. v. Arms*, 91 U. S. 489. In view

of the testimony of the principal witness for the defendant, it seems to have escaped on this occasion with a light verdict.

Plaintiff in error contends that the court erred in instructing the jury that it might award exemplary damages. That in certain classes of cases juries are authorized to give punitive or exemplary damages to punish a wrongdoer and to deter others from the commission of a like wrong is well-settled law in the federal courts and in the courts of this state. *Day v. Woodworth*, 13 How. 370; *Railroad Co. v. Arms*, 91 U. S. 489; *Voltz v. Blackmar*, 64 N. Y. 440. In such cases exemplary damages may be given in addition to what may be proved to be the actual money loss of the plaintiff. It is contended, however, that when no actual damages are proved, exemplary damages should not be allowed. In support of this proposition three cases are cited from the Texas Reports, but the law of that state is peculiar on the subject of exemplary damages (*Sedg. Dam.* § 359, and cases there cited), and its decisions inapplicable where a different law prevails. Of the other cases cited on the brief, *Graham v. Fulford*, 73 Ill. 596, was an action on a special statute. *Kuhn v. Railroad Co.*, 74 Iowa, 141, 37 N. W. 116; *Stacy v. Publishing Co.*, 68 Me. 287; and *Maxwell v. Kennedy*, 50 Wis. 649, 7 N. W. 657,—sustain the contention of the plaintiff in error. They are, however, plainly at variance with the theory upon which exemplary damages are awarded in the federal courts, namely, as something additional to, and in no wise dependent upon, the actual pecuniary loss of the plaintiff, being frequently given in actions “where the wrong done to the plaintiff is incapable of being measured by a money standard.” *Day v. Woodworth*, *supra*; *Wilson v. Vaughan*, 23 Fed. 229. There is room for argument against the allowance of exemplary damages at all as anomalous and illogical. Some courts have held that it is unfair to allow the plaintiff to recover not only all the loss he has actually sustained, but also the fine which society imposes on the offender to protect its peculiar interests. But if it be once conceded that such additional damages may be assessed against the wrongdoer, and, when assessed, may be taken by the plaintiff,—and such is the settled law of the federal courts,—there is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost \$10, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrongdoing of defendant.

Several passages in the charge dealing with the question of exemplary damages were excepted to, and are set out in the assignment of errors; but, since no argument in support of such exceptions is found in the brief, and none was made on the hearing, no discussion of them need be had in this opinion. They seem to be without merit.

Plaintiff in error cites authorities as to nonliability of a corporation for exemplary damages except under special circumstances. Presumably this is in support of his request to charge, “Malice cannot be imputed to an incorporation for the acts of its agent unless it has advised or ratified the same,” which request was refused. The

court, however, charged that "a corporation cannot be made liable for exemplary damages for the acts of its employes unless it has itself directed the acts or ratified them." This was certainly all the defendant was entitled to on that branch of the case. The court stated to the jury, and error is assigned to such statement, that "Mr. Chamberlain [the managing editor] was asked, and replied in the negative, if he had ever been blamed or found fault with for his conduct; and he was also asked if his conduct had been ratified by the managers of the corporation, to which he replied that it had been, so far as he knew." This was an accurate statement of the evidence. The court in no way indicated what weight should be given to it, but left it to the jury to consider as proof which the plaintiff claimed showed a ratification. In this there was no error. Approval of the conduct of the particular editor who had directed the publication tended to prove ratification of his acts.

Exception was taken to the statement in the charge that the copy of the ode was obtained by defendant against the mind and will of the author. The evidence abundantly warranted such a statement. Exception was also taken to the statement that "the Columbian Exposition committee desired to keep this ode secret until the day of its delivery." This exception is frivolous. The court merely rehearsed the testimony of the officers of the committee on that point, and added that upon that evidence and the other proofs in the case it was contended by the plaintiff that the ode was obtained surreptitiously, and without intent of the Exposition company, leaving it to the jury to determine that question.

We are at a loss to understand from the record upon what theory the defendant supports its claim that there was harmful error in admitting in evidence any part of Exhibit 4 (a copy of the Sunday World of September 25, 1892) except the ode. When this paper was offered, defendant objected that there appeared in it the ode, and also some comments on the ode, and a picture of Miss Monroe, which defendant contended were irrelevant. No Exhibit 4 is presented here. The record states that the plaintiff, then on the witness stand, "read the first column of the article down to and including the words, 'This is set to music, and ends with the line, 'And love shall be supreme,'" and then continued reading to and including the words, 'The ode is published for the first time exclusively in the World to-day,' and then read the ode as published in the World." The only exhibit we find in the record answering to this description, in that it contains the lines quoted, comments on the ode, the ode itself in full, and a portrait of Miss Monroe, is a document marked "Defendant's Exhibit No. 1," which was, without objection, read in evidence by defendant's counsel, and marked, during the direct examination of defendant's managing editor. Whether a paper put in evidence during the examination of a witness shall be read by counsel or by witness is a matter of practice in the court below, which will not be reviewed on appeal. In allowing plaintiff thus to read the article in the World and her own copy of the ode, the trial judge committed no error. The conversations with Fay, the Chicago representative of the World, who interviewed plain-

tiff on the morning of the day of publication under instructions from defendant, were proper as tending to show knowledge on the part of defendant's agent that the poem had not been published by author or committee, and was to be withheld from publication until the day of dedication.

There are many other assignments of error; some to the admission of evidence, others to parts of the charge, or to refusals to charge defendant's requests. We have examined them all, but find in them no ground for reversal. Since they have not been discussed either in the brief of counsel or upon the oral argument, it is unnecessary to give them any fuller discussion here. The judgment of the circuit court is affirmed.

COOK & BERNHEIMER CO. v. ROSS et al.

(Circuit Court, S. D. New York. March 31, 1896.)

UNFAIR COMPETITION—IMITATION OF SHAPE OF BOTTLES.

Plaintiff, under a contract with the distiller of a popular brand of whiskey, bottled such whiskey at the distillery, and sold it under labels stating that it was so bottled, and bearing the distiller's guaranty of purity, which obtained favor in the market for plaintiff's bottling. The bottles used by plaintiff were of a peculiar shape, originally devised by plaintiff; and, by means of extensive advertising, such bottles came to be generally relied upon by purchasers as a means of identifying the whiskey bottled by plaintiff, which attained a large sale. Some time after the adoption by plaintiff of such peculiar bottles, defendants, who had been dealing for some years in the same whiskey, bottled by themselves, began to use a bottle of precisely similar shape and appearance to that used by plaintiff, though bearing labels which were in no sense imitations of plaintiff's labels. *Held*, that the use of such bottles by defendants constituted unfair competition with plaintiff, and should be restrained.

Motion for Injunction Pendente Lite.

Livingston Gifford, for the motion.

John A. Straley, opposed.

LACOMBE, Circuit Judge. The Hannis Distilling Company has for many years manufactured a rye whiskey, which it sells at wholesale in barrels under the name of "Mount Vernon Pure Rye Whiskey." The brand has long been well known and popular. Dealers in whiskey have been accustomed to buy this variety in barrels, and, after bottling it themselves, offer it to the trade in the smaller package under the name of "Mount Vernon." The purchaser's assurance that the whiskey in the bottles is pure Mount Vernon, unaltered by rectification or otherwise, of course depends upon the reputation and character of the individual bottler. Complainant is the successor of the firm of Cook & Bernheimer. That firm, in 1889, entered into a contract with the Hannis Distilling Company whereby said firm and its successors became possessed of the exclusive right of bottling Mount Vernon whiskey at the distillery of the company. The importance of this concession lies in the fact that under the provisions of sections 3280, 3244, 3456, Rev. St. U. S., no one

is allowed to carry on the business of distilling on any premises less than 600 feet in a direct line from any premises used for rectifying, nor to rectify distilled spirits on any premises less than 600 feet from a distillery. A heavy fine is imposed for any violation of these provisions. It is evident, therefore, that, when whiskey is bottled at a distillery, the purchaser has a further assurance than the mere reputation of the individual bottler that there has been no adulteration or modification of the original article during the process of so-called "rectification." It is evident, therefore, that the exclusive right of bottling a popular brand of whiskey at the distillery is valuable to its possessor. Moreover, being itself assured that the bottling would be honest, the Hannis Distilling Company further agreed that Cook & Bernheimer might put on their labels the words, "Purity Guaranteed by the Hannis Distilling Company." Immediately after securing this concession, Cook & Bernheimer began, and their successor, the complainant, has continued, to bottle Mount Vernon whiskey, and offer it to the public. Complainant's name does not appear on the labels used, the name of the bottler being considered immaterial, since the honesty of the bottling no longer depends solely on his good faith, but upon the circumstance that it is bottled at the distillery. Complainant's name and the distilling company's monogram appear on the capsule. On the front of each bottle is the following label:

MOUNT VERNON PURE RYE WHISKEY,
Bottled at the Distillery and Purity Guaranteed by the
HANNIS DISTILLING CO.
Bottled for Export. Copyright 1890, by Hannis Distilling Co.

On the rear of the bottle appears the following label:

I certify that to this bottle, after being filled, corked, and capped in the warehouse of the Mount Vernon Distillery, Baltimore, Md., was attached this numbered label.

H. W. WHITE.

Series A, No. 635,195, Sup't. Mt. Vernon Dist.

The capsule of this bottle is wired and sealed and cork-branded. The absence of this protection is evidence that the contents are not as bottled at the distillery. The label is registered, and the design of the bottle patented.

The defendants' front label reads:

MOUNT VERNON PURE RYE WHISKEY.
Bottled and Guaranteed
by
ROSS & KEANY,
New York.

The defendants' rear label reads:

CAUTION: We guarantee this whiskey distilled by THE HANNIS DISTILLING CO. Baltimore, Md. matured by age and bottled under our own supervision.

ROSS & KEANY.

Complainant, of course, has no exclusive right to the name "Mount Vernon," and the labels of defendants are in no sense an imitation of the labels of the complainant. Complainant's case rests solely on the form of package, which it claims has been so imitated as to make out a case of unfair competition.

Undoubtedly, a large part of the consumption of whiskey is in public drinking places, where it is dispensed to the consumer from the opened bottle. It is always desirable, therefore, for a dealer who wishes to push the sale of his own goods on their own merits to devise, if he can, some earmark more permanent than a pasted label to distinguish them. Complainant's predecessors accordingly, in March, 1890, adopted a brown glass bottle of a peculiar square shape, unlike any that had theretofore been used for bottling whiskey, or, indeed, so far as the evidence shows, for any other purpose. It is a form of package well calculated by its novelty to catch the eye, and be retained in the remembrance of any one who has once seen it. In order to develop and extend the business they expected to control under their agreement with the Hannis Distilling Company, complainant and its predecessors have expended more than \$50,000 in advertising its said bottling. In all these advertisements the peculiar square-shaped bottle is the chief and most prominent feature. It is not surprising, therefore, to find it stated in the moving affidavits that the shape and general appearance of the bottle has come to be principally, if not exclusively, relied on by ordinary purchasers as the means of identifying this bottling of Mount Vernon whiskey from all other bottlings, the purity of which is not guaranteed by the distillers, but only by the bottler. Complainant's bottling seems to have acquired a high reputation, large and increasing quantities of it being yearly sold, at a price in excess of that obtained by other bottlers of Mount Vernon whiskey.

About December, 1895, defendants, who had been dealing in Mount Vernon whiskey for many years, began first to put it up in bottles, which are Chinese copies of the peculiar square-shaped, bulging-necked bottles of the complainant. Of course, they aver that this was without any intention "to deceive the public," "or to palm off defendants' goods for complainant's." They account for the sudden appearance of their output of Mount Vernon whiskey in this form as follows. "There was a demand for Mount Vernon whiskey along in November last, and defendants sought a convenient and useful package in which to place their product upon the market, and purchased a stock of bottles of the square form for that purpose, without making a special design therefor, and in the open market;" and allege that "such bottles can be purchased of reputable bottle manufacturers from molds used for some time last past." This last averment may well be true. The industry of defendants' counsel has marshaled here an array of square-shaped bottles filled with whiskey, which shows that for some time imitations of complainant's bottle have been on the market. But there is not a word of proof to trace back any one of these bottles to a period anterior to the adoption of the square shape by complainant's predecessor as a distinctive form of package. Despite defendants' denials,—and they only deny intent to deceive the public, not intent to use a form of package just like complainant's,—the court cannot escape the conviction that they found the square-shaped bottle "convenient and useful," because it was calculated to increase the sale of their goods; and that such increase, if increase there be, is due to the circum-

stance that the purchasers from defendants have a reasonable expectation that the ultimate consumer, deceived by the shape, will mistake the bottle for one of complainant's. This is unfair competition within the authorities, and should be restrained.

It is contended that complainant is not entitled to an injunction because its own representations are untruthful. This contention is not established by the proof. The label does not assert that the whiskey is "bottled by the Hannis Distilling Company," but only that it is "bottled at the distillery." Nor is there anything in the suggestion that the bottling is not done within the very four walls in which the whiskey is distilled. It is done on premises of the Hannis Distilling Company, known generally as its "Distillery," and within the 600 feet prescribed by the statute from the room in which the stills are located.

The fact that complainant also puts up in bottles of the same shape another brand of whiskey, known as "Hannisville," made by the same distilling company in another of its distilleries, and bottled by complainant under a similar contract to the one above referred to, is wholly immaterial.

Injunction pendente lite is granted against the further use of the square-shaped, bulging-necked bottle as a package for Mount Vernon whiskey.

BONSACK MACH. CO. v. UNDERWOOD.

(Circuit Court, E. D. North Carolina. March 2, 1896.)

1. PATENTS—CIGARETTE MACHINES.

The Hook patent, No. 184,207, for a cigarette-making machine, covers a patentable and primary invention, and the second claim thereof is infringed by a machine made in accordance with the Underwood patent, No. 470,269.

2. SAME.

The Emery patent, No. 216,164, for a cigarette machine, *held* not infringed as to claims 10 and 12, which relate especially to "a filler-forming chamber," but *held* valid and infringed as to claim 13, which is for "an endless belt and a guide tube, whereby a continuous filler in a sealed wrapper is inclosed and carried forward," by the Underwood machine (patent No. 470,269); and claims 14 and 15, which relate to minor details of mechanism, by which the completed cigarette rod is presented to the cutting mechanism, *held* void for want of patentable improvement over the Hook machine.

3. SAME.

The Bonsack patent, No. 238,640, for a cigarette machine, *held* not infringed as to claims 6 and 7, which relate to the device for wrapping the paper about the filler, by the Underwood machine (patent No. 470,269).

4. SAME—INFRINGEMENT—EXPERIMENTAL MACHINES.

The making of an infringing machine merely as an experiment is not an actionable infringement, but if it is to be used for the purpose of selling the patent under which it is made, it is then to be regarded as used for profit, and a suit will lie for the infringement.

5. SAME—LICENSE TO MAKE INFRINGING MACHINE.

A manufacturer who had contracted with a corporation to make no cigarette machines except under a patent owned by the corporation, submitted to its secretary the question of making a machine for another inventor, and was told to go ahead, and that when the machine was put on the mar-

ket his company would look into the matter of infringement. *Held*, that this did not estop the company from suing such inventor for infringement.

This was a suit in equity by the Bonsack Machine Company against J. B. Underwood for alleged infringement of certain patents for cigarette machines.

A. H. Burroughs, Samuel A. Duncan, Robert H. Duncan, and Busbee & Busbee, for complainant.

George M. Rose, M. De W. Stevenson, John W. Hinsdale, and N. A. Sinclair, for defendant.

Before SIMONTON, Circuit Judge, and SEYMOUR, District Judge.

SEYMOUR, District Judge. The Bonsack Machine Company brings suit against the defendant for infringement of letters patent No. 184,207, granted to A. H. Hook, and dated November 7, 1876; No. 216,164, granted to C. G. and W. H. Emery, and dated June 3, 1879; and No. 238,640, granted to J. A. Bonsack, and dated March 8, 1881. The defendant's patent is numbered 470,269, and bears date March 8, 1892. These patents are all for cigarette-making machines. In all of them a continuous ribbon of paper for forming a cigarette wrapper is drawn from a spool or reel past a wheel which applies paste to one edge, and through a former which folds them around the tobacco and presses the pasted edge to the paper, thus forming a continuous cigarette, proper to be cut into suitable lengths. In the Hook machine a paper ribbon drawn from a reel enters a tapering former, which, commencing as a trough, terminates in a tube. The trough and tube gradually fold the edges of the paper over tobacco which is delivered to the paper from a bucket wheel while its surface is in a flat position, and before it enters the tube. Before the edges are folded over one another, one is drawn down, and passes a pasting wheel, which applies paste to its edge. A continuous cigarette of an indefinite length is thus produced, which, as it leaves the machine, is cut into cigarettes of the usual length. The Emery machine does not, as does the Hook machine, form the filler inside of the wrapper, but previous to the application of the former to the paper. The filler in the Emery machine is continuously formed in an endless traveling belt, curved around it by the walls of a chamber through which it passes. The endless belt separates from the tobacco filler as it delivers it to the paper wrapper. The wrapper, with the already formed filler, is then taken through a former, which wraps the ribbon about the filler, past a pasting disk, and through a tube to the mechanism constructed for the purpose of cutting it into cigarettes. The Bonsack machine provides for carrying wrapper and filler, in the belt, through the wrapping mechanism. It also adds side guides and a spiral groove and flange for the purpose of keeping in place the edges of the ribbon during the process of being pasted and folded around the filler. In the defendant's machine, as in those constructed under the Emery and Bonsack patents, the filler is formed before the paper envelope is applied to it. But, instead of being formed in an end-

less traveling belt, curved around it by the walls of the chamber through which it passes, it is formed by passing between two grooved revolving wheels so adjusted that the two grooves form a substantially circular opening between the wheels. The tobacco-feeding mechanism of the Underwood machine consists of a casing in which a cylinder revolves on a vertical axis, the cylinder and casing being both provided with picker teeth to disentangle and distribute the fibers of the tobacco. At the base of the cylinder, on the same shaft, is a grooved wheel, provided with a horizontal flange arranged immediately below the lower edge of the groove. Opposite, and revolving in the same plane, is another grooved wheel, so adjusted that the upper and lower edges of each wheel touch and form a circular opening between the wheels, while the horizontal flange of the first wheel projects immediately under the second wheel. Because of this arrangement the tobacco which is deposited on the flange is carried through the opening between the two grooved wheels, and compressed by them, as has been stated, into a continuous cylindrical filler. The filler so formed is delivered onto the paper ribbon passing immediately beneath. The paper ribbon is unwound from a wheel below, and carried over a pulley at the same level with, and immediately in front of another pulley, over which passes an endless traveling belt, to which the paper is applied. As the traveling belt moves, it draws with it the wrapper, unwinding it from the reel. Traveling belt, paper wrapper, and filler are carried along a longitudinally divided table, which permits the lower part of the belt to be carried on pulleys a little below its surface. The traveling belt is compound, and consists of a lower or power belt and an upper carrier belt. The two members are secured together along their central line by a row of stitches. Immediately upon receiving the filler, the compound belt enters into a slotted trough or folding channel arranged longitudinally along the top of the divided table. This channel is composed of two adjustable guide bars so adjusted as to form a narrow slot between them. The slot between the inner lower edges of the guide bars permits the passage of the carrier belt within the channel while the power belt travels below the channel. The guide bars are each provided for a part of their length with an inwardly projecting and downwardly inclined flange or belt guard. The guide bars themselves at their front ends are nearly longitudinal. As the carrier belt, with the wrapper and core, are drawn along through them, they gradually arise to a nearly vertical position, while the flanges are gradually inclined downwards to a nearly vertical position. The carrying belt and wrapper are thus made to form a U-shaped channel. As they pass further along through the channel, one side of the carrying belt and wrapper is curved over the filler by a "deflector," so as to permit paste to be applied by a wheel to the standing edge of the paper. Further on, a "separator" separates the belt from the turned-over edge of the paper. The other edge of the belt and the pasted side of the paper are next curved over the filler and opposite side of the paper by a "belt-curve," and the filler is sealed

within the wrapper. The completed continuous cigarette is then carried forward, and cut into cigarette lengths by cutting mechanism. The Underwood machine, it is claimed by the plaintiff, infringes claim 2 of the Hook patent, claims 10, 12, 13, 14, and 15 of the Emery patent, and claims 6 and 7 of the Bonsack patent.

The second claim of the Hook patent is as follows:

"(2) The combination of a spool, A, gumming wheel, B, trough, C, and cylinder, D, with a mechanism for charging with tobacco and drawing the ribbon, 'a,' through the trough and cylinder as set forth."

The three patents of the plaintiff have heretofore been in litigation in the Southern district of New York in the case of Machine Co. v. Elliot, 63 Fed. 835, in the circuit court, and on appeal, 16 C. C. A. 250, 69 Fed. 335. The patent of Abadie & Co., and the unpatented Hook machine, referred to in the opinions of the circuit and appellate courts in the Elliot Case, are not mentioned in the records or briefs in this case. The Hook machine appears to have been, as was stated by Shipman, J., in Machine Co. v. Elliott, 16 C. C. A. 250, 69 Fed. 339, "a patentable and primary invention, and its wrapping mechanism exists, with many improvements, in the machines of to-day." It exists in substance in the Underwood machine. Underwood uses the Hook wrapping device, and folds the paper around the tobacco in the general way pointed out by Hook. His machine has a spool, a gumming wheel, a trough, and mechanism for applying tobacco to a ribbon of paper and drawing it through a trough and cylinder. The difference of detail between the Underwood and Hook machines are not (in view of the fact that the latter embodies a primary invention) material. We are of the opinion that the second claim of the Hook patent has been infringed by defendant. The tenth, twelfth, thirteenth, fourteenth, and fifteenth claims of the Emery patent are as follows:

"(10) In combination with an endless belt, a filler-forming chamber, and a guide for applying a wrapper around a filler, a conductor or chamber through which the continuous filler and wrapper are conveyed to a suitable pasting device, whereby the swelling of the filler is prevented, and the wrapper is held in form while the edges are secured by pasting, substantially as described." "(12) The combination of a gauge or former for uniting the edges of the wrapper with a paste supplying and distributing disk, and mechanism for operating the same, a guide for wrapping the wrapper around the filler, a filler-forming chamber, and an endless flexible belt; all to operate in a manner substantially as described. (13) In combination with devices for forming a continuous cigarette, an endless belt and a guide tube, whereby a continuous filler in a sealed wrapper is inclosed and carried forward, substantially as described. (14) In combination with devices for forming a continuous cigarette of any desired size, an endless belt, a guide tube, and a delivery tube, whereby a continuous cigarette is presented to the action of suitable cutting mechanism for division into desired lengths, substantially as described. (15) The combination of an endless belt and guide tube with a delivery tube and suitable cutting devices, whereby a continuous cigarette of any desired diameter can be advanced and severed into desired lengths, substantially as described."

The essential matter in the tenth and twelfth claims of the Emery patent is "a filler-forming chamber." We do not think that this claim is infringed by the Underwood machine. It is true that both form the filler separately from the wrapper, and wrap the latter around a previously formed filler. But the process of form-

ing the filler is radically different in the two machines. Nor do we think that even upon the most liberal construction of these claims the device which in the Underwood machine forms the filler by pressing the tobacco between the grooves of two revolving wheels touching each other only on the line of their contact, can be called a "filler-forming chamber." The thirteenth claim of the Emery patent, for "an endless belt and a guide tube, whereby a continuous filler in a sealed wrapper is inclosed and carried forward," appears valid. There is no evidence that any cigarette machine made prior to the date of the patent, contained an endless belt to support the wrapper and draw it through the machine. This was a valuable improvement upon the Hook patent, and appears indispensable to its commercial success. The Underwood machine appears to have a combination which is substantially the same as that called for in this claim of the Emery patent. The fourteenth and fifteenth claims are for minor details of mechanism by which the completed cigarette rod is presented to cutting mechanism. That it was to be drawn along and to be presented to cutting mechanism was shown in the Hook patent, and therefore the need of some sort of guide or delivery tube or conveying mechanism was obvious. We think that the claims do not contain any patentable improvement. *Machine Co. v. Elliott*, 16 C. C. A. 250, 69 Fed. 335-341.

The sixth and seventh claims of the Bonsack patent are as follows:

"(6) In a cigarette machine which rolls a continuous cigarette in an endless belt by passing through a tapering tube, the combination of an open trough having side guides for the belt, a tapering tube having a spiral groove extending from one of said side guides, and a terminal section to the tapering tube having its edges lapped passed each other, but not united, so as to form a flange continuous with the spiral groove, substantially as and for the purpose described. (7) In a cigarette machine which rolls a continuous cigarette in an endless belt by passing through a tapering tube, the combination of an opening trough having side guides for the belt, a tapering tube having a spiral groove extending from one of the side guides of the trough, and a terminal section having its edges separated to form a flange, S, to give access to the paste wheel, and then closed again, as and for the purpose described."

In the Bonsack machine the prepared filler is received by the paper wrapper as the latter is drawn into a trough. The wrapper is supported by an endless belt, whose purpose is, besides supporting the cigarette rod and paper, to form them, and enfold the tobacco with the paper. The belt is narrower than the wrapper, so as to admit the application of paste to the lapping edge of the paper as it passes the pasting wheel. A spiral side groove for the edges of the belt within the tube through which belt wrapper and tobacco are drawn after leaving the trough, causes the covering and wrapping of the paper to proceed only on one side. The guide groove opens in the form of a longitudinal lip as soon as the complete circumference is made to expose one edge of the paper to the paste, and then closes again to force the pasted edge down on the body of the cigarette. It is clear from these descriptions that the devices for forming the cigarette rod, for covering the

paper over the rod, for presenting its edge to the paster and for curling one edge over the other, are materially different in the two machines. The Underwood machine has no tapering tube with a spiral groove. Its belt is as wide or wider than the paper wrapper, and wraps paper around tobacco by turning each side of the belt over the cigarette rod alternately, allowing each side of the belt to assume a vertical position, so that at no time are both sides of the belt curved around the rod. We do not think that Underwood's machine is an infringement of these claims of the Bonsack patent.

The defendant denies the plaintiff's right to maintain this suit on the grounds of license and privilege. He says plaintiff permitted him to make the one machine that he made, and that he has never used that machine for commercial purposes. It is true that, if an infringing machine is made or used as an experiment merely, it does not infringe former patents. And it has been held that the making of a machine as an experiment, and its exhibition as simply a model or illustration, do not of themselves constitute an infringement. *Machine Co. v. Teague*, 15 Fed. 390. To constitute an infringement, the making must be with an intent to use for profit, and not for the mere purpose of a philosophical experiment. *Sawin v. Guild*, 1 Robb, Pat. Cas. 47, Fed. Cas. No. 12,391. In the present case, however, the Underwood machine has not been made simply as an experiment, but has been used for profit, that is, for the purpose of selling the patent. The defendant, besides making a contract by which he gave a 60-days option to James A. Bryan, an original co-defendant, to purchase, has taken his machine to St. Louis, and assisted in organizing a company in that city for manufacturing cigarettes under his patent. A bill will lie for an injunction upon well-grounded proof of the intention to violate the patent right. *Sherman v. Nutt*, 35 Fed. 149. As for the alleged license, it is not contended that any consent was given to any commercial use of the machine. The utmost of defendant's claim is that the plaintiff permitted the Glamorgan Company, of Lynchburg, Va., to build his machine. It seems that this company, which manufactured the Bonsack machines, was under contract not to construct any other cigarette machine any part of which was substantially covered by the Bonsack patents. Apprehensive of some trouble with the Bonsack Company, McWane, superintendent of the Glamorgan Company, submitted the matter of building Underwood's machine to Mr. Krise, secretary and treasurer of the Bonsack Company. Krise told him to go ahead, and said that when the machine was put upon the market his company would look into the matter of infringement; that whether it was an infringement could only be finally settled by a court. We do not see anything in this that estops the plaintiff from maintaining its suit. We attach no importance to the alleged opinion of Mr. Argobite that the Underwood machine was not an infringement of the Bonsack patents. Mr. Argobite had no authority from the Bonsack Company to speak for it on any such question, and his

opinion is clearly incompetent. The Hook patent expired in 1893, but the Underwood machine was built during its life.

Let a decree be entered for the orator that the second claim of the Hook patent was valid, and that the thirteenth claim of the Emery patent is valid; that they have been infringed; and for an injunction against further infringement of the said claim of the Emery patent, and for an accounting with respect to the infringement of the second claim of the Hook patent and the thirteenth claim of the Emery patent.

SIMONTON, Circuit Judge. I concur in the conclusion reached by my Brother SEYMOUR. At the hearing it was distinctly admitted that the question of infringement would not be denied, but the defendant pressed upon the court that this was not a case for damages. He contended that the Underwood machine was wholly experimental, made with the knowledge and consent of the complainant, and with no view to practical operation. This contention has been contradicted by the fact that Underwood has contracted to sell his supposed invention to Dula & Drummond, trustees.

MATTHEWS & WILLARD MANUF'G CO. v. TRENTON LAMP CO. et al.

(Circuit Court, D. New Jersey. March 24, 1896.)

1. PARTIES IN EQUITY—PATENT INFRINGEMENT SUIT.

In a suit against a corporation for infringement of a patent, officers of the company, who are mere employés, receiving a fixed salary, in no wise dependent upon the sale of the alleged infringing article, and who have not personally been guilty of infringement, are neither necessary nor proper parties defendant.

2. DESIGN PATENTS—WHO ENTITLED TO.

Under Rev. St. § 4929, which authorized the issuance of a design patent to any person who, "by his own industry, genius, efforts, and expense, has invented," etc., the use of the word "expense" is not limited to mere disbursement of money, and does not prevent the granting of a patent to one who invents a design while in the employ of another, especially where it does not appear that any "expense" was necessary in producing the design.

3. SAME—LAMPS.

The Miller design patents, Nos. 22,422, 23,672, 23,673, and the Miller & Schmitz patent, No. 23,671, for designs for certain parts of lamps, held valid.

These were four suits in equity by the Matthews & Willard Manufacturing Company against the Trenton Lamp Company and others for alleged infringement of certain design patents for lamps.

Charles L. Burdett and Lucien F. Burpee, for complainant.
Francis C. Lowthorp, for defendants.

GREEN, District Judge. There are pending four suits between the parties complainant and defendant, which relate to, and charge the infringement of, certain patented designs for lamps, or parts of

lamps. Upon the argument they were treated as one controversy, and properly so; for, while the several distinct designs are for specific and separate parts of a lamp, it is perfectly feasible to arrange in any one lamp at least two of the designs (if not more), and the sale of a single lamp, so prepared, may involve the infringement of the designs in question. The letters patent involved in this litigation are four in number, and are as follows: (1) No. 22,422, dated May 9, 1893, for design for lamp-fount holders. (2) No. 23,671, dated October 2, 1894, for design for lamp-fount holders. (3) No. 23,672, dated October 2, 1894, for design for bases for lamps. (4) No. 23,673, dated October 2, 1894, for design for bases for lamps. Patents No. 22,422, No. 23,672, and No. 23,673 were granted to John C. Miller, assignor to the Matthews & Willard Manufacturing Company of Waterbury, Conn.; and patent No. 23,671 was granted to John C. Miller and Edward Schmitz, assignors to said the Matthews & Willard Manufacturing Company, the complainant herein.

The bills of complaint are in the usual and orderly form. They allege that the patentees were, respectively, the first and original inventors and producers of the designs in question; that letters patent for said designs were duly granted and issued, and were duly assigned to the complainant; that the designs were popular, and the lamps embodying them in great demand, and that they were, respectively, of great value to the complainant; that said designs were duly stamped with the word "Patented," in accordance with the provisions of the statute; that the public generally have acquiesced in and respected the rights of the complainant thereto, except the defendants, who have, to the great damage of the complainant, infringed the letters patent by manufacturing, producing, and selling lamps embodying the several designs in question, and that, too, after notice had been given them of the alleged infringement.

The defendants have answered fully, and have set up the following defenses: First. Misjoinder of defendants. Second. Invalidity of the several patents sued on, by reason of want of jurisdiction of the commissioner of patents to grant the same. Third. Estoppel upon the complainant to sue the defendants for infringement of the several patents by reason of an implied license granted to the defendants under each of the said patents. Fourth. That the complainant is not entitled to recover damages or profits from any of the defendants by reason of the complainant's failure to properly mark the patented articles made and sold by the complainant under said letters patent respectively. Fifth. Noninfringement.

So far as the third and fourth defenses are concerned, it is sufficient to say that they are not justified by the evidence in the cause. On the contrary, the great weight of the testimony is against both. But one witness was produced by the defendants to prove a license. It is not necessary to analyze his statements in relation thereto. They are far from satisfactory. By his own admissions the implied license which he seeks to prove was wholly based upon a conversation with a sales agent of the complainant, who had no authority to license others to make the designs in question, and whose words, if they are correctly reported by this witness, convey not the slight-

est permission or grant of right to make such designs. Nothing occurred at the interview of which this witness testifies, accepting his statement as correct, which affords the least ground upon which to base an implied license to the defendants from the complainant to manufacture these patented designs. Besides, this witness is broadly contradicted by other witnesses who were present at the interview, and heard all the conversation between him and the sales agent; and, weighing these contradictory statements, it is not possible to sustain this defense.

Nor can the defense fourthly above pleaded avail the defendants. The evidence is quite satisfactory that upon these designs was placed a label bearing the word "Patented," as required by the statute. The negative testimony of the one witness who declared that he "had handled a good many hundred dollars' worth of these goods [lamps], and had never seen one marked yet," cannot be permitted to outweigh the positive testimony of four witnesses to the effect that after the granting of the letters patent all designs protected thereby were duly stamped or labeled "Patented."

The fifth defense, of noninfringement, is practically abandoned. The proofs of infringement are so ample and satisfactory that the counsel for defendants, in his brief, is forced to admit "there is no question that the defendant, the Trenton Lamp Company, made and sold articles embodying the designs shown and claimed in each of the patents in suit. They were precisely similar in configuration and appearance." And in this statement is tersely summed up the testimony.

Only two of the defendants can avail themselves of the first defense, and as to them it seems to be properly interposed. The bill charges Francis W. Rockhill and Barclay L. Stokes with infringement of the letters patent, and the same decree is prayed against them as against the principal defendant, the Trenton Lamp Company. The answers filed distinctly aver that Francis W. Rockhill was formerly secretary of the defendant corporation, but that he never was a stockholder nor a director therein, nor derived any profit from his connection therewith, excepting his regular stated salary, and that he had no direction or control whatsoever of its affairs, excepting as a subordinate officer, and no authority to concern himself with the making, using, or vending of the alleged infringing articles. The answers also show that the said defendant Barclay L. Stokes is and has been the treasurer of the said defendant company, and is and has been a stockholder and director therein, but has at no time had any direction or control of the making, using, or vending of the alleged infringing articles, or any colorable imitation thereof, and had no knowledge whatsoever in the premises. The same benefit of this defense, raised thus by the answers, is prayed as if the same had been set up by plea. The testimony of the witness John W. Wilkes proves the statements contained in the answers in this behalf. These averments and this testimony are not impeached or controverted, and full credit must be given to them.

The principles of equity pleading require that all parties interested in the subject-matter or issue of the suit, and who must necessarily

be affected by the decree, must be made parties thereto. But it is quite certain that neither of the defendants Rockhill nor Stokes have a scintilla of interest in this controversy or its final outcome. They are simply employ  s of the defendant company, receiving in return for their services fixed salaries, in no wise dependent upon the sales of the infringing lamps. They do not appear to be interested in the infringement of which their employer has been guilty, nor have they personally been guilty of infringement themselves. Under such circumstances they cannot be held responsible in these actions. The safer rule to be applied in the making of officers, agents, and employ  s of a corporation parties defendant in a suit in equity to restrain infringement of letters patent is that every agent who performs acts of infringement, and all stockholders, directors, and other officers, who, in the prosecution of the business of the defendant corporation, authorize them, are personally responsible to the patentee complainant; otherwise they are neither necessary nor proper parties. It follows that as to these two defendants, Rockhill and Stokes, the bill must be dismissed.

The last defense to be considered is certainly a novel one. As stated in the answer, it is as follows:

"And these defendants further say that the said letters patent are invalid, because the said design for lamp-fount holders which is the subject-matter thereof was not produced by the said John C. Miller at his own expense, as well as by his own genius and effort, as is, by the statute in such case made and provided, required."

And under this averment the defendants contend that by the law the applicant for a design patent can only lawfully receive letters patent when he has invented and produced the design sought to be patented "by his own genius, efforts, industry, and expense" (Rev. St.    4929); and that in the cases now under consideration the applicant did not invent and produce the patented designs at his own expense. To maintain this proposition, the counsel for defendants has delivered an argument which is undoubtedly very acute, but scarcely accurate. That it may be the more plausible, and that it may to some extent be based upon fact, he limits the word "expense" to mere "pecuniary expense," and he proves by the cross-examination of the patentee that he did not expend any money in the production of these designs; that in fact the patentee was employed, at a regular salary, by the complainant as a "designer" in brass, and it was in the course of his regular employment, and during the fixed and regular hours of work, that he invented and produced the designs. And the insistence is that the designs were really produced at the expense of the complainant. This can hardly be assented to. No authority can be found to compel the limitation of the word "expense," in the construction of this statute, to the "expenditure of money." It may, indeed, be defined as a "disbursement of money," but it is as well "the employment and consumption of time and labor." Cent. Dict. tit. "Expense." This statute, then, has made use of a word, in its expression, which bears rightfully two meanings. Which should be accepted as the more proper? Certainly that which common sense and good faith will approve; for the ob-

ject in construing a statute must always be, not to bend and twist and shape the text until it is forced into apparent harmony with some doubtful claim, or into the mold of a preconceived idea, but simply and solely to discover, disclose, and fix the true sense, whatever that may be. And in judging of and in weighing proposed constructions of statutes it is a leading principle that every interpretation which leads to an absurdity must be rejected. Now, the purpose of the statute in question was to secure to those who should invent and produce a new and original design a monopoly in the design for a certain number of years. It was practically the offering of a prize to inventive genius. It was directed to, and included within its terms, everybody, without regard to nationality, residence, or condition in life. The learned and the illiterate, the strong and healthy, the weak and the invalid, the rich and the poor, each would be rewarded under the statute if inventive genius were found in the design created. This being the admitted object, it must be assumed that the legislative power which made the enactment selected and used such terms, phrases, and words as would surely and certainly accomplish the desired result. Yet, if the construction contended for by the counsel for defendants prevails, it seems that the statute would fall far short of its purpose, and would wholly fail to offer any reward to one class of inventors, who, in preference perhaps to all others, should have been the beneficiaries under its bountiful provisions; for if the word "expense" is to be limited in its meaning to the "disbursement of money" which belongs to the inventor and would-be patentee, then he who has not the means—the money—to disburse in the realization of his mental conception of a design would be forever barred from obtaining the fruits of his inventive genius and aesthetic taste, though the design he had conceived were never so novel, never so pleasing, never so beautiful. Clearly, such a construction of this statute would be an absurdity, and ought not to obtain.

It might be said with reference to the question now under consideration that, even if the construction of the defendants touching the statute was sound, it could not avail them in these actions. *Prima facie*, the letters patent are evidence that all the requirements of the statute have been fully complied with; and if it be true that the patentee has been at no pecuniary expenditure in realizing his conception of the designs, it simply follows that there was no such expenditure demanded by the circumstances. The defendants do not show that any expenditure of money became necessary from the first conception of the designs in the brain of the inventor, until the application was made for the letters patent; and if no "expense" was necessary, no "expense" was to be looked for. In such case the argument against the validity of the letters patent based upon the failure of the inventor to expend money, personally, in producing a physical representation or model of the design falls, as it has no support from the facts.

As was said before, this defense is a novel one. Although all the acts touching design patents have employed the words now under consideration practically since the act of 1842, yet the question de-

bated seems to be mooted now for the first time. A very thorough search has failed to reveal a single reported case in which the attention of the court has been called to this word "expense." The other words, however, which appear in the context have, at times, received construction. These words, as has been stated, are, "any person, who by his own industry, genius, efforts, and expense, has invented," etc. In the case of *Sparkman v. Higgins*, 1 Blatchf. 205, Fed. Cas. No. 13,208, it appeared that one Kelsey claimed to be the original inventor of a certain pattern (or design) to be printed upon cotton goods. The defendants were enjoined from infringing by a preliminary injunction. The defendants moved upon affidavits to dissolve the injunction. By the affidavits it was shown that Kelsey, the alleged inventor, did not make the design or pattern personally, but employed one Berry to make it from suggestions which he made to him, and the insistence was that Berry was the real inventor, under the statute. But Judge Betts retained the injunction. He said:

"To constitute an invention, it is not necessary that he should have the manual skill and dexterity to make drafts. If the ideas are furnished by him for producing the result arrived at, he is entitled to avail himself of the mechanical skill of others to carry out practically his contrivance."

The same principle obtained in *Streat v. White*, 35 Fed. 426, reported in *Fent. Pat.* 125. In this case the letters patent were for a design for textile fabrics, the leading feature of which was stripes of a solid block of color, parallel to and alternating with stripes which were crossed at right angles by alternate dark and light lines blended into each other by shading, and which was intended to be an imitation in printed cloth of the woven fabric commonly called "seersucker." A bill being filed to restrain an alleged infringer, it appeared that, though the patentee conceived the idea of the invention which had been previously attempted by others, the actual invention of successfully producing the imitation by blending together the cross lines by shading, which was alone novel, was entirely the work of the engraver of the design at the factory where made. Judge Shipman held that the letters patent were void, but said, in effect, that if the patentee had conceived the idea of the blending together of the cross lines by shading, though he did not actually do the work, the patent would have been sustained.

It seems perfectly fair to argue from these cases that if the industry and efforts expended in the production of a design need not be the personal industry or the personal efforts of the patentee, then the expense alluded to need not be a personal expense of the inventor. It is the conception of a design as the result of inventive genius which characterizes the inventor. The realization of that conception may be brought about by any means which the inventor may fairly control or obtain. There must be a decree for the complainant.

PALMER PNEUMATIC TIRE CO. v. NEWTON RUBBER WORKS (three cases).

(Circuit Court, D. West Virginia. March 14, 1896.)

Nos. 415-417.

1. PATENT INFRINGEMENT SUITS—PRELIMINARY INJUNCTIONS.

It is now settled that a patent alone does not create a sufficiently strong presumption of its own validity to justify the granting of a preliminary injunction. There must be either a prior adjudication sustaining the patent, or a continuous public acquiescence, creating a strong presumption of its validity, or it must have withstood a contest by interference in the patent office.

2. SAME—PROOF OF ACQUIESCENCE.

Where public acquiescence is not alleged in the bill, it is insufficient to aver universal acquiescence, by mere general statements in the affidavits filed by complainant; and when such evidence is met by a number of witnesses, giving names, dates, and places, who testify that, for nearly two years before the suit, several manufacturers, including complainant's principal competitors, have been making and selling goods similar in all material respects to those of the patent, a preliminary injunction must be denied.

These were three suits by the Palmer Pneumatic Tire Company against the Newton Rubber Works for alleged infringement of three patents. Complainant has moved for a preliminary injunction.

Dyrenforth & Dyrenforth, for complainant.

Leonard E. Curtis and Parker W. Page, for defendant.

GOFF, Circuit Judge. The Palmer Pneumatic Tire Company, a corporation organized and existing under and by virtue of the laws of the state of Illinois, on the 2d day of November, 1895, instituted three separate suits in equity against the Newton Rubber Works, a corporation organized and existing under and by virtue of the laws of the state of West Virginia, and said suits are now pending in the circuit court of the United States for the district of West Virginia. It is claimed in the bills that the complainant is the owner of three certain letters patent of the United States, to wit, No. 489,714, No. 493,220, and No. 532,902, issued, respectively, on the 10th day of January, 1893, the 7th day of March, 1893, and the 22d day of January, 1895, to one John F. Palmer, and by him duly assigned to said Palmer Pneumatic Tire Company. The first of said letters patent relates to a "new and useful improvement in bicycle and other tubing"; the second, to "a new and useful improvement in fabric"; and the third, to "a new and useful improvement in textile fabric for tubing envelopes." The bills allege that the complainant has invested large sums of money in manufacturing, introducing, and securing the sale of said patented articles, and that thereby they have become known and in general use throughout the United States; that the defendant, since the granting of the said letters patent, in infringement of the same, and in violation of the complainant's exclusive rights thereunder, has made, used, and sold the said articles and improvements described and claimed in said letters patent; and that

defendant persists in so doing, to the great and irreparable loss and damage of the complainant. The relief asked is that defendant be restrained from further infringing said patents, for an accounting, and for damages. The cases are now before the court on motions made by the complainant for preliminary injunctions.

It must be conceded that the mere patent itself is an unsatisfactory foundation on which to base a preliminary injunction. The rule is now well established that the patent alone does not create a sufficiently strong presumption as to its own validity to justify a court in granting a preliminary injunction. It must be established either by prior adjudication, or a strong presumption of its validity must exist because of continuous public acquiescence, or it must have successfully withstood an action by interference in the patent office. *White v. Manufacturing Co.*, 3 Fed. 161; *De Ver Warner v. Bassett*, 7 Fed. 468; *Steam Gauge & Lantern Co. v. Miller*, 8 Fed. 314; *Bradley & Hubbard Manuf'g Co. v. Charles Parker Co.*, 17 Fed. 240; *Edward Barr Co. v. New York & N. H. Automatic Sprinkler Co.*, 32 Fed. 79; *Dickerson v. Machine Co.*, 35 Fed. 143; *Standard Elevator Co. v. Crane Elevator Co.*, 6 C. C. A. 100, 56 Fed. 718; *Machine Co. v. Williams*, 2 Fish. Pat. Cas. 135, Fed. Cas. No. 5,847; *Toppan v. Bank-Note Co.*, 2 Fish. Pat. Cas. 195, Fed. Cas. No. 14,100; *Mowry v. Railway Co.*, 10 Blatchf. 89, Fed. Cas. No. 9,893; *George Ertel Co. v. Stahl*, 13 C. C. A. 31, 65 Fed. 519.

It is admitted that neither one of the patents in question has ever been in litigation; so that there is no adjudication as to their validity. Then, has the complainant alleged or shown any circumstances in the nature of an estoppel precluding the defendant from denying the validity of the patents, or either of them? The insistence of the complainant on this point is that the validity of its patents has been established by public acquiescence. In neither one of the bills has public acquiescence been alleged, although, by general statements in affidavits filed by complainant, universal acquiescence in the validity of its patents is claimed. This is not sufficient. *Edward Barr Co. v. New York & N. H. Automatic Sprinkler Co.*, 32 Fed. 79; *Hurlburt v. Carter & Co.*, 39 Fed. 802; *Johnson v. Aldrich*, 40 Fed. 675; *George Ertel Co. v. Stahl*, 13 C. C. A. 29, 65 Fed. 517; *Orr v. Littlefield*, 1 Woodb. & M. 13, Fed. Cas. No. 10,590; *Toppan v. Bank-Note Co.*, 4 Blatchf. 509, Fed. Cas. No. 14,100; *Guidet v. Palmer*, 10 Blatchf. 217, Fed. Cas. No. 5,859. In reply to this, the defendant shows by a number of witnesses, who give names, dates, and places, that, for nearly two years before these suits were instituted, several different manufacturers in this country, including the principal competitors of the complainant, have been extensively engaged in the making and selling of bicycle tires which, in the judgment of said witnesses, are substantially similar in all material respects with those made by the complainant under the patents in controversy. A careful consideration of all the affidavits filed forces the conclusion that there has been no such public acquiescence in the validity of either one of the patents in suit as will justify the court in awarding a preliminary injunction against the defendant.

It also appears from the answers filed by defendant, as well as by affidavits used by it on the hearing of these motions, that the validity of the patents is seriously contested. It is evident that this is one of the important, intricate, and disputed questions of fact involved in these suits, and that it should come up for determination after the parties have had ample time to properly present it, by full and orderly proof, and this also, in my opinion, renders it improper, in this controversy at least, to resort to the exercise of the extraordinary writ asked for. *Parker v. Sears*, 1 Fish. Pat. Cas. 93, Fed. Cas. No. 10,748; *Machine Co. v. Adams*, Fed. Cas. No. 752; *Cross v. Livermore*, 9 Fed. 607; *Goodyear v. Dunbar*, 1 Fish. Pat. Cas. 472, Fed. Cas. No. 5,570; *Fish v. Machine Co.*, 12 Fed. 495; *American Nicholson Pavement Co. v. City of Elizabeth*, 4 Fish. Pat. Cas. 189, Fed. Cas. No. 312; *Goebel v. Supply Co.*, 55 Fed. 828; *Page v. Buckley*, 67 Fed. 142; *Bowers v. Bridge Co.*, 69 Fed. 640; *Brown v. Hinkley*, 6 Fish. Pat. Cas. 370, Fed. Cas. No. 2,012; *Hockholzer v. Eager*, 2 Sawy. 361, Fed. Cas. No. 6,556; *Spring v. Machine Co.*, 4 Ban. & A. 427, Fed. Cas. No. 13,258.

There having been no adjudication establishing either one of the patents in controversy, and finding as the court does on the question of public acquiescence, it follows that other matters referred to by counsel in argument need not now be passed upon. The preliminary injunctions asked for by the complainant are refused.

THE CITY OF TOLEDO.

SANDERSON et al. v. THE CITY OF TOLEDO.

(District Court, N. D. Ohio, W. D. March 24, 1896.)

No. 211.

1. ADMIRALTY JURISDICTION—LAKES AND RIVERS—TRIAL BY JURY.

In the act of 1845, purporting to extend the admiralty jurisdiction of the federal courts over the interior lakes and rivers, the provision, now embodied in Rev. St. § 566, saving to the parties a right to demand a jury trial of issues of fact in certain cases, is inoperative to do more than make the verdict advisory, and does not change the powers of the admiralty judge, who is still responsible for the decree rendered.

2. SAME.

The statute, by its terms, does not apply to controversies arising in respect to a vessel plying between ports in the same judicial district, and not engaged in commerce and navigation between places in different states.

This was a libel in rem by Ida Sanderson and others against the steamer *City of Toledo*. The cause was heard on libelants' motion to submit the issues to a jury for trial.

Scribner, Waite & Wachenheimer, for libelants.

John C. Shaw and Swayne, Hays & Tyler, for respondent.

RICKS, District Judge. This case is now before the court upon a motion of the libelant demanding the right to submit the issues

made by the pleadings to a jury for trial and verdict. They make this demand under section 566 of the Revised Statutes, which reads as follows:

"In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

This motion is resisted by the respondent upon the claim that this section of the Revised Statutes is unconstitutional and void, in that it undertakes to restrict the right of the district court to try admiralty cases under the rules and practice known to the admiralty courts at the time the constitution of the United States was framed. Section 2 of article 3 of the constitution of the United States says the judicial power shall extend "to all cases of admiralty and maritime jurisdiction." Paragraph 8 of section 563 of the Revised Statutes defines the jurisdiction of the district courts of the United States as follows:

"Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts."

For some years there was a diversity of opinion between the courts of the United States as to whether the extent of the jurisdiction conferred by the constitution "to all cases of admiralty and maritime jurisdiction" was to be limited; one party contending that it was to be interpreted by what were cases of admiralty jurisdiction in England when the constitution was adopted, and the other party contending that it was to be as broad as the jurisdiction conferred upon the admiralty courts as they existed in the colonies and states prior to the adoption of the constitution. The extent and exact nature of this jurisdiction was well known to the authors of the constitution when that instrument was framed. There had been important controversies between the different states as to the extent and nature of the jurisdiction of their respective admiralty courts; and the want of an harmonious and uniform system of administering the admiralty laws was greatly felt, and one of the chief arguments in favor of the adoption of our present constitution. The inability of the confederation preceding our present Union of states to reconcile these conflicts in the jurisdictions of the several states had been made so apparent by one or two cases which attracted the attention of all the people of the different states that it was the purpose of the authors of the constitution to vest in the federal courts of the new government ample power to cure all these notorious conceded defects. The chief and most important business of the states bordering on the Atlantic Ocean, the Gulf of Mexico, and tide waters, was commerce between foreign governments and between the states. The most important questions in litigation between the citizens of the different states, and between American citizens and aliens,

grew out of business connected with this international and interstate commerce. The litigation, therefore, in the district courts of the United States, in their early history, growing out of the jurisdiction in admiralty, was the most important then known to litigants and jurists. The early decisions of these courts confined the jurisdiction of the admiralty courts to cases arising upon the ocean, or upon waters having the ebb and flow of the ocean tide. As the country grew, and the territory bordering upon the great internal lakes and navigable rivers of the United States became prosperous and populous, the necessity for extending this admiralty jurisdiction of the federal courts to these fresh-water navigable bodies became apparent.

Assuming that the earlier decisions of the federal courts upon this subject were correct, and that their jurisdiction did not extend beyond tide waters, the congress of the United States, in 1845, passed an act extending the admiralty jurisdiction over the lakes, and the rivers connecting them, and the navigable streams within the United States. Knowing the jealousy with which the people of the United States guarded their right to a trial by jury, the congress in this act, assuming that cases arising upon the lakes were cognizable only in the common-law courts, and were consequently triable by jury under the constitution, saved to the parties the right of trial by jury. It will be noticed that this was not a grant of a new right, but the saving of one already supposed to exist to litigants in such cases within that territory. But subsequent to this act the supreme court of the United States, in *The Genesee Chief*, 12 How. 443, decided that the admiralty jurisdiction of the courts in this country was not limited to tide water; but, on the contrary, that by force of the constitution and the act of 1789, it extended to the lakes and the navigable waters connecting the same. From this it followed that at the time of the passage of the act of 1845 the very cases provided for by it, and as to which it assumed to confer jurisdiction upon the admiralty courts as a new jurisdiction, were already cognizable in those courts, and hence that the constitutional provision guarantying the right of trial by jury in suits at common law had no application to those cases.

The supreme court of the United States, in a later case of *Waring v. Clarke*, 5 How. 441, decided that:

"The grant in the constitution extending the judicial powers 'to all cases of admiralty and maritime jurisdiction,' is neither to be limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted by the states of the Union. Admiralty jurisdiction in the courts of the United States is not taken away because the courts of common law may have concurrent jurisdiction in the case with the admiralty, nor is a trial by jury any test of the admiralty jurisdiction."

In this case, which came up by appeal from the district court of the United States for the Eastern district of Louisiana, the question presented was whether that court had jurisdiction in admiralty in a case of collision which occurred on the Mississippi river, 160 miles above its mouth, within the body of a county wholly within the state of Louisiana. In the opinion of the court it is stated that two grounds were taken to maintain that position, as follows:

"(1) That the grant in the constitution of 'all cases of admiralty and maritime jurisdiction' was limited to what were cases of admiralty and maritime jurisdiction in England when our Revolutionary War began, or when the constitution was adopted, and that a collision between ships within the ebb and flow of the tide, *infra corpus comitatus*, was not one of them. (2) That the distinguishing limitation of admiralty jurisdiction and decisive test against it in England and in the United States, except in the cases allowed in England, was the competency of a court of common law to give a remedy in a given case in a trial by jury. And as auxiliary to this ground it was urged that the clause in the ninth section of the judiciary act of 1789, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it,' took away such cases from the admiralty jurisdiction of the courts of the United States."

The opinion of the majority of the court in that case was delivered by Mr. Justice Wayne, and in his exhaustive and very learned opinion he shows that when the framers of the constitution vested in the courts of the United States jurisdiction to try all cases of admiralty they meant to vest those courts with the jurisdiction according to the practice and principles of admiralty as distinguished and known in the admiralty courts then in existence in the several states framing and adopting that instrument. In the case of *Waring v. Clarke* it was contended that the limit of this jurisdiction was the practice and principles as recognized and enforced by the English courts of admiralty. They contended, further, as evidence of this, that the congress of the United States, in extending the jurisdiction in admiralty over the lakes and the navigable waters connecting the same, saved to litigants the right of trial by jury,—a right which was wrested from the admiralty courts of England by the law courts in a long and bitter struggle, the story of which is familiar to every lawyer who has ever read the history of the mother country. In this case of *Waring v. Clarke* the chief objection urged by the three dissenting justices against the opinion of the majority of the court extending the jurisdiction of the district court of Louisiana to the case of collision on the Mississippi river, within the state of Louisiana, was that by such a holding it would extend the admiralty jurisdiction to cases of tort and contract within the body of a county of one of the states of the Union without the right to a trial to a jury. Mr. Justice Woodbury, who delivered the chief dissenting opinion in that case, argued against conferring the jurisdiction of the court in such a case, because, he said:

"If the jurisdiction was defeated, it would secure the highly-prized trial by jury, rather than by a single judge, for everything happening where a jury could be had from the vicinage of the occurrence within a county, and because it secured a decision on their rights by the highly-prized common law, inherited from their fathers, rather than by the civil law, or any other foreign code, attempted to be forced upon the commons and barons by Norman conquerors or their partisans."

So in that case, after full consideration, the majority of the court held, as before stated, that the grant of admiralty jurisdiction was not to be interpreted by what were cases of admiralty jurisdiction in England when the constitution was adopted. The character of the cases arising in the admiralty courts was such as to require speedy and prompt decisions on the part of the court, as in most cases the litigation concerned vessels or contracts arising out of navigation

where a speedy decision was necessary for the best interests of all concerned. The practice and procedure was therefore framed to secure the most expeditious and satisfactory disposition of all such controversies. Questions of fact were to be decided either by the admiralty judge, or by a commissioner appointed by him for that purpose, whose proceedings and findings were entirely within his control. To submit issues of fact to a trial to a jury under the principles and procedure of the common law would have involved great delay, expense, and embarrassment. If the finding of a jury was unsatisfactory to an admiralty judge, he might set it aside; but a new trial by another jury would be necessary, and so on until a verdict was secured which met with his approval and was consistent with his judgment. For these reasons the practice in admiralty was to dispense with juries, and the issues of fact were to be tried by the court. Such was the practice of the admiralty courts in the states and colonies preceding the formation of our constitution, so that, when the constitution vested in the courts of the United States jurisdiction of all cases of admiralty, it intended to invest those courts with the powers and practice known to the courts of admiralty at the time the constitution was framed.

The constitution, in the same section and article, extended the judicial power of the United States to all cases in law and equity. The supreme court of the United States (*Robinson v. Campbell*, 3 Wheat. 212) said:

"The court therefore think that, to effectuate the powers of the legislature, the remedies in the courts of the United States are to be at common law or in equity; not according to the practice of the state courts, but according to the principles of the common law and equity as distinguished and defined in that country from which we derive our knowledge of those principles."

The supreme court of the United States has repeatedly held that denying to parties litigant in the equity courts of the United States a trial to a jury on questions of fact did not thereby abridge the constitutional rights of the citizens; that those courts had the right and power to pass upon questions of fact according to the practice and principles known to courts of equity in England at the time our constitution was framed; that while, in some cases, the chancellor had a right to summon a jury, and submit questions of fact to its decision, for the purpose of informing the conscience of the court, yet the findings of the jury were merely advisory, and in no sense binding upon the chancellor. If parties in the equity courts of the United States are, therefore, not entitled to demand the trial to a jury upon questions of fact, because inconsistent with the practice of courts of equity, and because it would be an abridgment of the chancellor's powers and rights, why does not the same rule apply to a court of admiralty? True, congress has not undertaken, so far as courts of equity are concerned, to pass a statute giving to either party demanding a trial by jury the right to have such trial, as it has undertaken to do by the section now under consideration as to courts of admiralty; but it is clear that, if congress undertook to give such right of trial, and to make the finding of a jury anything more than advisory to the chancellor, it would be held unconstitutional. For the

same reason it seems to me the section now under consideration is imperative to do more than make such finding advisory. As before stated, when conferred in the act of 1845, it was inserted as a saving clause for the reasons before given. Judge Longyear, in the case of *Gillet v. Pierce*, 1 Brown, Adm. 553, Fed. Cas. No. 5,437, after reciting the history of the act of 1845, and showing why this saving clause was incorporated in that act, concluded that, in view of the decision of the supreme court in *The Genesee Chief*, congress never intended to apply this right to a trial to a jury to the admiralty courts. Considering that act, he says:

"If this were all, I should have no difficulty in holding that the clause in question was inoperative, and of no effect, and that libellant's motion to strike out and deny the respondent's request for a jury trial ought, therefore, to be granted; but, in the late revision of the United States Statutes the revisers in congress, probably looking alone to the language used by the judge in accepting the clause in question from the effect of the decision of the supreme court in the case of *The Eagle*, have sought to retain it as an existing effectual enactment, and as an expressed grant of cases specified in the act of 1845. * * * In the act of 1845 it was a mere saving of an erroneously supposed pre-existing right; in the revision it is the expressed grant of a right not previously existing. * * * Being there, however, under the forms of legislation it has become a law of the land, and as such it must be obeyed."

I concur with Judge Longyear in the opinion that in incorporating this section 566 in the Revised Statutes congress intended to confer upon suitors in admiralty a right to demand this trial to jury. But because, as before stated, such a right, if conferred without qualification, would be a curtailment or abridgment of the rights of the admiralty judge, I am of the opinion that the only effect the verdict of a jury after such a trial could have in an admiralty court would be as advisory to the court. This view of the effect of this act is confirmed by the opinion of Mr. Justice Bradley in the case of *Lee v. Thompson*, Fed. Cas. No. 8,202. In that case a person cited to appear and show his title to property which it was claimed had been transferred to one of the parties to the suit by fraudulent transfer, answered in response to the citation, and demanded a trial by jury. A jury was ordered, and the trial went on between the libellant and the person so cited, and a verdict was rendered against the latter. He thereupon excepted to the validity of this proceeding. Justice Bradley said:

"It is undoubtedly true that a court of admiralty has no power to try causes by jury; but there is no reason why it should not, either on its own motion or at the desire of the parties, submit any question of fact to commissioners or referees for their opinion or advice; and the number of these commissioners may be twelve as well as any other number. But their decision, after all, is not, like the verdict of a jury, conclusive upon the facts; and no bill of exceptions can be entertained, and no writ of error can be brought to consider such exceptions. The matter must be finally submitted to the judgment of the court, and the court will not be concluded by the verdict, although it may be aided in coming to a conclusion."

In support of this proposition Justice Bradley cites the case of *Dunphy v. Kleinsmith*, 11 Wall. 610. That case was properly an equitable proceeding, but the issue of fact was submitted to a jury under the supposition that the parties had a right to a jury trial. This, the court said, was wrong, in the following language:

"The case, being a chancery case, and being instituted as such, should have been tried as a chancery case by the proceeding known to courts of equity. In those courts the judge or chancellor is responsible for the decree. If he refers any question of fact to a jury,—as he may do by a feigned issue,—he is still to be satisfied in his own conscience that the finding is correct; and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury."

The supreme court, in the case of *The Eagle*, 8 Wall. 20, hereinbefore referred to, substantially held that this act of 1845 was obsolete. The court say:

"We must, therefore, regard it as obsolete, and of no effect, with the exception of the clause which gives to either party the right of a trial by jury when requested, which is rather a mode of exercising a jurisdiction than any substantial part of it."

From these cases I reach the conclusion that the provision of the act of 1845 giving to either party the right to a trial by jury has not changed the powers of the admiralty judge, who is still responsible for whatever judgment is rendered in the admiralty proceedings. Justice Bradley says the chancellor is responsible for the decree in a chancery case. The court may refer the questions to a jury, whose verdict will be only advisory.

The averments in the libel, and the facts set forth in the affidavit filed in support of the application for a jury trial, do not bring the libellant in this case within the meaning of the act of 1845. It appears from these averments that the City of Toledo is a vessel plying between ports within this judicial district, and not engaged in the business of commerce and navigation between places in different states. The application for a trial to a jury is therefore denied.

THE COLUMBIA.

SHORT et al. v. THE COLUMBIA et al.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1896.)

No. 172.

1. ADMIRALTY—LIMITATION OF LIABILITY—APPEAL—PARTIES.

When two or more parties, having distinct and several claims against the owners of a vessel, are brought into one proceeding for the limitation of the shipowner's liability, or his exemption from liability, pursuant to Rev. St. §§ 4282-4290 and admiralty rules 54-57, the decree in such proceeding, awarding different sums to the different claimants, is several as to them, and any of such claimants may appeal from such decree, without making the others parties to the appeal, or notifying them thereof. McKenna, Circuit Judge, dissenting. 15 C. C. A. 91, 67 Fed. 942, reversed.

2. SAME—TUG AND TOW.

When the owner of a barge which has no motive power undertakes to transport freight by means of the barge, such barge and a tug, belonging to the same owner, by which the motive power is supplied, become one vessel for the purposes of the voyage, and the owner is not entitled to limit his liability, under Rev. St. §§ 4282-4290, for damages caused by the negligence of the crew of either craft, without surrendering both.

Appeal from the District Court of the United States for the District of Oregon.

This was a petition by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company for a limitation of liability in respect to damages occasioned by the wrecking of the barge Columbia. Various parties filed claims for damages, and the district court rendered a decree limiting the liability of the owners to the amount of \$100. From this decree some of the parties took an appeal, which, on May 6, 1895, on motion of the appellees, was dismissed. See 15 C. C. A. 91, 67 Fed. 942. Afterwards a rehearing was granted, and the motion to dismiss has again been argued.

Page, Eells & Wheeler and Andros & Frank, for appellants.
W. W. Cotton, for appellees.

Before McKENNA, GILBERT, and ROSS, Circuit Judges.

ROSS, Circuit Judge. The motion to dismiss the appeal is first to be disposed of. The contention in support of this motion, which was sustained by this court on the former hearing of this cause, is based upon the theory that the decree entered in the court below is a joint decree, in which all of the respondents there have a common interest, and that, as two of them, namely, William Boyce and Anna C. Larson, did not join in the appeal, and no request was made of them to join therein, and no order of severance was made by the court below, and no notice of appeal was served on them, the appeal must be dismissed.

By the amendatory act of congress of June 19, 1886 (24 Stat. 79, 80), the provisions of what is commonly known as the "Limited Liability Act," originally enacted March 3, 1851 (9 Stat. 635), and the provisions of which have been substantially incorporated into Rev. St. §§ 4282-4290, are made applicable to all vessels used on lakes, rivers, or in inland navigation, including canal boats, barges, and lighters. Sections 4283 and 4284 of the Revised Statutes are as follows:

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost (loss), damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

"Sec. 4284. Whenever any such embezzlement, loss or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and (*owner*) (owners) of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

To facilitate and further the proceedings authorized by the act of March 3, 1851, the supreme court promulgated certain supplemental rules of practice in admiralty, numbered, respectively, 54, 55, 56, and 57, which are found in 13 Wall. xii., xiii., and the validity of

which has been judicially determined. *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, 109 U. S. 578-590, 3 Sup. Ct. 379, 617; *Norwich Co. v. Wright*, 13 Wall. 104. Those rules provide, among other things, that owners of vessels, making suitable allegations for the purpose, shall be at liberty to contest their liability, or the liability of the vessel, to pay any damages, as well as to show that, if liable, they are entitled to a limitation of liability. Rule 56; *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, *supra*. And that is what the petitioners in the court below sought to do.

They commenced the proceedings by the filing in the district court for the district of Oregon of a petition by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, which set forth, among other things, the ownership by the Oregon Railway & Navigation Company of a certain barge known as the *Columbia*, used and operated upon the *Columbia* and *Willamette* rivers, and that the Oregon Short Line & Utah Northern Railway Company is engaged in operating steamboats and other vessels, and in owning and operating lighters and barges between Portland and Astoria, in the state of Oregon, and elsewhere, and during the times mentioned in the petition was lessee, from the Oregon Railway & Navigation Company, for a period of 99 years, from the 1st day of January, 1887, of the barge *Columbia*, and was at all the times mentioned in the petition operating that barge under the terms and provisions of the lease, and had the sole possession and control thereof; that on or about October 21, 1892, the barge *Columbia* left Portland with a cargo of wheat, for transportation to Astoria, the wheat being part of the cargo of the British ship *Westgate*, and destined to be transported by means of the barge *Columbia* and the ship *Westgate* from Portland, Or., to Liverpool, England; that the barge was seaworthy, and that the wheat was properly loaded thereon, and that all went well until the barge, on the night of the 21st of October, 1892, reached Astoria, at which point the barge intended to tie up alongside the dock of the Oregon Railway & Navigation Company; that, lying in front of the dock, and floating nearly level with the water, and designed for the purpose of preventing ships from chafing against the timbers of the dock, was a pontoon, consisting of 12x12-inch timbers, securely fastened together, and being 60 feet long, 1 foot thick, and 4 feet wide; that the barge was towed by the steamboat *Ocklahama*, and that the darkness of the night rendered it impossible for the crew and captain in charge of the *Columbia* to see the pontoon, and, in attempting to make a landing at the dock, the barge ran against the pontoon with sufficient force to break the stem and forefoot of the barge, and to start her timbers to such an extent that she commenced leaking; that those in charge of the barge deemed it necessary and advisable to remove her into shallower water, in order that the barge and her cargo might be more conveniently saved, and thereupon the barge was taken behind the dock, and placed alongside the rear portion thereof; that, after an examination had been made by the men in charge of the barge, it was found that she would probably float if the pumps were used, and thereupon the men in charge of her commenced using the pumps, and kept the leak

in control, so that the barge did not continue to make water faster than it was pumped out of her; that the cargo upon the barge was entirely loaded upon her deck, as is customary and proper in vessels of her character, and that, at the time the pumps were working, no part of her cargo in the barge was injured in any manner, but that the cargo was injured in the manner afterwards stated; that the men in charge of the barge undertook to stop the leak by building a bulkhead, intending to place between the bulkhead and the bow of the barge sacks of wheat, for the purpose of stopping the leak; that, in order to aid in the work of building the bulkhead, three men, among others, entered the hold of the barge, namely, Marshal Short, the captain of the Ocklahoma, William Boyce, a deck hand on the Ocklahoma, and one Gus Peterson, who was a deck hand either of the barge or of the Ocklahoma; that the tide was at this time ebbing, and, while the men named were in the hold of the barge, the latter touched ground; that an examination was thereupon made by the men in charge of the barge as to her condition and position, and they thereupon concluded to continue the work of undertaking to stop the leak, believing that the barge would sink into the mud and remain upright; that, as the tide continued to flow the barge suddenly listed to one side, away from the dock, and partially turned over; that, as Short and Peterson undertook to escape from the hold of the barge, they were caught by the falling cargo, consisting of wheat in sacks, piled in tiers upon the deck of the barge, and were crushed and killed; that a large amount of the cargo was thrown into the water, and the barge subjected to such a severe strain that her house was carried away and her hull damaged; that Boyce claims to have been thrown down and injured as a result of the listing of the barge; that the accident happened, and the loss, damage, injury, and destruction set forth were occasioned, done, and occurred without the fault, privity, or knowledge of the petitioners or either of them, and were due solely to the perils of the sea; that, nevertheless, the administrators of Short and of Peterson, and the firm of Balfour, Guthrie & Co., threaten to and will, unless restrained as prayed, commence actions against the petitioners, or one of them, to recover damages claimed to be suffered by the accident; that on or about November 15, 1892, Boyce commenced an action in the circuit court of the state of Oregon for Multnomah county, against the petitioners, to recover damages in the sum of \$15,000 for injuries alleged to have been suffered by him, which action is pending; that the claims so made by the persons mentioned, and each of them, are largely in excess of the value of the barge in the condition in which she was after the accident and damage on the 22d of October, 1892, when her voyage was completed; that there was no freight money due or owing to the barge or either of the petitioners on account of the transportation of the cargo of wheat, and that there was no freight then pending in connection with the barge; that the petitioners, and each of them, desire to contest their liability for the loss, destruction, damage, and injury occasioned by the accident, and also to claim the benefit of the limitation of liability provided by the acts of congress, and, to that end, desire an appraisalment to be made and had of the amount or value of the interest of

each of said persons, and of the barge in the condition in which she was after the accident and damage on October 22, 1892, and of her freight then pending, and, for that purpose, petitioners ask that the barge be examined, and her value ascertained, by a commissioner of the circuit court, or by such other means as the court shall direct.

The petition further alleged, among other things, that the barge was, at the time of the accident, under the sole and exclusive management, operation, and control of the Oregon Short Line & Utah Northern Railway Company, and that none of the men on board of the barge were officers, agents, or employes of the Oregon Railway & Navigation Company; that the cargo of wheat belonging to Balfour, Guthrie & Co. was being carried by the Oregon Short Line & Utah Northern Railway Company under and by virtue of a bill of lading or shipping receipt issued by that company, and was not being carried, handled, or controlled in any manner by the Oregon Railway & Navigation Company. And the Oregon Short Line & Utah Northern Railway Company allege that the barge was in all respects sound, staunch, and seaworthy, and was properly manned, equipped, and provided for the voyage in which she was engaged, and under the charge and management of proper and suitable officers; that the captain of the barge executed to Balfour, Guthrie & Co. a shipping receipt or bill of lading for the wheat carried upon her, to wit, 8,898 sacks, which receipt contained the following provision, to wit: "In consideration of the reduced rate at which the articles covered by this receipt are carried, it is agreed by the undersigned, for and on behalf of the owner of the property, that the Oregon Short Line & Utah Northern Railway Company shall not be responsible for any injury or damage to the property described in this receipt not caused by the actual negligence of the said company or its agents;" that the agreement so contained in the receipt was signed by Balfour, Guthrie & Co., and that the wheat was being carried under the terms and provisions of that receipt, and not otherwise; that the injury to the wheat did not occur by reason of any negligence on the part of either of the petitioners, or of any of their agents or servants, but was caused solely by a peril over which the petitioners, and each of them, had no control, and which injury could not have been prevented by the exercise of any care on the part of the petitioners, their officers, agents, or employes. The petitioners further alleged that Short, Boyce, and Peterson, and each of them, well knew the danger connected with working in the hold of the barge, and that the danger was one of the risks of their employment, voluntarily assumed by them, and each of them had knowledge of the danger connected therewith, and that the injuries resulting to Boyce and to the estates of Short and Peterson were not caused by any negligence or lack of care or skill on the part of the petitioners, or any of their officers, agents, or employes, but were the results solely of the contributory negligence of Short, Boyce, and Peterson, and each of them, in entering and remaining in the hold of the barge, well knowing the danger connected with working therein; that the barge has not been libeled or arrested in any court for any of the injuries, loss, or destruction claimed, but the petitioners have been sued in the circuit court of

Multnomah county, of the state of Oregon, as aforesaid. And the petition concluded with the prayer that the court cause appraisement to be had of the value of the barge in the condition in which it was immediately after the accident, and, upon the ascertainment of such value, make an order for the payment thereof into court, or for the giving of a stipulation, with sureties, for the payment thereof into court whenever the same shall be ordered, and will issue a monition against all persons claiming damages for any loss, destruction, or damages or injury occasioned by the accident, citing them to appear before the court and make due proof of their claims at a time to be therein named, as to all of which the petitioners, and each of them, will contest their liability, independent of the limitation of liability claimed under the statutes aforesaid; and that the court designate a commissioner before whom proof of all claims presented in pursuance of such monition, shall be made, and that, upon the giving in of the report of the commissioner, and upon the hearing of the cause, if it shall appear that the petitioners are not liable for such loss, destruction, damage, and injury, it may be so finally decreed by the court, and that, in the meantime, until the final judgment of the court shall be given, an order be entered restraining the further prosecution of all or any suit or suits against the petitioners, or either of them, in respect to any claim or claims.

Upon the filing of the petition an order was made by the court appointing appraisers to appraise the value of the barge, her tackle, apparel, and furniture, as the same was at the end of her voyage at Astoria, on October 22, 1892, and after the injury and damage set forth in the petition, and also to determine the value of her freight then pending, if any. The appraisers, having qualified as such, appraised the barge, her tackle, apparel, and furniture at the sum of \$100, and found that the freight pending was nothing, it not having been delivered according to contract. Thereupon the petitioners were authorized to give a stipulation for the value of the barge, her tackle, etc., as fixed in the appraisement, which was done. Whereupon, the court ordered the issuance and publication of a monition commanding all persons claiming damages for any loss, destruction, damage, or injuries occasioned by the disaster to the barge Columbia, referred to in the petition, to appear and make due proof of their respective claims on or before a certain fixed day, and naming a commissioner before whom such claims should be presented, and restraining all persons from proceeding further against the petitioners, or in respect to such claims, by any separate or independent suit. Pursuant to this monition, Balfour, Guthrie & Co., Malvina Short, as administratrix of the estate of the deceased Short, Sven Anderson, as administrator of the estate of the deceased Peterson, Anna C. Larson, the mother of the deceased Peterson, and William Boyce, appeared and answered separately, and by different proctors set up separately, and not in connection with each or any other, their own separate and distinct claims for loss and damage. The claims of Anna C. Larson and Sven Anderson, as administrator, and of Malvina Short, as administratrix, were for the death of Peterson and Short, respectively; that of Boyce was for injuries claimed to have been sustained by him, and for wages claimed

to be due him; and that of Balfour, Guthrie & Co. set up the contract of carriage in defense of the petitioners' right to exemption from liability, and in defense of their right to a limitation of liability.

In support of these several claims and defenses, the respective claimants filed, as has been said, separate answers, some of which were amended. The answer of Balfour, Guthrie & Co. alleged, among other things, that the barge was not sound, staunch, or seaworthy at the time she was loaded for the voyage in question; that her cargo was carelessly, negligently, and improperly loaded, and was, in fact, overloaded; that the barge was insufficiently manned and equipped; and that her crew was without the necessary skill and experience for the business in which she was engaged; that all these matters were at the time well known to the owners, their officers, agents, and employés; that both the tug Ocklahama and the barge were so negligently handled at the time of the landing of the barge at the dock at Astoria that her bow was stove in; and that, in removing her to the inside of the dock, petitioners were guilty of negligence and unskillfulness.

The answer of Boyce, as amended, among other things, denied that the barge was seaworthy or in good order or condition, or that her cargo was properly loaded, or that all went well with her until the night of the 21st of October, 1892, or that the accident was at all due to the perils of the sea; but, on the contrary, alleged that the barge was lashed to the side of the steam tug Ocklahama, and, under its control, was under such headway and high rate of speed, that the Ocklahama ran the bow of the barge under the dock, striking the same and cutting off several of the piles, and by which the anchor was thrust through the side of the barge; that the damage, injury, and loss mentioned in the petition were caused wholly by the negligent manner in which the Ocklahama ran the barge into the dock, and not by the careless manner in which the barge was overloaded or otherwise; that he (Boyce) was employed as a deck hand on board the Ocklahama, and was ordered by her captain to go in the hold of the barge, and that, while engaged in building the bulkhead therein, as ordered by the captain of the Ocklahama, the barge listed and started to turn over, when he (Boyce) undertook to escape from the hold, and was greatly injured by the falling of the wheat. In a cross libel filed by Boyce, he set up, among other things, the same matters alleged in his answer, and also that he was employed as a deck hand on the Ocklahama, at the monthly wages of \$40, with board and lodging; that, in approaching the dock at Astoria, the captain of the Ocklahama, having in tow the barge, did not use due care or caution, but that the Ocklahama was so improperly and unskillfully managed and navigated that she was driven upon and into the wharf with such force as to drive one fluke of the anchor through the bottom of the barge, making a hole therein and letting the water into the hold thereof; that, while the steam tug and barge were under the full control of the master of the tug, he (Boyce) in obedience to the orders of the master, went from the tug Ocklahama to and upon the barge, and into her hold, to assist in repairing the leak, and, being in the performance of his duty, and in obedience to the orders of the master

of the Ocklahama, and without any want of due care upon his part, the barge turned to one side, causing the cargo of wheat to move and shift, whereby a large quantity of water entered the hold and the deck was broken in; that, as the barge was sinking, he (Boyce) endeavoring to save his life, undertook to escape from the hold, and was greatly injured by the falling sacks of wheat, the particulars of which injury he set out, and by which he lost all the profits of his labor from the 22d day of October, 1892, to wit, the sum of \$40 per month and his board and lodging, and has become permanently injured, to his damage in the sum of \$15,000, for all of which he asked judgment.

The answer of Malvina Short, as administratrix of the estate of the deceased Short, as also the answer of Sven Anderson as administrator of the estate of the deceased Peterson, alleged the same matters of negligence set out in the answer of Balfour, Guthrie & Co., except as to the alleged insufficiency and unskillfulness of the crew of the barge, and except, also, as to the allegation of negligence in making the landing at Astoria, and in moving the barge to the inside of the dock. They also allege, that the barge was improperly constructed, in having a round, instead of a flat, bottom, and that there was negligence on the part of the petitioners in not having provided suitable pumps and pumping apparatus.

The answer of Anna C. Larson, mother of the deceased Peterson, among other things, denied that the barge was seaworthy, or in good order or condition, or that the cargo of wheat was properly loaded thereon, or that the accident occurred without the fault, privity, or knowledge of the petitioners, or was at all due to the perils of the sea, or that the barge was properly manned or equipped for the voyage in which she was engaged, or was under the charge of proper officers. It also alleged that she is the mother and sole surviving parent of the deceased Peterson, who was, at the time of the accident, in the employment of the petitioners as deck hand on the Ocklahama, and subject to the orders of the captain thereof, who was the deceased Short; that, on the afternoon of October 21, 1892, Short, pursuant to the orders of the petitioners, took the barge, which was then old, decayed, leaky, and utterly unseaworthy, and without suitable pumps and pumping apparatus, of all of which the petitioners were aware, and which was negligently and unskillfully overloaded, and by means of the steam tug Ocklahama, towed the barge, having the deceased Peterson on board as a deck hand, from Portland to one of its docks at Astoria; that, on October 22, 1892, at the dock at Astoria, while the barge was still attached to the Ocklahama, and in tow thereof, and in control of the captain of the Ocklahama, the deceased Peterson, by the order of the captain of the tug, went from the deck of the Ocklahama, on board the barge, and into her hold, to assist in repairing a leak therein, and, while so engaged, and without any fault or want of due care or caution on his part, but solely by reason of the unsound and unsafe condition of the barge, and of her overloading, and to the carelessness of the petitioners, the barge suddenly turned to one side, and gave way, thereby causing the cargo of wheat to shift, whereby a quantity of water was shipped into the hold, the deck of the barge broken, the hatchways filled with sacks

of wheat, by means of which the deceased Peterson then and there lost his life, and by which the respondent Anna C. Larson was damaged in the sum of \$6,000, for which she asked judgment.

The barge *Columbia*, in respect to which the petitioners sought to limit their liability, not having been surrendered to a trustee, as provided for by section 4285 of the Revised Statutes, the proceeding taken was not a proceeding in rem, but a suit in equity (*In re Morrison*, 147 U. S. 14-34, 13 Sup. Ct. 246); and a suit in equity, not only for the purpose of limiting the liability of the petitioners, if any liability should be found to exist, but, as has been shown, also to have it judicially determined that no liability at all attached to the petitioners by reason of the injuries, damage, and loss mentioned in the petition. The monition issued and published in pursuance of the petition commanded all persons having claims growing out of the matters therein alleged to appear and intervene *pro interesse suo*. 13 Wall. 104; 109 U. S. 591, 3 Sup. Ct. 379, 617. All persons having such a claim or claims are forced by the provisions of the law into the one suit; but, when they come into it, each is entitled to set up the facts relied upon by him to make good his claim. Obviously, they may, and often do, rest upon separate and distinct grounds. It was so in the present case. All of the parties defendant, it is true, sought to defeat any limitation of liability of the petitioners, and each of the respondents sought to hold the petitioners liable for the full amount of damage sustained; but the ground of each claim, unless it be the claims of Sven Anderson, as administrator, and Anna C. Larson, was certainly separate and distinct from any other. The claim of Balfour, Guthrie & Co. was for damages for breach of a contract of carriage; that of Malvina Short, as administratrix, was for damages sustained by the death of her husband; of Boyce, for damages for loss of wages and for personal injuries sustained by himself; and those of Sven Anderson, as administrator, and Anna C. Larson, for damages sustained by the death of Peterson.

As has been shown, the purpose of the proceedings on the part of the petitioners was not only the limitation of their liability, but to obtain a decree that they are not liable at all by reason of any of the matters or things alleged in the petition. The subject of the suit, therefore, goes far beyond the value of the barge *Columbia*, for which the petitioners gave a stipulation, and involves subject-matters in which the various claimants have no common interest. What interest has Malvina Short, as administratrix, or Sven Anderson, as administrator, or Boyce, or Anna C. Larson, in the wheat of Balfour, Guthrie & Co. that was lost? What interest has that company in the death of Short, or of Peterson, or in the injuries and damage sustained by Boyce? And what interest has Malvina Short, as administratrix, in the death of Peterson, or in any of the injuries or damage sustained by Boyce? Or Anderson, as administrator, or Anna C. Larson, in the death of Short, or in the injuries and damage sustained by Boyce? Or Boyce, in the death of Short or Peterson? Obviously, none. These causes of action are the subject-matters of the suit, in which the interests are manifestly separate and distinct. In no respect does the stipu-

lated value of the barge, which the petitioners offer to give in satisfaction of all of the claims of the respondents, constitute the subject-matter. If so, what about the Ocklahama, which they do not bring into the suit at all? And yet one of the principal questions in the case is whether the petitioners are not required to surrender the Ocklahama as a condition precedent to securing a limitation of liability, if they are entitled to any such limitation at all. The fact that each of the claims may be established by the same proof does not convert separate and distinct subject-matters and separate and distinct claims into a common subject-matter and a common claim, nor give to the various claimants a common interest therein.

The proceedings here in question are quite analogous to joint suits for seamen's wages, and to the practice in cases of salvage. In *Olivier v. Alexander*, 6 Pet. 143, which was a libel by officers and seamen for their wages, and in which proceeding a separate decree was entered by the trial court for each libelant, for the amount found due him, and apportioning pro rata the payment of the same out of the funds in court and decreeing the deficit to be paid by the owners of the ship, the sums so decreed to the libelants, respectively, in no case exceeded \$900. From the separate decrees so rendered, an appeal was taken to the supreme court, the appellant giving several appeal bonds upon the appeal from each decree, as well as a joint appeal bond for the whole. A motion was made to dismiss the appeal upon the ground that the sum in controversy in each decree was less than \$2,000, and, as such, insufficient to give the supreme court appellate jurisdiction. The motion was resisted upon the ground that the aggregate in controversy under the whole of the decrees, taken together, greatly exceeded that value. The court granted the motion, and dismissed the appeal for want of jurisdiction, and in the course of its opinion said:

"It is well known that every seaman has a right to sue severally for his own wages in the courts of common law, and that a joint action cannot be maintained in such courts, by any number of seamen, for wages accruing under the same shipping articles for the same voyage. The reason is that the common law will not tolerate a joint action, except by persons who have a joint interest and upon a joint contract. If the cause of action be several, the suit must be several also. But a different course of practice has prevailed for ages in the court of admiralty in regard to suits for seamen's wages. It is a special favor, and a peculiar privilege allowed to them, and to them only, and is confined strictly to demands for wages. The reason upon which the privilege is founded is equally wise and humane. It is, to save the parties from oppressive costs and expenses, and to enable speedy justice to be administered to all who stand in a similar predicament,—in the expressive language of the maritime law, 'velis levatis.' And the benefit is equally as great to the shipowner as to the seamen, though the burden would otherwise fall upon the latter, from their general improvidence and poverty, with a far heavier weight. A joint libel may, therefore, always be filed in the admiralty by all the seamen who claim wages for services rendered in the same voyage under the same shipping articles. But, although the libel is thus in form joint, the contract is always treated in the admiralty, according to the truth of the case, as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim, and is unaffected by those of his colibelants. The defense which is good against one seaman may be wholly inapplicable to another. One may have been paid, another may not have performed the serv-

ice, and another may have forfeited, in whole or in part, his claim to wages. But no decree whatsoever which is made in regard to such claim can possibly avail to the prejudice of the merits of others which do not fall within the same predicament. And wherever, from the nature of the defense, it is inapplicable to the whole crew, the answer invariably contains separate averments, and is applied to each claim according to its own peculiar circumstances. The decree follows the same rule, and assigns to each seaman severally the amount to which he is entitled, and dismisses the libel as to those, and those only, who have maintained no right to the interposition of the court in their favor. The whole proceeding, therefore, from the beginning to the end of the suit, though it assumes the form of a joint suit, is in reality a mere joinder of distinct causes of action, by distinct parties, growing out of the same contract, and bears some analogy to the known practice at the common law of consolidating actions against different underwriters, founded upon the same policy of insurance. Be this as it may, it is the established practice of the admiralty. The act of congress, already referred to, adopts and sanctions the practice; and it enacts that, in proceedings in rem against the ship for mariner's wages, 'all the seamen or mariners having cause of complaint of the like kind against the same ship or vessel, shall be joined as complainants.' Act 1790, c. 29, § 6. It thus converts what by the admiralty law is a privilege into a positive obligation where the seamen commence a suit at the same time in the same court by a proceeding in rem for their wages. And it further directs that 'the suit shall be proceeded on in the said court, and final judgment be given, according to the course of admiralty courts in such cases used.' Act 1790, c. 29, § 6. From this summary view of the nature and operation of the proceedings in the admiralty, in cases of joint libels for wages, it is obvious that the claim of each seaman is distinct and several, and the decree upon each claim is, in like manner, distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another, for he has no interest in it and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners or other respondents is the sum or value of his own claim, without any reference to the claims of others."

In *Thomas v. Lane*, 2 Sumn. 1, Fed. Cas. No. 13,902, which was a cause of salvage, Judge Story said:

"My opinion is that there is no difference as to the right of appeal, whether the respondents sever or join in their answer or pleadings, if the defense is several in its nature. * * * In case of an appeal from a joint decree in chancery against the defendants in the suit all the defendants affected by the decree must join; but this is because they are united in interest. And in suits in admiralty, founded upon contracts, I should have no doubt that the appeal must be by all the respondents charged, either personally or in interest, by the decree. But wherever the case, though joint in form, is in reality several in its character, as in cases of salvage, where distinct owners intervene severally as respondents, each for his own interest, it seems to me that the decree, though in form joint, must be treated as several in its operation, and that each defendant must possess a several right of appeal for his own distinct interest."

In all of these cases the procedure is, in truth, a joinder of separate and distinct causes of action, the decrees in which, where several in their nature, should be treated as several in their operation even though joint in form. See, also, *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. 147; *Russell v. Stansell*, 105 U. S. 303; *Gray v. Have-meyer*, 3 C. C. A. 497, 53 Fed. 174. William Boyce, therefore, not having any interest in the questions at issue between the petitioners and the appellants, was not a necessary party to their appeal; and, if it be conceded that Anna C. Larson was a necessary party to the appeal of Sven Anderson, as administrator of the estate of the deceased Peterson, her appearance in this court on the appeal,

and the filing of a brief by her proctors, cure the lack of notice, since all that is required is that she be heard upon the appeal. *Penhallow v. Doane's Adm'rs*, 3 Dall. 87. For the reasons stated, the motion to dismiss the appeal is denied, and we proceed to a consideration of the merits.

All of the respondents and cross libelants not only contended that the barge was, from the inception of the voyage, unseaworthy, but also that the barge and tug were, in law, one vessel, and that, to avail themselves of the benefit of the limited liability act, the owners must surrender the tug as well as the barge in satisfaction of the loss and damage complained of. The court below found the fact to be that the barge was, at the time of the accident, seaworthy, and, as the evidence in respect to that question is decidedly conflicting, the finding of the trial court must be accepted on this appeal as conclusive. *The Alejandro*, 6 C. C. A. 54, 56 Fed. 621. The court below also found that the master of the barge was negligent in shifting certain portions of her cargo, and that this negligence of the master of the barge was the proximate cause of the sinking of the barge, and of the loss and injuries sustained by the respective claimants, and, holding, as it did, that "the tow service of the tug was ended before the proximate cause of the accident in question was set in motion," confined the compensation of the respective claimants to the stipulated value of the barge. In this we think the court below was in error.

The case shows that the wheat in question was destined to be transported from Portland, Or., to Liverpool, England, by means of the barge *Columbia* and the British ship *Westgate*. That fact appears, not only from the testimony in the case, but from the petition as well. The Oregon Short Line & Utah Northern Railway Company, lessee of the barge and of the tug *Ocklahama*, undertook to transport the wheat from Portland to the ship *Westgate*. The shipping receipt issued by the master of the barge to the owner of the wheat was issued on behalf of the owner of the craft. The contract of carriage was the owners' contract, and the terms of the contract were that the carrier was only to be liable to the owner of the cargo for negligence. According to the contract, the carrier was liable for negligence. As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. This the carrier did, as was its custom, by means of a tug,—in this instance, the tug *Ocklahama*, owned by the Oregon Railway & Navigation Company, and under lease to the Oregon Short Line & Utah Northern Railway Company, as was the barge *Columbia*. When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage,—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines. *The Northern Belle*, 9 Wall. 526–529; *Sturgis v. Boyer*, 24 How. 110–122; *The Merimac*, 2 Sawy. 595, Fed. Cas. No. 9,478; *The Bordentown*, 40 Fed. 686.

In the case of *The Northern Belle*, the supreme court, in speaking of the facts there appearing, said:

"The barges are owned by the same persons who own the steamboats by which they are propelled, and are generally considered as attached to and making part of the particular boat in connection with which they are used, though quite often an individual or corporation owning several boats running in a particular trade have a large number of barges, which are taken in tow by whatever boat of the same line may be found most convenient. In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage."

In *The Keokuk*, 9 Wall. 519, the court found, from the evidence, that the carrier had made no contract to carry the wheat that had been put in one of the carrier's barges without its knowledge, and which, therefore, had not been cared for by the carrier and lost; but the court said:

"It is very clear, had the steamer taken the barge in tow, the lien would have attached, although the bills of lading were not executed, because the act of towing the barge would be evidence that the grain was received, and that there was a contract to carry it safely. And the steamer would be equally liable if the barge had been left at the landing by the fault of the officers of the boat. But the evidence not only fails to prove this, but establishes the contrary conclusion."

In the present case, the barge and tug had the same owner, and both were operated by the same carrier. In the voyage, both were necessarily under the control of the master of the tug. They constituted the instrument of carriage, to which the wheat was liable for the service, and on which the owners of the cargo had a lien for the due performance of the contract of carriage. The case shows that the tug, having the barge loaded with wheat in tow, left Portland about 1 o'clock in the afternoon of October 21, 1892, and reached Astoria about 12 o'clock that night. Notwithstanding there is nothing in the case to show that the contract of carriage contemplated the landing of the wheat at Astoria, or the tying up of the barge at the dock at that place, but, on the contrary, the delivery of the wheat from the barge to the ship *Westgate*, yet the tug—due, probably, to the late hour of arrival—undertook to tie up at the dock, and, in doing so, carelessly ran the barge against the piles of the dock, and with such force as to knock a hole in her stem, thereby causing a serious leak. The master of the tug continued, after the accident, to exercise control over the barge, as well as the tug, changed its position, put the engineer of the tug at work with a siphon to pump the water out of the barge, and himself went, with one of the deck hands of the tug, into the hold of the barge for the purpose of building a bulkhead to guard against the water, and was so engaged when, about two hours after the accident, the barge collapsed, causing the death of the master and deck hand of the tug, the injury of Boyce, a deck hand of the barge, and the loss of the wheat of Balfour, Guthrie & Co.

The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proximate cause of the loss and damage in question. But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage

be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that, in according the petitioners a limitation of liability without the surrender of the tug Ocklahoma, the court below was in error.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

McKENNA, Circuit Judge (dissenting). I am unable to agree with the majority of the court in the conclusions reached on the motion to dismiss the appeal, for the reasons stated by Judge HANFORD in the opinion of the court at the original hearing, and reported in 67 Fed. 942, 15 C. C. A. 91. Jurisdiction being entertained, I concur in the judgment requiring the surrender of the steamer or tug Ocklahoma, as well as of the barge.

HUMBOLDT LUMBER MANUFACTURERS' ASS'N v. CHRISTOPHERSON et al.¹

(Circuit Court of Appeals, Ninth Circuit. February 19, 1896.)

No. 183.

1. TOWAGE—NEGLIGENCE OF TUG—CROSSING BAR IN ROUGH WEATHER.

A tug attempting to tow a schooner from the Pacific Ocean across Humboldt Bar into Humboldt Bay *held* liable for the loss of the tow by capsizing, on the ground that it was gross negligence to try to cross the bar (the sands of which are shifting and uncertain) at a time when the tide was ebbing at near its maximum velocity of about four knots an hour, and a southeast wind blowing at nine miles an hour, so that heavy seas were breaking on the bar in about seven fathoms of water. 60 Fed. 428, affirmed. Hanford, District Judge, dissenting on the evidence.

2. CONSTITUTIONAL LAW—STATE JURISDICTION OF COAST WATERS.

The rights and jurisdiction of the several states over the sea adjacent to their coasts are those of an independent nation, except as qualified by any right of control granted to the United States by the constitution. And where, by a state's constitution and laws, her boundaries and those of her counties are three miles from the shore, her statutes giving an action for death by negligence are operative within such boundaries where death occurs by negligence in the navigation or towage of vessels. 60 Fed. 428, affirmed. *Manchester v. Massachusetts*, 11 Sup. Ct. 559, 139 U. S. 264, followed and applied.

3. SHIPPING—EXEMPTIONS FROM LIABILITY—RETROACTIVE LEGISLATION.

The act of February 13, 1893 (27 Stat. 445), exempting shipowners from liability for loss resulting from errors of navigation, etc., in certain cases, has no retroactive effect, so as to apply to damages occasioned before its passage.

4. DAMAGES—EXCESSIVE AWARDS.

\$7,000 and \$5,000, respectively, *held* not excessive awards by a court of admiralty for the death by drowning of the master and cook of a schooner, they being in good health at the time, and earning wages of \$100 and \$50 per month, respectively; the master being 35, and the cook 39, years old. 60 Fed. 428, affirmed.

Appeal from the District Court of the United States for the Northern District of California.

¹ Rehearing pending.

The action grew out of the following facts, as stated by the learned judge who heard the case in the district court:

"On the 16th day of November, 1889, the schooner *Fidelity*, while being towed from the Pacific Ocean into Humboldt Bay by the steam tug *Printer*, was capsized on Humboldt Bar. The captain and all hands on board the schooner were drowned, and the vessel itself drifted away, and became a total loss. On March 17, 1890, the Humboldt Lumber Manufacturers' Association, charterer of the steam tug *Printer*, filed a petition in this court, setting forth the loss of the schooner *Fidelity*, and alleging that three separate actions had been commenced against the petitioner in the superior court of Humboldt county by persons claiming damages aggregating seventy-five thousand dollars, charged to have accrued to plaintiffs by reason of the loss of the lives of the master and two of the employes of the schooner *Fidelity*. Petitioner also alleged that it was informed and believed that other persons would claim damages for the loss of life and property in said disaster, and that it desired to contest its liability and the liability of the steam tug *Printer* for the loss of the schooner *Fidelity*, her cargo, master, and crew, and also to claim the benefit of the limitation of petitioner's liability under the provisions of sections 4282-4289, inclusive, of the Revised Statutes of the United States. Thereupon, an order was entered by the court, citing all persons who had suffered any loss or damage by reason of the loss of the schooner *Fidelity* to show cause why an appraisal of the tug *Printer* should not be made, and why the petitioner should not have such other and further relief in the premises as might be meet and proper, and in the meantime all persons who had brought suits against the petitioner were restrained and enjoined from the prosecution of the same, as was also the commencement and prosecution of all and any suits against the petitioner as owner or charterer of the steam tug *Printer*, and in rem against the steam tug *Printer*, for and on account of any loss or damage arising from the loss of the schooner *Fidelity*. On May 1, 1890, Henry Wolfe, an administrator of the estate of one who had perished by reason of the disaster, and who, prior to the filing of the petition in this case, had commenced a suit in the state court for damages accruing to the estate by reason of such loss, filed his answer and exceptions to the petition of the Humboldt Lumber Manufacturers' Association, denying, in effect, the jurisdiction of this court, and claiming, further, that, if the court had jurisdiction, the petitioner was not entitled to the benefit of the limited liability act, because the tug *Printer*, as he alleged, was not engaged in interstate commerce, and therefore was not subject to the national, but to the local, or state, law. The questions raised were argued before the late Judge Hoffman, and on the 7th of May, 1890, the answer and exceptions were overruled. On July 29, 1890, the matter was referred to Southard Hoffman to appraise the value of the tug *Printer*, and such proceedings were thereafter had that on August 22, 1890, the commissioner filed his report, appraising the value of the tug at \$22,500, which appraisal was confirmed by the court on September 5, 1890. On October 6, 1890, an admiralty stipulation in the sum of \$22,500 was given and filed. On October 7, 1890, an order was made and filed that a monition issue against certain persons, therein designated, 'and against all persons claiming damages for any loss, destruction, damage, or injury suffered by them, or any of them, or suffered by any decedent represented by them, or any of them, by reason of the loss and destruction of said schooner *Fidelity*,' citing them to appear before the court and make due proof of their respective claims on or before February 3, 1891. The monition was issued, published, and served as directed by the court, and returned and filed on January 3, 1891. The admission of service as to those on whom the monition was specially directed to be served was filed on February 3, 1891. February 2, 1891, the following answers and claims were filed: Claim of Olivia Christopherson et al., damages for causing death of Captain L. H. Christopherson, who was on the schooner *Fidelity* when she capsized, and was then drowned, \$25,000; claim of Mathilda O. Pederson et al., damages for causing death of Hans C. Pederson in like manner, \$25,000; also claims of part owners in the schooner *Fidelity*, as follows: Geo. W. Rager, one-sixteenth, \$1,200; Wm. Wallace, one-sixteenth, \$1,200; Wm. F. McDaniels, one-sixteenth, \$1,200; Henry Axton, one-sixteenth, \$1,200; J. W.

Freese, one thirty-second, \$600. No claims were filed by the other part owners, and no explanation is furnished why they have failed to do so."

From the testimony in the case the court found as follows:

"That the petitioner was and is a corporation duly created and existing under the laws of the state of California. That at all times mentioned in said petition and claims said petitioner, the Humboldt Lumber Manufacturers' Association, was the lessee and charterer of the steam tug Printer. That the said steam tug Printer was of about one hundred tons gross measurement, and enrolled and registered in the United States customhouse in San Francisco, state of California, and within the Northern district of California. That at all times mentioned in said petition and the answer thereto and claims therein, the said steam tug Printer was used by the petitioner for the towage of vessels engaged in interstate and foreign commerce from the Pacific Ocean to Humboldt Bay, and from Humboldt Bay to the Pacific Ocean. That on said 16th day of November, 1889, the said steam tug Printer was commanded by one Robert J. Lawson as master and pilot thereof, who was then the servant of said petitioner. That on the 16th day of November, 1889, said steam tug Printer, within the admiralty and maritime jurisdiction of this court, upon the Pacific Ocean, made fast to the sailing schooner Fidelity, and undertook to tow said schooner over and across said Humboldt Bar and into Humboldt Bay, and that while towing said schooner over said Humboldt Bar said schooner Fidelity, by reason of the carelessness and negligence of said tug, was capsized, and all on board thereof perished, and said schooner Fidelity, with all of her stores and personal effects of the master and crew, became a total loss. That at the time the said steam tug Printer arrived at said Humboldt Bar and started to tow said schooner Fidelity across said bar, on said 16th day of November, 1889, it was about nine or a quarter past nine o'clock in the morning, and the tide had been running ebb about two hours, and was approaching its maximum velocity for that time. That the said schooner Fidelity capsized on Humboldt Bar on said 16th day of November, 1889. That said vessel was inward bound, and at the same time was opposite to the entrance to Humboldt Bay, and at a point not greater than two miles from the shore. That the disaster occurred within the admiralty and maritime jurisdiction of the United States, and within the territorial limits and jurisdiction of the state of California. That the said schooner Fidelity capsized at about a quarter past nine o'clock on the morning of the said 16th day of November, 1889. That on said 16th day of November, 1889, said Humboldt Bar was subject to constant changes by reason of the shifting of the sands beneath the waters thereon, and the navigation of said bar could not be safely undertaken by mariners desiring to enter into or proceed out of said Humboldt Bay over said bar, without the assistance of a tug pilot. That at the time and before the steam tug Printer, commanded by the said Robert J. Lawson, as master and pilot thereof, attempted to tow the said schooner Fidelity across said Humboldt Bar, the said Humboldt Bar was in an exceedingly dangerous condition, there being heavy seas breaking on said bar, in and about seven fathoms of water, the tide ebbing thereon at about its maximum velocity, to wit, about four knots an hour, and a southeast wind blowing at the rate of about nine miles an hour. That these turbulent elements combined caused the said bar to be very rough and dangerous for vessels to cross on the said morning of November 16, 1889, at the time the said schooner Fidelity was capsized. That in attempting to cross the said Humboldt Bar on the said 16th day of November, 1889, with the said schooner Fidelity in tow, under the then existing and prevailing conditions, the said petitioner and its said steam tug Printer were guilty of gross and inexcusable carelessness and negligence, and the said schooner Fidelity was capsized and lost, and her said crew drowned, among whom were the said L. H. Christopherson and said Hans C. Pederson, by reason of said carelessness and negligence. That the value of the said schooner Fidelity was \$12,000, and the verified claims of the part owners presented and filed herein amount to nine thirty-seconds thereof; and the court finds that the part owners in said schooner have sustained damages to the amount of their respective interests, to wit, \$3,375. That the claims of the part owners of the schooner Fidelity are as follows: George W. Rager, a one-sixteenth; William Wallace, a

one-sixteenth; William F. McDaniels, a one-sixteenth; Henry Axton, a one-sixteenth; and J. W. Freese, a one thirty-second. That at the time of the filing of the said petition of the Humboldt Lumber Manufacturers' Association for limitation of its liability for the loss of the schooner Fidelity, and at all of the times mentioned in said petition, said George W. Rager was the owner of an undivided one-sixteenth interest of, in, and to said schooner Fidelity; said William Wallace was the owner of an undivided one-sixteenth interest of, in, and to said schooner Fidelity; William F. McDaniels was the owner of an undivided one-sixteenth interest of, in, and to said schooner Fidelity; said Henry Axton was the owner of an undivided one-sixteenth interest of, in, and to said schooner Fidelity; and said J. W. Freese was the owner of an undivided one thirty-second interest of, in, and to said schooner Fidelity. That L. H. Christopherson was the master, and was on board, of the said schooner Fidelity, and was drowned at the time she was lost. That he was thirty-five years of age, and in good physical condition, at the time of his death, and was in receipt of wages to the amount of \$100 per month. That he left, him surviving, as his next of kin and only heirs at law, a widow and two children, namely, Olivia Christopherson, his widow, and claimant in her own right, and Harold Christopherson and Lilia Christopherson, his two children, claimants herein. That Hans C. Pederson was the cook, and was on board of the schooner Fidelity, and was drowned, at the said time she was lost. That he was thirty-nine years of age, and in good physical condition, at the time of his death, and was in receipt of wages to the amount of \$50 per month. That he left, him surviving, as his next of kin and only heirs at law, a widow and three children, namely, Mathilda O. Pederson, his widow, and claimant in her own right herein, and Peter Adolph Pederson, John L. Pederson, and Henry C. Pederson, his three children, claimants herein. That the damages sustained by said Olivia Christopherson, widow of said L. H. Christopherson, and his two minor children, Harold Christopherson and Lilia Christopherson, by reason of the death of said L. H. Christopherson, caused by the carelessness and negligence of petitioner, as aforesaid, is \$7,000. That the damages sustained by said Mathilda O. Pederson, widow of Hans C. Pederson, and his three minor children, Peter Adolph Pederson, John L. Pederson, and Henry C. Pederson, by reason of the death of said Hans C. Pederson, caused by the gross carelessness and negligence of petitioner, as aforesaid, is \$5,000."

Upon which findings it was ordered, adjudged, and decreed: "That the said petitioner, the said Humboldt Lumber Manufacturers' Association, as lessee and charterer of the said steam tug Printer, is entitled to the benefits of the limitations of liability provided for and embodied in sections 4282-4289 of the Revised Statutes of the United States, and the several acts and statutes amendatory thereof and supplementary thereto; and petitioner is liable only to the amount of its interest in said steam tug Printer, appraised and fixed by this court at \$22,500.00. It is further ordered, adjudged, and decreed that said claimant and respondent Olivia Christopherson, and her minor children, Harold Christopherson and Lilia Christopherson, recover herein against petitioner, said Humboldt Lumber Manufacturers' Association, the sum of seven thousand (7,000) dollars, together with legal interest thereon from the date hereof. It is further ordered, adjudged, and decreed that said claimant and respondent Mathilda O. Pederson, and her minor children, Peter Adolph Pederson, John L. Pederson, and Henry C. Pederson, recover herein against petitioner, said Humboldt Lumber Manufacturers' Association, the sum of five thousand (5,000) dollars, together with legal interest thereon from the date hereof. It is further ordered, adjudged, and decreed that claimants and respondents, George W. Rager, William Wallace, William F. McDaniels, Henry Axton, and J. W. Freese, part owners of the schooner Fidelity, recover herein against the petitioner, Humboldt Lumber Manufacturers' Association, the sum of three thousand three hundred and seventy-five (3,375) dollars, together with legal interest thereon from the date thereof, the said sum to be proportioned as follows: Two-ninths part thereof, amounting to the sum of seven hundred and fifty (750) dollars, to George W. Rager; two-ninths part thereof, amounting to the sum of seven hundred and fifty (750) dollars, to William Wallace; two-ninths part thereof, amounting to the sum of seven hundred and fifty (750)

dollars, to William F. McDaniels; two-ninths part thereof, amounting to the sum of seven hundred and fifty (750) dollars, to Henry Axton; and a one-ninth part thereof, amounting to the sum of three hundred and seventy-five (375) dollars, to J. W. Freese. It is further ordered, adjudged, and decreed that claimants and respondents herein recover their costs, taxed at the sum of eighty-two and ninety one-hundredths (82.90) dollars."

It is not disputed that the place of disaster was on Humboldt Bar, off the entrance to Humboldt Bay, and within two miles of the ocean shore.

S. M. Buck, for appellant.

J. N. Gillett, for appellees.

Before McKENNA, Circuit Judge, and HANFORD and HAWLEY, District Judges.

McKENNA, Circuit Judge, after stating the facts as above, delivered the opinion of the court, as follows:

It is contended by appellant that: (1) The evidence does not sustain the finding of the court that the officers of the tug Printer were at fault. (2) There can be no recovery for loss of life, as the disaster occurred on the high seas. (3) If there was liability, it arose while transporting property to a port of the United States, and hence excused from responsibility for damages by section 3 of the act of congress of February 13, 1893. (4) That the damages assessed for the deaths of Christopherson and Pederson are excessive. They were assessed, respectively, as we have seen, at \$7,000 and \$5,000. The culpability or nonculpability of the master of the tug depends upon the condition of Humboldt Bar at the time he undertook the towage of the Fidelity, and hence to this fact the testimony of the witnesses was addressed. It is conflicting, but the witnesses, if equally competent, do not appear to be equally disinterested. This and other circumstances determine the preponderance of evidence in favor of the findings of the district court. A review of the evidence we shall not undertake. To be satisfactory, it would necessarily have to be circumstantial, and hence very long. Besides, it is unnecessary. It was done by the learned judge of the lower court, and its substantial accuracy we have verified by an independent examination. It is not disputed that the bar is changeable, and requires constant observation and care. It is not disputed that at the time the service was undertaken the tide was ebbing, and that this was a more dangerous condition than though it had been flowing. There is some conflict in the testimony as to its strength, and some as to the wind and roughness of the sea; but it was established or conceded that if the sea was breaking in seven or eight fathoms of water it was too rough for towage. Of the immediate actors in the incident those on the Fidelity were all lost. Of those on the tug three testified,—the captain, the mate, and the steward. The two former aver that the bar was not dangerous, and attribute the accident to an unexpected heavy sea, and the deficiency of ballast in the schooner. The steward, however, testified that the bar that morning (to quote his words) "was rough at times, and at times it wasn't." And he further testified that when the passage of the bar was about to be made he had the following conversation with the captain: "I asked him if he was going in, and he said, 'Yes.'"

I told him I thought the bar was rough, and he said for me to go about my business." And to the question, "Were you frightened?" he answered: "Well, I didn't like it very much." In many particulars of seamanship and of the perils of the sea the captain and the steward should not be compared, but to judge of the roughness of a sea seems to be within the skill of any seafaring man. The testimony shows that the witness had two years' familiarity with the bar in service on tugboats,—surely long enough to instruct any observation of its favorable or unfavorable states. Besides, the event confirmed his judgment. We might think this was accidental if there was not corroboration of his judgment by the testimony of others, undoubtedly skilled witnesses, who explicitly testify that the bar was too rough to cross. We have selected this testimony for comment because it was given by actors in the circumstances, and hence has importance for that reason; but other parts of the testimony as well justify the judgment of the district court that the master of the tug was culpably imprudent.

To support its second contention, appellant urges that no liability arose at common law from an act causing the death of another, and that there is no act of congress creating the same. There is a statute of the state of California creating such a liability, and it is conceded that the liability may be enforced in a court of admiralty. In addition to the concession of appellant's counsel, see the case of *The Willamette* (decided by this court Sept. 18, 1895) 70 Fed. 874. But it is contended that the liability may be enforced only when the act complained of occurs on inland waters, and it is claimed that the act complained of in this case occurred on the high seas, and hence outside of the dominion of the California statute. By the constitution of the state (article 21) the western boundary line is three English miles from the shore, and by section 33 of the Political Code the sovereignty and jurisdiction of the state extends to this boundary; and by the same code the western line of Humboldt county, in its extent, coincides with the state boundary. Therefore, as far as the latter law is concerned, the place of the disaster which is the subject of this suit was within the territorial limits of the state of California. Is it not so in substance of law, as well as the letter? In *Wheat. Int. Law*, § 177, the maritime territorial jurisdiction of an independent nation is defined as follows:

"The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same state. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore along the coasts of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation."

And in *Kent's Commentaries* it is laid down that:

"According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as a cannon shot will reach, and no further, and this is generally calculated to be a marine league. * * *"

The jurisdiction of the state of California over the sea is that of an independent nation. *U. S. v. Bevans*, 3 *Wheat.* 336; *Manchester v. Massachusetts*, 139 *U. S.* 264, 11 *Sup. Ct.* 559. In the latter case

the contention was presented which is presented in the case at bar. It arose under a statute of a state prohibiting fishing in Buzzard's Bay, except as provided in the act. The defendant violated said act, and was prosecuted and convicted. Mr. Justice Blatchford, speaking for the court, stated, among others, the following, as contentions of the defendant:

"* * * That the proprietary right of Massachusetts is confined to the body of the county; that the offense committed by the defendant was committed outside of that territory, in a locality where legislative control did not rest upon title in the soil and waters, but upon rights of sovereignty inseparably connected with national character, and which were entrusted exclusively to enforcement in admiralty courts; that the commonwealth has no jurisdiction upon the ocean within three miles of the shore; that it could not, by the statute in question, oust the United States of jurisdiction. * * *

And, discussing these contentions, the learned justice said:

"The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation, and, except so far as any right of control over this territory has been granted to the United States, this control remains with the state."

And further:

"Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea, and the boundaries of its counties."

Henry, in his work "Admiralty Jurisdiction and Procedure" (section 12), states the law as follows:

"Sec. 12. But neither the lakes nor the public rivers of the United States are, in a federal sense, highways of the state. A vessel, after leaving a port of a state on a public river, is on a national highway, subject to state jurisdiction for some limited police purposes, which are subordinate to the paramount right of navigation, and the navigable rivers are as much national highways as the high seas are international. The littoral jurisdiction of a state, although extending, for some purposes, beyond low-water mark, is subject to the paramount right of navigation as a highway of the nation, in the same manner as the sea within the three-mile zone from the shore is subject to the right of navigation by foreigners without becoming subject to the local law. Such waters are considered as the common highway of nations, and the jurisdiction of the local authorities exists only for the protection of the coast and its inhabitants, not to subject passing vessels to the local law of the government of the shore."

To sustain this statement the learned author cites the following cases: *Reg. v. Keyn*, 2 Exch. Div. 63; *Collier Co. v. Schurmanns*, 1 Johns. & H. 180; *The Twee Gebroeders*, 3 C. Rob. Adm. 336; *The Saxonia*, Lush. 410. They are English cases, and citing them makes the meaning of the text doubtful. The text seems to make a distinction between national and state authority. If so, it is disposed of by *U. S. v. Bevans* and *Manchester v. Massachusetts*, *supra*. If it mean to deny authority to both the national and state governments, it is opposed to the same cases, and to *Wheaton* and *Kent*, and the authorities they cite, and does not appear to be sustained by the cases quoted to support it, except probably the case of *The Saxonia*. I say probably, because that case has been interpreted as only deciding the applicability of a particular statute. In *The Twee Gebroeders*, Sir W. Scott speaks of the sea within three miles of Friedland as "waters belonging to Prussia." In *Collier Co. v. Schur-*

manns, it was decided that the limitation upon the liability of a shipowner in a case of a collision under one of the merchant shipping acts, applied to a case of damage done to a foreign ship within three miles of the English coast, though foreign ships are not mentioned in the act. It was said in that case, of the three-mile limit:

"It is not questioned that there is a right of interference for defense and revenue purposes, and it is difficult to understand why a country having this kind of territorial jurisdiction over a certain portion of the highroad of nations should not exercise the right of settling the rules of the road in the interests of commerce. An exercise of jurisdiction for such a purpose would be at least as beneficial as for the purpose of defense and revenue."

Reg. v. Keyn occupies about 270 pages of the report; hence it is too long for review, and, besides, was concerned with some questions with which the case at bar is not. It was a criminal case. Keyn was indicted at the central criminal court for manslaughter. He was a foreigner, and in command of a foreign ship passing within three miles off the shore of England, on a voyage to a foreign port; and while within that distance his ship ran into a British ship, and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law. The ultimate question was the jurisdiction of the central criminal court. This depended not only on dominion over the three-mile limit, but upon certain statutes, and on the absence of an enabling enactment. The court was not unanimous on any of the propositions, and the agreement of the majority was only as to the latter; that is, the absence of a statute. The minority of the court was firm in the conviction that the sea within three miles of the coast of England was part of its territory. Lord Chief Justice Cockburn rendered the opinion of the majority, and if it may be said that he accurately opposed the reasoning and conclusion of the minority, he nevertheless based his judgment as well on other grounds, and it was only in the judgment that others of the minority concurred. Lush, J., in his concurring opinion, makes a distinction between the dominion of parliament and the dominion of the common law, and excludes the three-mile limit only from the latter. In concluding, he said:

"Therefore, although as between nation and nation these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must, in my judgment, be authorized by an act of parliament."

The lord chief justice also conceded the power of parliament, and jurisdiction for certain purposes, including fishing, finding sufficient, or at least not dissenting from the sufficiency of, the reasoning for the latter. But if the jurisdiction be one of legislative power, if it exist in England it must exist in the United States, disregarding now, as not a condition of our inquiry, the difference between control over domestic and control over foreign ships. If it exist in the United States, it is either in the national or in the state governments. In which it is we have already considered, and can only repeat what Justice Blatchford said in *Manchester v. Massachusetts*, that the jurisdiction of a state over the sea adjacent to its

coast is that of an independent nation. If there is a limitation of this jurisdiction, it is in the commerce clause of the constitution of the United States, under which congress may assume it; but, until congress does assume it, state legislation is valid. *Steamboat Co. v. Chase*, 16 Wall. 522; *Sherlock v. Alling*, 93 U. S. 99; *The Wilamette*, *supra*.

To the jurisdiction of the state, besides the citation from *Henry*, *supra*, the appellant opposes the cases of *Armstrong v. Beadle*, 5 Sawy. 485, Fed. Cas. No. 541; *Lord v. Steamship Co.*, 102 U. S. 541. If the latter case is an antagonism to *Manchester v. Massachusetts*, it will have to yield to the latter. But there is no antagonism. *Lord v. Steamship Co.* is to be interpreted as applying to the ocean beyond the three-mile limit. In *Armstrong v. Beadle* the facts were that plaintiff and his wife were passengers on a steamer bound from a port of Oregon to San Francisco. On the voyage she struck a rock "near" Point Arena, in the county of Mendocino, the complaint said, and plaintiff and his wife were ordered to get into a surf boat, with which the steamer was provided, and by its negligent handling his wife was thrown into the water. The answer admitted the principal facts, but alleged that while said steamship was proceeding on her voyage, and on the high seas, the said steamship was, by the perils and accidents of the seas, forced and cast upon a rock. The opinion of the court was on a demurrer to this answer. The exact locality of the disaster did not appear. The complaint put it "near" Point Arena. The answer put it "on the high seas." But there is nothing further to show whether it was inside or outside of the three-mile limit, or that the fact or the effect of such limit was urged upon the court. Nothing, therefore, can be determined from the case than that it adjudges that the statute had no extraterritorial effect. If it extends further than this, it is inconsistent with *Manchester v. Massachusetts*.

Against the validity of the statute may be cited Judge Hopkinson's charge to the jury in *U. S. v. Kessler*, Baldw. 15, Fed. Cas. No. 15,528, and for its validity the case of *The Ann* (decided by Judge Story), 1 Gall. 61, Fed. Cas. No. 397. The learned judge said:

"All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a cannon shot, or marine league, over the waters adjacent to its shores; and this doctrine has been recognized by the supreme court of the United States. Indeed, such waters are considered as a part of the territory of the sovereign."

The appellant further urges that it is exempt from liability by section 3 of the act of congress of February 13, 1893 (27 Stat. 445). It reads as follows:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States, shall exercise due diligence to make said vessel seaworthy, and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel," etc.

The acts complained of occurred in 1889, and therefore, if this statute was otherwise applicable in the circumstances of this case,—of which we express no opinion,—the statute would have to be given

a retroactive operation to make it so. It is a well-settled rule of construction that this is not done except under the compulsion of language so clear and positive as to leave no room for doubt that such was the intention of the legislature. There is no such compulsion in the language of the act relied on, and we may not so construe it.

The fourth contention of appellant—that the damages awarded are excessive—needs not much comment. It may be, as counsel urges, quoting Judge Billings in *Cheatham v. Red River Line*, 56 Fed. 250, that the problem of how long a man's productive life shall be estimated, and at what sum, is one of the greatest uncertainty. But an estimate must be made, and what better can we do than to take the existence and the promise of the qualities and conditions when the life was destroyed. By this test the damages awarded were not excessive. The judgment of the district court is therefore affirmed.

HANFORD, District Judge (dissenting). I concur in the opinion of the majority in holding that the place of the disaster to the *Fidelity* is within the boundaries of the state of California, and that the laws of California in force at the time furnish to this court a rule of decision applicable to the question in this case as to the right of widows and children to recover damages from a person or corporation guilty of negligence or a wrongful act causing the death of their husbands and fathers. I concur generally in the opinion of the majority, except that I am unable to find from the evidence that the master of the steam tug *Printer* or the petitioner were in any wise to blame for the disaster to the *Fidelity*, or by any wrongful act or negligence caused the death of the persons on board of her. The only ground upon which the petitioner or the steam tug *Printer* can be held liable for the damage resulting from the loss of the *Fidelity* is that the master of the tug was guilty of negligence or some fault which was the direct or proximate cause of the casualty, and the burden rests upon the parties claiming damages to establish by at least a fair preponderance of the evidence that there was some negligence or fault. The liability of a tug boat in general is stated by the learned judge of the district court before whom this case was tried in the following excerpt from the opinion of the supreme court in the case of *The Margaret*, 94 U. S. 496:

"The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the full extent of the measure of the consequences. *Brown v. Clegg*, 63 Pa. St. 51; *The Quickstep*, 9 Wall. 665; *Wooden v. Austin*, 51 Barb. 9; *Wells v. Navigation Co.*, 8 N. Y. 375; *The New Philadelphia*, 1 Black. 62; *The Cayuga*, 16 Wall. 177; *Cushing v. The Fraser*, 21 How. 184. The port of Racine was the home port of the tug. She was bound to know the channel, how to reach it, and whether, in the state of the wind and water, it was safe and proper to make the attempt to come in with her tow. If it were not, she should have advised waiting for a more favorable condition of things. She gave no note of warning. If what occurred was inevitable, she should have forecasted it, and refused to proceed."

In seeking to fasten responsibility for damages to the tow the libellant is required to show negligence or dereliction on the part of the tug boat, affirmatively, by a fair preponderance of the evidence; and it is necessary to show with reasonable clearness the real cause of the loss. *The Webb*, 14 Wall. 406; *The A. R. Robinson*, 57 Fed. 667. And upon the issue of negligence or dereliction, whether as to seaworthiness, adequacy for the work, or the time of starting, the rule by which the conduct of the master of a tug boat is to be measured is this: The law does not require a vessel, in order to be rated as seaworthy, to be capable of withstanding every peril, nor that a tug be capable of rescuing her tow in all weather, nor that she shall start only when there is no possibility of danger, nor that the master will in an emergency infallibly do that which, after the event, others may think would have been best. The tug must be reasonably adequate for all the work undertaken, managed with reasonable judgment and nautical skill, and she must start only in weather that, in the judgment of nautical men, is reasonably safe for the trip, and the master must exercise reasonable prudence and good judgment. A fault on the part of the tug which consists of a mere error of judgment on the part of her master is not sufficient to create a liability for resulting damage. *The Battler*, 62 Fed. 612, and cases therein cited. The customs and practice of nautical men of recognized skill, at a particular place, is a just criterion for judging as to what is reasonable prudence in a particular instance, for men whose calling requires them to contend with dangerous elements are guided in a large measure by necessity, and the particular forces which environ them. Therefore, the rules and habits shaped by necessity may rightfully be depended upon as guides. *The Allie and Evie*, 24 Fed. 745-749.

With the foregoing general rules of law in mind, the evidence must be canvassed in order to ascertain whether the facts established are such as to entitle the respondents in this case to recover, and it is proper now to take up singly the particular specifications of negligence and fault alleged against the master of the Printer.

First. It is alleged that Capt. Lawson was not licensed by the local board of pilot commissioners for Humboldt Bay, as required by the statute of the state of California. This charge is true in fact. But Capt. Lawson was duly licensed for the service in which he was engaged, as master and pilot of the Printer, in conformity with the laws and regulations of the United States. In such matters, the national law is paramount to the state law, and section 4444, Rev. St. U. S., prohibits the states from imposing upon pilots of steam vessels any obligation to procure a state license in addition to that issued by the United States, except in the case of persons serving as pilots of vessels other than coastwise steam vessels. It is shown by uncontradicted evidence that Capt. Lawson had been 20 years continuously employed as pilot of steam tugs in towing over the bars at the entrances to the Columbia river, Shoal Water Bay, and Gray's Harbor; that he has been a successful pilot, and has retained the confidence of his employers; and that he had been successfully employed as master and pilot of tug boats employed in towing over the

bar at the entrance to Humboldt Bay for over three months prior to the loss of the *Fidelity*,—a sufficient time for him to become acquainted with the locality, the channel, the customs and usages pertaining to business in the line of his profession at the place, he being already experienced as a master and pilot on steam tugs at other places on the Pacific coast, where the dangers of his calling were similar. His lack of a state license was, therefore, not a fault, nor a contributing cause to the disaster.

Second. The next fault to receive attention is the failure of the Printer to have on board a licensed mate. The evidence shows, however, that Mr. Johnson, who was employed in that capacity, was competent, and that he performed his duties faithfully, and he did not in any manner, by omission or commission of any act, contribute towards the disaster. Such being the case, no liability attaches in favor of the respondents by reason of noncompliance with the law in this particular. The *Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711.

Third. The particular fault alleged is recklessness on the part of the master of the tug in attempting to cross the bar with the *Fidelity* in tow at the particular time, and it is contended that the state of the tide, the force of the wind then prevailing, and the tempestuous sea breaking on the bar created conditions so unfavorable for crossing, and were dangers so plainly apparent, that the conduct of Capt. Lawson in making the attempt to cross, instead of waiting outside for more favorable conditions, is inexcusable. This contention presents the main issue in the case, and upon this the findings of the district judge who tried the case are adverse to the petitioner. The rule that, where there is a conflict in the evidence, the findings of the judge before whom the case was tried on questions of fact will not be disturbed by an appellate court, cannot be fairly invoked, for the reason that the case was tried in the district court upon depositions taken out of court; and as the judge did not see the witnesses, nor have an opportunity to observe their appearance or behavior while giving their evidence, he could not be in a better position to weigh the evidence than the judges of this court; and a careful reading of the testimony in the record shows that, while the witnesses called on each side expressed opinions and stated conclusions favorable to the party calling them, there are really no contradictions as to actual facts of vital importance. To arrive at a just conclusion as to the condition of things at the time and place of the disaster, the evidence must be analyzed, and due weight given to all of it. There is no ground apparent for rejecting the statement of any witness as to any material fact in the case. The most that can be claimed is that some of the witnesses erred in their opinions and statements as to the force of the tide and of the wind, and as to the degree of roughness of the sea, and the depth of the water breaking on the bar. The only witnesses who actually saw the capsizing of the *Fidelity* are Capt. Lawson, Mate Johnson, of the Printer, and Capt. W. P. Smith, assistant engineer in charge of the government works in Humboldt Bay. And their statements as to the cause and manner of the casualty and the conduct of the tug can be fairly reconciled. All of the witnesses who observed the weather and sea at the

time and place of the occurrence give their individual opinions and statements as to the force of the tide, velocity of the wind, and depth of the breakers, except Capt. Smith, who gave positive testimony as to the reading of the tide gauge under his charge, showing the precise time of high tide in the morning, and the exact difference between high tide and low tide on that day, and for the days next preceding and subsequent; and Mr. Connell, observer of the weather, in charge of the United States signal station at Eureka, who shows by the record in his office the exact direction and velocity of the wind during each hour between 6 o'clock a. m. and 6 o'clock p. m. on the day in question. The differences in the opinions and statements of other witnesses are not greater than should be expected in regard to such matters, assuming that all the witnesses were honest, and testified according to the best of their understanding, and making due allowance for such differences as would naturally arise by reason of the different standpoint and opportunity for observation of each. It is but a fair comment to say that the major part of the testimony adduced in behalf of the appellees is argumentative, rather than a plain narration of facts, and that it appears to have been elicited by leading questions. The strongest statements are in the words of counsel, and merely assented to by the witnesses. Giving due weight to the testimony as a whole, and to every part, and making due allowance for the interest and prejudice which some of the witnesses are shown to have, and considering the opportunity of each to observe the conditions, it is entirely safe to accept the testimony of Capt. Smith with reference to the tide. He is disinterested, and appears to have been candid, and an intelligent observer. His duties, for a long time prior to the occurrence, included not only the keeping of the tide gauge, but afforded ample opportunity for acquiring accurate knowledge with reference to the tide and currents exerting force on Humboldt Bar. At the time of the casualty he was in a boat, in which he not only felt the force of the tide, but drifted with it. There is quite as much in the testimony of the other witnesses to corroborate his statements and confirm his opinions as there is to the contrary. He states that the self-registering tide gauge was in perfect working condition at the time, and that the total fall of the tide, between high tide, at 7:05 a. m. and low water, at 12:40 p. m., was but one foot and seven-tenths of a foot, and that the incoming flood tide on the afternoon of the same day, at high tide, was but one foot and three-tenths of a foot higher than the low-water mark at 12:40 p. m. On the previous day, high water, at 6:30 a. m., was five feet and eight-tenths above standard low-water mark, and low water, at 11:45 a. m., was four feet and five-tenths. It was high water again at 4:30 p. m., five feet and eight-tenths; and low water at 11:20 p. m., two feet and two-tenths; and on the next day after the occurrence there was low water at 1 o'clock a. m., two feet and nine-tenths; then high water at 8 a. m., seven feet and four-tenths; then low water at 2:25 p. m., four feet and six-tenths; then high water at 7:15 p. m., six feet and three-tenths. The Fidelity was capsized between 9 o'clock and 9:30 a. m., so that the tide had been ebbing about two hours, in which time Capt. Smith states the

water had fallen about eight-tenths of a foot. In view of these well-established facts, it is not possible that the tide could have been running with any considerable force outside of the narrowest part of the entrance to Humboldt Bay, and Capt. Lawson's statement that, at the time of starting to cross in with his tow, the state of the tide was high water slack, is literally true. It is also safe to accept the testimony of Mr. Connell, with reference to the wind. He gives the record kept in his office for the day of the casualty as follows:

"Commencing at 6 a. m. on the 16th, from six to seven, it blew one mile of wind. The direction of the wind was from south to southwest. It varied from south to southwest. From seven to eight, two miles; eight to nine, six miles; nine to ten, eight miles; ten to eleven, thirteen miles; eleven to twelve, sixteen miles; twelve to one, eighteen miles; one to two, sixteen miles; two to three, twelve miles; three to four, fourteen miles; four to five, nine miles; five to six, fourteen miles; six to seven, fourteen miles."

These observations were taken at a distance of five miles from Humboldt Bar, and according to the testimony an allowance of one mile per hour additional velocity on the bar is reasonable, so that at the time when Capt. Lawson started to cross the bar the very light breeze prevailing during the early morning hours had increased in velocity to not exceeding nine miles per hour. This certainly cannot be characterized as a strong wind, nor portentous of immediate danger. There had not been, during the night preceding, any strong wind in the immediate vicinity; and the evidence fails to show that there was, during the morning in question, any indication of a coming storm, or any cause to anticipate high waves, or additional roughness of the sea. The Printer and another tug, the H. H. Buhne, crossed the bar, going to sea in search of vessels in the offing to be towed in. The two tugs were competitors for business, but Capt. Lawson had no occasion to take chances in order to succeed against his rival, for the other tug had preceded him in an offer of service to the Fidelity, and his offer had been rejected on the ground that the captain of the Fidelity was obliged to give preference to the Printer. The testimony shows that another tug was disabled in attempting to cross the bar on the same morning, but this circumstance is without significance, for the reason that it is not shown by the evidence that the mishap was not caused by bad seamanship or negligence on the part of her officers. The Printer met with no difficulty in crossing the bar, going out. The H. H. Buhne, which accompanied her, also crossed the bar without difficulty, and waited outside until afternoon, when she returned, after the wind had been blowing with increasing velocity for several hours, and crossed in without an accident; and her master, Capt. Hanson, who was called as a witness in behalf of the appellees, corroborates Capt. Lawson in giving as one of the rules observed by masters of steam tugs on Humboldt Bar that when the conditions are so that a tug can go out in safety to a vessel in the offing, it is safe to tow her in. His testimony on this point is as follows:

"Q. Isn't it a fact that if you can cross over the bar, and a vessel is in the offing, you can always tow her in? A. Yes, sir; I can. If I can go out with the tug boat, I can bring the vessel in, too. That is what I think every day. But if I can't get out, I can't take a vessel. If I can go with the tug boat over

the bar, I can come back again with the vessel, unless something occurs that is unlooked for, or unless something breaks down when we are out there. If everything goes well, I calculate to come right back. It is always easier to come in than to go out. You can stay outside, and watch your chance to come in, and, when a sea overtakes you, you can go in; but you can't do it in going out."

Capt. Lawson's testimony on the same point is as follows:

"It is always deemed safe to tow in when the tug can in safety cross out."

Eureka was the home port of the Fidelity, and her captain must be presumed to have been acquainted with the dangers and difficulties of crossing the Humboldt Bar, and some consideration must be given to his conduct. He had been for some time waiting in the offing for a tug, having ample opportunity to observe the conditions of the sea, wind, and tide. It is shown by the uncontradicted testimony of Capt. Hanson that he was only waiting for the Printer to tow his vessel in; and Capt. Lawson, in giving his testimony, has sworn that Capt. Christopherson expressed the opinion that the weather was favorable, and that, as it was then high tide, it was perfectly safe to tow the Fidelity into Humboldt Bay. It is certain that he consented to be towed in at that time, if he did not positively request it, for he was in no wise compelled to surrender control of his vessel to the tugboat. His responsibility is at least equal to that of the master of the tug. The mate of the Printer, Mr. Johnson, has also sworn that in his judgment, at the time of giving the hawser to the Fidelity, everything was favorable as to the time, the tide, and the condition of the bar and of the weather for crossing it in safety; that there was no reason to expect such a wave as that which capsized the Fidelity at that particular time more than at any other time, and he further expresses his opinion thus:

"I think it would be the judgment of any good boatman that the vessel should have towed in with perfect safety at the time we took her onto the bar."

In opposition to the judgment of these experienced navigators, as shown by their conduct and sworn testimony, is to be placed the evidence of the officer of the life-saving station, and his two assistants, to the effect that the bar, on the morning in question, was very rough, and that they considered it hazardous and unwise to tow a vessel in at the time when the Printer made the attempt; and the statements of Capt. Peter Bone, Capt. H. H. Buhne, and Capt. Hanson, in answer to hypothetical questions, to the effect that under conditions stated in the questions, which are not proven to have existed at the time, it would be negligence on the part of the master of a tug to tow a vessel in across Humboldt Bar; and the testimony of the cook on the Printer, to the effect that he made a voluntary suggestion to Capt. Lawson, that the bar appeared too rough to tow in, and was told by the captain to mind his own business. With respect to the men of the life-saving station, there is ample ground to assume that their opinions are founded upon the conditions existing after the casualty, rather than upon facts which they observed previous to its occurrence. Although the Printer, with the Fidelity in tow, was seen approaching the bar by one of their number, the fact made so little impression that they ceased observing the tug and her tow,

and were engaged in routine work about their establishment when the *Fidelity* was capsized, and they did not know of the occurrence until informed by a man sent as a messenger from Capt. Smith's boat. The expert evidence and the opinion of the cook cannot, in fairness, be allowed to outweigh the judgment of experienced and competent shipmasters and pilots. A clear preponderance of the evidence justifies and leads to the conclusion that Capt. Lawson's conduct was reasonably prudent, and was guided by what other competent and experienced nautical men, acquainted with the conditions and dangers of Humboldt Bar, would regard as good judgment.

The real cause of the disaster is shown plainly by the uncontradicted testimony of all the eyewitnesses to have been an unusually high wave or swell, which rolled in over the bar suddenly and unexpectedly, the origin of which was a disturbance at a distant point on the ocean. The *Fidelity* was in ballast, and she usually carried only about 20 tons, and there is no evidence tending to prove that she had a greater quantity on this occasion. With that amount of ballast, a light draught vessel of her capacity would be, as described by Capt. Lawson, "like an eggshell," in a heavy sea. The wave lifted her stern out of the water, and, instead of settling back, she careened, and the second wave coming completely capsized her. The disaster was sudden, and fully completed within a very few moments. Capt. Smith's description of the occurrence, in his testimony, is as follows:

"I saw her when she evidently took her first sea on the bar, because I could see her stern lifted. * * * I suppose she then commenced running ahead. After it lifted a while she gradually swung to the east and north, and evidently nearly stopped. The second sea threw her down to about forty-five degrees, I should think; and then I jumped up in my boat,—I jumped up on the seat,—and when I got up on top of the seat I saw her keel."

The disaster can be attributed to only one cause,—a peril of the sea,—for which no blame can be imputed to any person. It was not an inevitable consequence of crossing the bar at that particular time. The tug might have waited until the turn of the tide. If she had done so, the time would not have been more opportune, for by that time the wind had increased to about its maximum velocity for the day, and the sea was necessarily rougher than at any time during the forenoon; and if the tug had delayed for days or weeks or months she might still, in crossing the bar, have encountered a swell from the ocean, equally as dangerous.

It is my opinion that the judgment appealed from should be reversed, with costs, and the cause remanded, with instructions to enter a decree declaring the appellant to be exempt from all liability.

THE HERCULES.

NEALL v. GENTHNER.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

1. TOWAGE—LOSS OF BARGE—LIABILITY OF TUG.

A tug, with two coal-laden, sea-going barges, left Delaware Bay for Providence, in the afternoon, after delaying several hours on account of a threatened easterly storm. At the time of starting, the wind had shifted to west-northwest, and was blowing about 10 miles an hour, which was a favorable wind for the voyage. The masters of both tugs assented to starting at that time. After midnight, when the vessels had proceeded about 21 miles, the wind increased, and there was thick snow, and during the following day there was a gale from the north-northwest. Little progress was made, but no damage was done until late in the evening, when a heavy sea struck one of the barges, and caused her to spring a leak, from which she sunk, and was totally lost. *Held*, that the tug was not liable, either on the ground that her master was not warranted in leaving the breakwater in the condition of the weather, or because he did not turn back when he found the storm increasing, there being apparently as much danger, from the shoals near the Capes, in attempting to regain the breakwater in the darkness, as in continuing to face the storm, and it also appearing that the barge was old, and had a weak bottom. 63 Fed. 268, reversed.

2. SAME—CONDUCT OF MASTER.

A tug is not to be *held* liable for the loss of a tow merely because her master, in an emergency, did not do precisely what, after the event, others may think would have been best. If he acted with an honest intent to do his duty, and exercised the reasonable discretion of an experienced master, the tug should be exonerated.

Appeal from the District Court of the United States for the Eastern District of New York.

This was a libel in rem by Philip J. Genthner against the steam tug Hercules (Frank L. Neall, trustee, claimant) to recover damages for the loss of the barge Saugerties. The district court rendered a decree in favor of libellant (63 Fed. 268), and the claimant appealed.

Robinson, Biddle & Ward (Henry Galbraith Ward, advocate), for appellant.

Benedict & Benedict (Robert D. Benedict, advocate), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. In the afternoon of March 3, 1893, the tug Hercules, having in tow the barges Saugerties and Moonbeam, both laden with coal, left Delaware Bay for the port of Providence, passing the breakwater at 5:30 p. m. About 11 o'clock in the evening of the next day, the Saugerties having sprung a leak, and being about to sink, her crew were taken on board the tug, and soon after she sunk, and became, with her cargo, a total loss. Her owner brought this action to recover the value of the barge and her cargo, upon the theory that the loss was occasioned by the negligence of the tug in starting on the voyage in the face of a threatened gale, and, after starting, when it had come on to blow a gale, and while yet within easy reach of the Delaware breakwater, in not turning about, and seeking safety. The district judge was of the opinion that the tug put to sea with

the barges, "in the face of evident signs of approaching storm," but placed his decision upon the ground that she was "guilty of continuing to face a dangerous storm after she experienced its force, when common prudence required her master to turn back, and seek the shelter of the breakwater." We are constrained to differ with the learned district judge in respect to each of these conclusions. It will not be profitable to rehearse or analyze the evidence found in the voluminous record, much of which was not taken in the presence of the district judge. The facts shown by a decided preponderance of proof are these:

The tug belonged to the Red Star line, was a strong, thoroughly equipped vessel, and was in command of an experienced master, who had no interest or motive to induce him to expose the barges, or his employer, to the consequences of a dangerous voyage. He had brought the barges down the river, and anchored them there early in the forenoon, because he thought the weather indications unpromising. These denoted an easterly storm, with snow, and the wind from that direction would have been inshore. The weather continued threatening during the forenoon, but in the afternoon there was a favorable change, and, when the vessels left, the wind, which had worked around from the southeast to the southward and then into the westward, was blowing about 10 miles an hour from the west-northwest, indicating a fresh breeze from the northwest,—a favorable wind for the proposed voyage. The barges were seagoing ships, cut down, and, as loaded, had ample freeboard; that of the Saugerties being seven feet. The masters of both barges acquiesced in starting, and so, also, did the superintendent of the Red Star line, who was near by. After passing the Capes, the vessels proceeded slowly against a head sea, making the Five-Fathom Bank lightship, distant 21 miles from the breakwater, at 1:15 a. m. Between midnight and the next morning, the wind increased, and at 4 a. m., March 4th, there was thick snow, which continued at intervals, with increasing wind, until 4:30 p. m., at which time the wind was blowing a gale from the north-northwest. From this time until about 8 o'clock p. m. the gale increased, shifting to the northwest. After passing the Five-Fathom Bank lightship, the vessels made very slow progress, and from the morning of the 4th, when they had gone about 10 miles from the lightship, throughout the day, the tug did not attempt to do more than hold the barges up against the wind.

It is apparent that, throughout the day, until early evening, notwithstanding the severity of the gale, the barges did not suffer, and, indeed, did not experience any serious discomfort. They were not boarded by any considerable seas, and the storm racks were not used, at table, when dinner and supper were served. Neither those in charge of the tug nor in charge of the barges considered the situation dangerous, and the thought of turning back and attempting to reach the breakwater does not seem to have occurred to any of them. When the pumps were sounded on the Saugerties between 6 and 7 o'clock no water was found. A little later, however, a heavy sea struck her, which carried away her boats, and, the cabin door being open, some of it went into the cabin. An hour or so later she was found to be leak-

ing badly. She had recently been overhauled, and caulked where the oakum had worked out of her seams. The shipwright testifies that, "in a general looking over, she looked pretty fair." After she had been caulked, her bottom was in such condition that, if subjected to moderate strain, she would be likely to leak. The master who had been in charge of her the previous fall testifies that she leaked constantly, that it was necessary to caulk her continually, and that he refused to sail with her again because he thought her unsafe. There is evidence that, after she began to leak badly, her pumps could not be worked because the connections of her engine were out of order, but this may not be true. About 9 p. m. her master signaled the tug for assistance. The master of the tug, supposing the barge was only suffering from the bad weather, turned the vessels about, and ran before the sea. An hour or so later the Saugerties signaled the tug again. The master of the tug then broke the hawser between the tug and the Saugerties, pulled alongside the Saugerties, and the crew of the Saugerties got on board the tug. While this was going on, the Moonbeam, whose hawser had been detached from the Saugerties, was adrift, and for some time continued drifting in the trough of the sea, when she was again taken in tow by the tug. Although she was a smaller barge than the Saugerties, none of her crew, even at that time, thought her in serious danger. While thus drifting, or later in the night, she broke her tiller. Her master repaired it as best he could, but later it was carried away again. The gale moderated the next morning, but as the Moonbeam could not be steered, early in the afternoon, at the request of her master, the tug turned about, and took her back to the breakwater.

Doubtless the barges were exposed to a storm, after the morning of the 4th, which was dangerous, in the sense that some mishap to the steering gear, or even the parting of a hawser, might imperil them, and which was so severe that a vessel with a decrepit bottom would be likely to spring a leak. If the master of the tug ought to have forecast such a storm, the dictates of prudence should have forbidden him to expose the barges to the chances, notwithstanding he was unaware of the weakness of the Saugerties. But we are convinced that the weather conditions when he put to sea justified him in doing so, taking into consideration the character of his tug and the apparent sea-going qualities of the barges. If he could have turned back at any time during the forenoon of the next day, and safely brought his vessels to the protection of the breakwater, it is apparent now, after the event, that it would have been the part of prudence to do so; but it was not so apparent then, and it cannot be confidently asserted that it would have been safer to have put back than to hold on. The vessels drew 21 and 22 feet of water, respectively. They were 30 miles from the Capes of the Delaware, and the wind was shifting more to the westerly. The risk of taking them back, and attempting, in snow, and perhaps darkness, to avoid the shoals near the Capes, was apparently as menacing and real as any to which they were likely to be exposed by holding on in the face of the storm. It would have been still more impracticable and hazardous to have made the at-

tempt later in the day. The situation was one where the judgment of the master of the tug ought not to be pronounced unwarranted, and certainly ought not to be treated as culpable. His conduct is approved by the master of the Moonbeam, a disinterested witness, who, from the deck of his own vessel, was able to appreciate the situation, throughout the day of the 4th, in all its bearings. In all probability, if the Saugerties had been a seaworthy vessel, she would have weathered the gale. The disaster which befell her is more properly attributable to her own unsoundness, than to any fault of the master of the tug. The tug is not to be held responsible because the master, in an emergency, did not do precisely what, after the event, others may think would have been best. If he acted, as we are satisfied he did, with an honest intent to do his duty, and exercised the reasonable discretion of an experienced master, she should be exonerated.

The decree is reversed, with costs, and instructions to the district court to dismiss the libel, with costs of that court.

THE BURLINGTON.

GRUMMOND v. THE BURLINGTON.

(District Court, E. D. Michigan. February 7, 1896.)

1. MARINE INSURANCE—ABANDONMENT.

When the insured is paid as for a total loss, the property insured passes to the insurer without any formal abandonment.

2. SALVAGE—REMOVAL OF WRECK—OBSTRUCTION TO NAVIGATION.

Under the Canadian statute giving to the minister of marine and fisheries authority to cause the removal of any wreck which, in his opinion, constitutes an obstruction to navigation, his decision that a particular wreck on the Canadian side of the Detroit river is such an obstruction is not reviewable by the courts of this country, and is sufficient to protect any person, authorized by him to undertake the removal, from any claims of the owner of the wreck for an unlawful interference with his property.

3. SALVAGE—DERELICT VESSEL.

The fact that a sunken wreck is allowed by her owners to remain for nine months in a position where she is exposed to further injury, and where she is a serious obstruction to navigation, and is likely to become a source of danger to vessels navigating in the vicinity, is sufficient to establish her character as a derelict, so as to make her a proper subject of salvage.

4. SAME—COMPENSATION—DERELICT.

Where the work and expenditures actually employed in raising a wreck abandoned by the owners far exceeded the value of the property recovered, and it was clear that the property could not have been rescued without an outlay exceeding its value, *held*, that the entire proceeds should be awarded to the salvors, and that, as against them, no compensation should be awarded to a vessel which had endeavored to put out the fire causing the wreck, where the benefit of her services was lost by the sinking of the vessel.

This was a libel by U. Grant Grummond against the steam barge Burlington and cargo to recover compensation for salvage services.

The libel in this cause claims salvage for the raising and removing to this port of the steam barge Burlington and the remnant of her cargo of lumber, which lay almost entirely submerged near Sandwich Point, on the Canadian

side of the Detroit river, about three miles below Detroit. While on a voyage from Bay City to Cleveland, Ohio, having on board a cargo of lumber, on the 16th day of April, 1894, the Burlington took fire; and, all efforts to extinguish the flames failing, she was headed for the Canadian shore, and there beached, with her bow in about eight feet of water. In this position, she continued to burn, and, by reason of the injuries done to her hull by the fire, she filled, and sank with her stern in about 30 feet of water, her bow holding its place where she was beached. Her deck load and upper works were entirely consumed. Much of the lumber in her hold was also injured, and great damage was done to her hull. Some time after the vessel had been stranded, the municipal fireboat *Detroit* was obtained, and by her aid the progress of the fire was checked. The Burlington had, however, already suffered such damages in her hull as to make it impossible to keep her afloat, and the only benefit derived from the aid of the *Detroit* was the prevention of further injury by fire to the charred hull and the cargo in the hold. No effort was made by the owner of the Burlington to remove her from the position in which she lay, nor did he manifest any intention of looking to the raising of the vessel or the unloading of the remnant of her cargo. She was suffered to remain where she sank until about the 8th day of December, 1894, when the libellant, having obtained the use of the tug *Champion* and a wrecking outfit, and having employed an adequate crew for the work, undertook to raise and remove the vessel and cargo. On April 16th and 17th, libellant communicated by telephone and telegraph with G. K. Jackson, of Bay City, the legal owner of the Burlington, and endeavored to make a contract with him for the recovery of the wreck for \$300, "No cure, no pay," or to furnish a tug and lighter for that purpose for \$175 per day. Libellant testifies that Jackson then disclaimed ownership or interest in the property, and referred him to the general agents of the insurers of the steamer. This is denied by Jackson, who, though not sworn as a witness, it was admitted upon the hearing, would testify that he simply declined to have anything to do with libellant, or to sanction his effort to raise the vessel. Libellant had also, before entering upon the work, made telegraphic inquiry of the insurer's agents at Buffalo, who also disclaimed all interest in the vessel and cargo. On the 11th day of December, 1894, after libellant had commenced work on the wreck, Jackson's attorney wrote libellant, stating that Jackson had not abandoned the Burlington or her cargo, and did not recognize the right of libellant or any person to undertake the salvage thereof, and requested Grummond to desist from interference therewith. No purpose was expressed by Jackson at any time to raise the vessel in his own interest.

The Burlington lay on the Canadian shore, somewhat out of the path of vessels navigating the Detroit river, yet with her stern in such a depth of water as might be used safely by such vessels when occasion required. By the Canadian statute (1 Rev. St. Can. 1886, p. 1239, c. 91) it is provided that "if, in the opinion of the minister of marine and fisheries, the navigation of any navigable water, as aforesaid, is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck, sinking or lying ashore or grounding of any vessel or of any part thereof, or other thing, the said minister may, under the authority of the governor in council (if such obstruction or obstacle continues for more than twenty-four hours) cause the same to be removed or destroyed in such manner and by such means as he thinks fit, and may use gunpowder or other explosive substance for that purpose, if he deems it advisable, and may cause such vessel or its cargo or anything causing or forming part of such obstruction or obstacle to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable, and may apply the proceeds of such sale to make good the expenses incurred by him in placing, and maintaining any signal or light to indicate the position of such obstruction or obstacle, or in the removal, destruction or sale of such vessel, cargo or thing, paying over any surplus of such proceeds to the owner of the vessel or thing sold or other persons entitled to such proceeds or any part thereof respectively." November 21, 1894, one J. A. H. Campbell made a tender to the department of marine and fisheries of Canada, under the provisions of this statute, for the removal of the wreck, offering to accept, in full payment of his services in connection with the work, everything that he might be able to recover from the wreck, and proffered

other terms for the performance of the work looking to the complete clearing of the channel from any obstruction arising from the wreck. This tender was accepted by that department by telegram dated November 23, 1894. On the 5th day of January, 1895, the minister of marine and fisheries officially certified to Campbell, *inter alia*, "that, evidence having been produced that such removal [of the wreck of the Burlington] has been completed, the said wreck and cargo have been, and are hereby, handed over to you for your sole use and benefit." Claiming under the authority thus given to Campbell, although the proofs fail to show that Campbell authorized libellant to raise the wreck, libellant, on the 8th day of December, commenced the work of raising the Burlington. Owing to her position and her badly damaged condition, this task was found much more difficult than had been expected. The after-hold and the engine room of the steamer were filled with mud. The fire had so greatly injured the hull as still further to increase the difficulties of the undertaking, and the engine of the steamer had suffered so greatly from the heat as to be practically worthless. The cargo also had suffered serious detriment while so long submerged, by reason of the sediment deposited upon it by the action of the water. The work was prosecuted vigorously, the crews of the tug and lighter and the laborers (some 25 men in all) working 18 to 20 hours per day, until December 22d, when the vessel was raised. The libellant expended, for the purchase of timber and in the hire of chains for the raising of the tug, several hundred dollars. The work required the employment of the tug Champion, two lighters, and a diver, besides the usual outfit of steam pumps and other necessary appliances. The position in which the steamer lay was such as to expose her to the effect of ice, and the evidence is undisputed that, had she been permitted to remain at the place of stranding during the winter, the ice would have crowded her into deeper water, where she would have been a still more serious obstruction to navigation. The steamer was raised after removing some three or four hundred tons of mud from her hold, and taken to Detroit, when such was the condition of her hull that she was sunk by the ice, while lying in a comparatively sheltered slip. To recover compensation for his services, the libellant filed this libel, wherein he claims \$7,500 salvage. The steamer and cargo were sold *pendente lite*. The proceeds in the registry amount to about \$1,100, and it is conceded that the vessel could not have been raised for that sum. The evidence of the libellant, which is uncontradicted, is that it was worth from five to six thousand dollars to save the steamer and cargo, and bring them to Detroit.

After the burning of the Burlington, suit was brought against her insurers by G. K. Jackson, who held the legal title of the vessel as trustee, and he recovered, as for a total loss of the vessel, the full amount of the policy. It is admitted that the judgment has been satisfied by the insurers. The policies sued upon were against fire, although in the ordinary form of lake hull policies, the limitation of the risk insured against being expressed by a rider upon the policy, reading as follows: "This policy covers against fire only on the terms and conditions of the standard form policy of the state of New York, and anything in this policy conflicting therewith is hereby waived. This policy covers the property as hereinbefore described only while in board or attached to said vessel. * * *" Another rider is attached to the policy, which reads as follows: "N. Y. Standard. Percentage Co-insurance Clause. If, at the time of the fire, the whole amount of insurance on the property covered by this policy shall be less than eighty per cent. of the actual cash value thereof, this company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured by this policy shall bear to the said eighty per cent. of the actual cash value of such property." There was no evidence given in the cause other than this last rider of any difference between the New York standard policy and that written upon the Burlington, upon which Jackson recovered against the insurers.

F. H. & G. L. Canfield, for libellant.

T. E. Tarsney and W. W. Wicker, for respondent.

SWAN, District Judge (after stating the facts). The concession that the services rendered by libellant in this cause were meritorious, and resulted in the salvage of the property, is not necessary to the

ascertainment of that fact. They have all the elements necessary to constitute a valid salvage claim, namely: (1) A marine peril to the property to be rescued; (2) voluntary service, not owed to the property as matter of duty; (3) success in saving the property, or some portion of it, from the impending peril. The *Clarita* and The *Clara*, 23 Wall. 16. The fund in court arising from the sale of the wreck is the product of the libellant's labor and energy and the expenditure of his means. Upon the admitted facts of the case, it is clear that whatever value the property had when sold was given to it by his efforts. In the condition in which the wreck was left, although it was not physically all destroyed, it was as much a total loss as if the fire had wholly consumed it, as demonstrated by the cost of the work actually performed in raising and removing it to a place of safety. It is not contended that this work could be done for less than the amount fixed by the testimony of the libellant as its value, and no evidence was offered in contradiction of the libellant's valuation, and we must assume its correctness. The undisputed evidence as to the condition of the steamer when the work was undertaken and prosecuted is strongly corroborative of the libellant's estimate.

It is urged by the claimant that, as there was no formal abandonment of the *Burlington* to the insurers, the title of the property still remains in the claimant. It appears, however, that the loss was paid in full by the insurers, and that, upon the trial of the suit brought by Jackson against the underwriters, the plaintiff insisted that, because of the totality of the loss, no abandonment to the insurers was necessary to entitle him to recover. The court sustained that contention, and its judgment was affirmed by the supreme court, where the case was taken on writ of error. Jackson having received payment on the basis of a total loss, such payment operated to transfer to the insurers the salvage of the property injured, without the necessity of a formal abandonment in writing. "Abandonment is implied as accompanying every settlement of a claim for total loss. It is unnecessary to stipulate for it. It passes without a word spoken, for it is a necessary incident of every contract, not only of insurance, but of indemnity. This abandonment takes place at the time of the settlement of the claim; it need not take place before." Lown. Ins. p. 152.

This doctrine is held by the supreme court of the United States in the case of *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 320, 6 Sup. Ct. 750, 1176, where it is said:

"When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance or abandonment by the assured is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from remnants of the goods or other damages paid by third persons for the same loss."

This doctrine is clearly applicable to claims in marine policies. *The Manitoba*, 30 Fed. 129. See, also, *Wood, Ins.* § 485; *Rankin*

v. Potter, L. R. 6 H. L. 118; *Kaltenbach v. Mackenzie*, 3 C. P. Div. 471. *Hall v. Railroad Co.*, 13 Wall. 367, is to the same effect, and holds that "there can be no abandonment where there has been total destruction. There is nothing upon which it can operate, and an insured party may recover for a total loss without it."

It is laid down in *Phillips on Insurance* (section 1523) that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may be afterwards recovered from other parties on account of the loss"; and that "the effect of the payment of a loss is equivalent in this respect to that of abandonment."

In *Railway Co. v. Jurey*, 111 U. S. 584, 594, 4 Sup. Ct. 566, it is said:

"The payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had against the carrier for the recovery of its value. It is immaterial whether the policy sued upon insured against fire or marine peril."

The contract being one of indemnity, it is clear, under the authorities, that its utmost requirement is satisfied when the insurer is paid for a total loss; and it is but equitable that, having thus indemnified the assured, the insurer should be entitled to the remnants of the property saved, if any.

The stress of the defense is laid upon the proposition that the *Burlington* was not, when libellant performed the work, the proper subject of salvage service. It is clear, however, that under the doctrine stated in the case of *The Clara*, *supra*, the condition and location of the property, and the dangers to which it was exposed, brought it within those circumstances which justified the effort to rescue it. It had lain uncared for, for nearly nine months, in navigable waters, in such proximity to the main channel, and so liable to be carried by ice into the pathway of vessels, that, under the authority conferred by the law of Canada for the removal of wrecks and obstructions in navigation, it was deemed important, in the interest of commerce, to remove it as an obstruction. It is not within the power of this court to review the action of the Canadian government or that of any of its departments upon matters within their jurisdiction. The Canadian statute, in effect, made the department of marine and fisheries a special tribunal to decide whether or not the wreck was an obstruction to navigation, and, if it should hold affirmatively on this point, to authorize its removal or destruction, in the interest of commerce. This determination must be held conclusive of the necessity of removing the property, and, upon elementary principles, would shield any persons authorized or employed by that department to perform the work. Many analogous grants of authority exist in our own legislation whereby special tribunals are created, whose determinations are not reviewable by the courts. The authority of such officials has been passed upon in numerous cases. *Johnson v. Towsley*, 13 Wall. 72; *Steel v. Refining Co.*, 106 U. S. 451, 1 Sup. Ct. 389; *Baldwin v. Stark*, 107 U. S. 463, 2 Sup. Ct. 473. Other and later instances of the grant of like powers, and the finality of the judgments of

officers acting under them, are found in laws of the United States, excluding undesirable immigrants, and prohibiting the entry of Chinese persons into this country and in legislation of the states for the protection of fisheries and other interests. *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 12 Sup. Ct. 336; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499.

By the law of Canada, the property in the soil adjacent to the shore is in the crown, subject to the public right of navigation, bathing, and fishing. *Attorney General v. Perry*, 15 U. C. C. P. 329. An act of congress very similar in its provisions to the Canadian statutes in question is found in 1 Supp. Rev. St. pp. 296, 369. By section 4 of that act (of June 14, 1880, p. 296), it is made the duty of the secretary of war, whenever the navigation of navigable waters is obstructed or injured by any sunken vessel or water craft, to notify persons interested therein, or in the cargo thereof, to remove the same; and, in case of their default, it is the secretary's duty to cause the same to be removed. The provisions of this statute and the amendment of August 2, 1882 (page 369), give the secretary of war the discretion to sell and dispose of sunken vessels or property in navigable waters before or after the raising or removal thereof, and the acts make appropriations for the purpose of removing such obstructions. Section 8 of the act of congress approved September 19, 1890 (26 Stat. 454), also empowers the removal of wrecked vessels and other obstructions in navigable waters after a specified time, and makes it the duty of the secretary of war to cause them to be removed or broken up "without any liability for damage to the owners of the same." The effect of the action authorized by the Canadian department of marine and fisheries was to divest the former owner of the title to the wreck, and vest the same in the grantee of the crown. *Story, Confl. Laws*, § 390; *Whart. Confl. Laws*, §§ 297, 307, 308; *The Trenton*, 4 Fed. 657; *Green v. Van Buskirk*, 5 Wall. 307. But, even if this were not true, the determination that the situation of the wreck authorized its removal, and made it fairly subject to salvage service, demonstrates that the boat and her cargo had lain so long unclaimed and uncared for as to justify the belief, both of the officials and of the public, that the property was derelict. The facts of the case are much stronger in favor of libellant's claim for salvage compensation than those which were the subject of decision in the case of *Murphy v. Dunham*, 38 Fed. 503, in which it was held that a vessel that had been sunk in Lake Michigan, and whose location had remained for some time undiscovered, was the subject of salvage service, and that one who removed her cargo was entitled to reimbursement for his services and outlay in recovering it, although he had abandoned the vessel to the insurers, and was notified by their grantee that he had begun preparations for its recovery. Libellant's conduct in the prosecution of this work was open, and free from concealment, and the facts that the value of the property was but a fraction of the cost of its recovery, and that libellant entered upon the undertaking under a misconception of its difficulties, and in ignorance of the changes which the elements had

wrought in the condition of the vessel, disprove any color of wrong motive in his prosecution of the work. The action of the department of marine and fisheries was an assurance to libelant of the lawfulness of his undertaking, and repels the contention that he was a wrongdoer in disregarding Jackson's request to desist from further prosecution of the work, especially as this request was not made until after libelant had begun operations for the recovery of the boat and cargo.

There is no evidence that Jackson had or expressed any intention to recover the property. It is sufficient to establish its character as derelict that its long abandonment exposed it to further injury, and in all probability would cause it to become, from natural causes, a more serious obstruction to navigation, and a source of danger and injury to vessels navigating in that vicinity. It is well settled that a mere intention on the part of owners of a wrecked vessel to ultimately rescue her cannot prevent others from becoming salvors of the property, or take from it the character of derelict. The reports abound in instances of the application of this doctrine where, under circumstances much less suggestive of the intent of the owner to abandon the property, salvage has been awarded to those who have voluntarily recovered it. *The Union Express*, 1 Brown, Adm. 516, Fed. Cas. No. 14,363; *The Senator*, 1 Brown, Adm. 372, Fed. Cas. No. 12,664; *The Silver Spray*, 1 Brown, Adm. 349, Fed. Cas. No. 12,857; *The Ann L. Lockwood*, 37 Fed. 233; *The Cairnsmore*, 20 Fed. 519; *The Island City*, 1 Black, 128; *The Laura*, 14 Wall. 336; *The Coromandel*, 1 Swab. 208; *The Hyderabad*, 11 Fed. 749; *The John Gilpin*, Olc. 77, Fed. Cas. No. 7,345; *Wyman v. Hurlburt*, 12 Ohio, 81.

There is no fixed rule for the compensation of salvors. The amount of the reward depends upon the circumstances of each case. The difficulties which surrounded the undertaking, the value of the property rescued, the imminence of the peril which threatened it, the danger to life and property in effecting the rescue, the value of the property hazarded in the work by the salvors, and other circumstances, are all factors in fixing the amount of the reward. Where no claimant appears, and the property is of small value, it is not unusual to award all that is saved to the salvors. *Llewellyn v. Two Anchors & Chains*, 1 Ben. 80, Fed. Cas. No. 8,428; *The Zealand*, 1 Lowell, 1, Fed. Cas. No. 18,205. The amount awarded in such cases is not merely compensation pro opere et labore, but is proportioned to the merit of the service, having in mind all the elements and considerations which attend its rendition. It is the aim of the courts to stimulate, by liberal rewards, efforts to rescue property from maritime perils. While the mere fact that the undertaking was beset with more difficulties than the salvors contemplated in entering upon it is not per se sufficient to entitle them to the whole of the property, yet where it clearly appears that the value of their work and expenditures largely exceeded that of the property recovered, and it is clear that it could not have been rescued without the outlay of a sum exceeding its value, it is only equitable that the entire proceeds of the property

realized on a fair sale should be awarded to the salvors. As already remarked, the enterprise, labors, and expenditures of the libelant have given the property here in controversy all its value. No one else has hazarded anything in its rescue. The proof is uncontradicted that the libelant will not receive more than about one-fifth of the value of the work done and the expenses of its performance. To take from him any part of the proceeds of the property under such circumstances, and bestow it upon one whose title was divested by competent authority, because of his inaction, would be simply to increase libelant's loss, and to revest the title of the property in one who has no legal or equitable ownership therein.

It was argued that, if the libelant should be held to be a salvor, the proceeds of the property could not be awarded to him solely, but a part should be decreed to the persons who obtained the services of the fireboat *Detroit*, which checked the progress of the flames, and prevented a further loss by fire of the vessel and cargo. The facts do not warrant any allowance for the services of the fireboat as against the claim of the libelant. Had the fund been sufficient to pay the libelant's actual expenditures and the fair value of his work, and leave surplus for distribution, the *Detroit* might be permitted to share in it, if not barred by her contract of service. But the steamer was not equipped to perform the services rendered by libelant, and bring the vessel and cargo into port. All that she did was practically lost by the submergence of the vessel, and conferred no appreciable benefit upon the salvors. The proofs fail to show that any considerable portion of the cargo in the hold was benefited by the extinguishment of the fire on deck, while it is clear that the hull of the *Burlington* had been so injured before the arrival of the fireboat as to make it practically worthless above the water line.

A further and insuperable objection to any allowance out of the fund by way of salvage to the *Detroit* is the fact that her work was done under a contract that her services were to be paid for at all events, whether successful or unsuccessful. *The Camanche*, 8 Wall. 448, 477; *The Excelsior*, 123 U. S. 40, 49, 8 Sup. Ct. 33.

The libelant was the last salvor, and is entitled to priority, under the circumstances of the case, over all others. His services, including his necessary disbursements, were fairly worth the sum of \$5,000, and a decree will be entered in his favor for that sum, with costs. The fund in the registry of the court arising from the sale of the *Burlington* and cargo is awarded to the libelant.

THE TERRIER.

FERGUSON v. THE TERRIER.

(District Court, E. D. Pennsylvania. March 31, 1896.)

1. SHIPPING—INJURY TO STEVEDORE.

Injury caused to a stevedore working in the hold beneath an open hatch, by the dropping down of a board upon him by the ship's servant, who was engaged in relaying the floor of the between deck, is, in legal contempla-

tion, an injury caused by the ship herself; and if the same was the result of carelessness she is liable. And it is immaterial that the person whose negligence caused the injury was also a stevedore, since in performing the said work he was acting as a servant of the ship.

2. CHARTER—CONTROL OF OWNERS.

Where the owners appoint the officers and crew and retain control, they remain liable to all the ordinary responsibilities of owners, although they have contracted for the privilege of sending a supercargo on the vessel's voyages.

This was a libel by Richard F. Ferguson against the steamship Terrier to recover damages for personal injuries.

Samuel Evans Maires and Curtis Tilton, for libelant.

Henry R. Edmunds, for respondent.

BUTLER, District Judge. The libelant sues for an injury inflicted on him by the vessel while working upon her as a stevedore.

There is no room for serious controversy about the facts involved. While the libelant, with other stevedores was engaged in the vessel's hold, unloading cargo, her agents and servants commenced relaying the floor of the between deck. This floor had been taken up and stored above for convenience in placing cargo. In passing the flooring down through a hatch immediately over the heads of the stevedores, a plank was allowed to fall, and striking the libelant inflicted serious injury. There was carelessness, both in passing the flooring down through this hatch, and in allowing the plank to fall. It should have been passed through another hatch, equally convenient, whereby all danger would have been avoided. The work was being performed by the crew under the supervision of one of the mates. The evidence does not leave these facts in doubt.

Is the ship responsible for the libelant's injury? This is the only question raised. In my judgment she is. First because *she* inflicted the injury. This flooring was as much a part of her, as was any other part of the structure; that it was out of place at the time is unimportant. As is said in the *Kate Cann*, 8 Fed. 719 (under similar circumstances) "in legal effect the blow inflicted was inflicted by the ship." And second, because it was her duty to see that the place where the stevedores worked was safe, while they were upon her. *Cannon v. The Protos*, 48 Fed. 919, and *Records of Dist. Ct. E. D. Pa. No. 8 of 1889*; *The Kate Cann*, 2 Fed. 243, 8 Fed. 719; *The Frank & Willy*, 45 Fed. 494; *The Wells City*, 38 Fed. 48; *The Carolina*, 30 Fed. 200; *The Helios*, 12 Fed. 732; *Sherlock v. Alling*, 93 U. S. 108. *The Germania*, 9 Ben. 356 [Fed. Cas. No. 5,360] cited and relied upon by the respondent is easily distinguished from this case. There the work on which the libelant was engaged was foreign to the business and obligations of the vessel. He was arranging the cargo to suit the convenience of a purchaser, in compliance with the consignee's contract; and the court held, in effect, that the ship owed him no duty. On no other ground, in my judgment, can the decision in that case be sustained. All the court says there must be understood with reference to the special facts stated.

The respondent asserts that one of the stevedores assisted in lowering the planks, and that the accident resulted from negligence

on his part. This assertion is not sustained by the evidence. The fact would be unimportant, however, if proved. All persons engaged about the work were the ship's agents and servants, and it would make no difference that others than her usual employes assisted; they were engaged about her business, for her benefit, and under her orders; and they were not therefore fellow workmen with the stevedores, who were engaged in unloading cargo.

The defense set up, that the vessel was under a time charter, and not in possession or charge of her owners is not sustained by the evidence. The charter proves the contrary. Under it the owners appointed the officers and crew, and retained control; and consequently remained liable to all the ordinary responsibilities of such owners. *Leary v. U. S.*, 14 Wall. 607; *U. S. v. Shea*, 152 U. S. 186 [14 Sup. Ct. 519]; *Marcadier v. Insurance Co.*, 8 Cranch, 39. A careful reading of the charter leaves no doubt of this. It is in effect a contract on the part of the owners and vessel to enter the charterer's service, under the conditions stipulated. The latter contracted for the privilege of sending a supercargo on the vessel's voyages, which is entirely inconsistent with the notion that they were to become the owners while the vessel was in their service. If the fact were as alleged, however, the responsibility of the ship for this injury would be the same—just as in the ordinary case of collision or other torts, which she may commit. No charter could relieve her of such responsibility. As is said in *Sherlock v. Alling*:

"By the maritime law the vessel as well as the owners, is liable for the damage caused by her torts. The vessel is deemed to be an offending thing, and may be prosecuted without any reference to the adjustment of responsibilities between the owners and employees for the negligence which resulted in the injury. Any departure from this liability of the owners or vessel has been found in practice to work great injustice."

Charterers may of course be liable also, as was held in the case of *Posey v. Scoville*, 10 Fed. 140, cited by the respondents. No case has been found wherein the ship was not held to be responsible for her torts under such circumstances.

THE NATCHEZ.

NEW ORLEANS NAV. CO. et al. v. WATSON.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1896.)

No. 410.

SHIPPING—INJURY TO SEAMAN—LIABILITY OF VESSEL.

Where it was sought to recover damages against a steamboat for personal injuries to one of her crew on the ground that the mate, being in command at the time, was directing the loading of bales of cotton from a wharfboat, and in the course thereof ordered and personally assisted in the negligent act, causing the injury, *held*, upon the testimony, that he was not so present directing or assisting; and that, as libellant was cared for at the time, returned to the port of New Orleans, paid full wages to the end of the voyage, and given a certificate entitling him to admission to the United States marine hospital, he could recover nothing further.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel in rem by Albert Watson against the steamboat Natchez to recover damages for personal injuries. The steamboat was released on bond, and the district court, after hearing the evidence, rendered a decree for libellant in the sum of \$250. The New Orleans Navigation Company, claimant, and J. H. Menge have appealed.

John D. Grace, for appellants.

O. B. Sansum, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

PARDEE, Circuit Judge. The appellee, Albert Watson, exhibited his libel in the lower court against the steamboat Natchez, her tackle, apparel, and furniture, in an alleged cause of tort, civil and maritime, and thereafter alleging the business of the steamboat as to the carrying of freight and passengers between New Orleans and Vicksburg, his own employment thereon as a mariner, the arrival of the boat in the month of January, 1894, at a certain wharfboat at Vicksburg, for the purpose of taking upon the said steamboat certain bales of cotton, the entering of libellant and others of the crew upon the business of loading the said cotton, particularly charged in the fifth article as follows:

"That, wholly neglecting to observe any care and caution whatsoever in the premises, and while libellant's attention was exclusively directed, as aforesaid, to the handling of a certain bale of cotton on deck of said steamboat Natchez, said Andy Sullivan, then being in command of said steamboat Natchez, caused a certain other bale of cotton to be brought from said wharfboat, and to be rolled upon a certain other bale of cotton on the deck of said steamboat. And the said bale of cotton so brought by the order of said Andy Sullivan being upon and on top of the said other bale, the said Andy Sullivan directed the men then handling it to push it down from said bale, and to throw it upon the deck of said steamboat Natchez. That the men then handling said bale of cotton warned and cautioned said Andy Sullivan against throwing said bale of cotton down upon the deck of said steamboat, because it might turn over and roll down upon and against said libellant; but the said Andy Sullivan, wholly disregarding said caution, not only ordered said bale of cotton to be immediately thrown upon the deck of said steamboat Natchez, but aided and assisted in pushing it over, and in consequence of the negligence and carelessness of said Andy Sullivan said bale of cotton fell down, turned over, and rolled against and upon libellant, and libellant's foot and leg were then and there crushed, cut, and wounded by said bale of cotton."

The libel further alleges pain and suffering, necessity for medical advice and surgical operations, hindrance from performing work, and the right to recover damages therefor. Process in rem was issued; the steamboat was seized; the appellants claimed the same, and obtained possession under a bond of release, and at the same time answered the libel by specific and general denials; charged that libellant was injured through the negligence of himself and fellow servants, without any fault on the part of the boat; and, further, averred that after libellant was injured the officers of the boat gave the libellant such care and attention as the means at hand permitted, brought him back to New Orleans, the place of shipment, paid his full wages for the trip for which he had shipped, and gave him a certificate entitling him to admission in the United States Ma-

rine Hospital at the port of New Orleans, and in that institution the right to such medical, surgical, and other care and attention as he might stand in need of; all without charge to the libelant. The evidence of about 15 witnesses, officers and members of the crew, was taken; and the cause was submitted to the then presiding district judge, who gave a decree for the libelant for the sum of \$250.

The liability of the boat seems to be based upon two points: First, that the mate, Sullivan, was in command of the boat, having full power and authority to direct and command all persons then and there in and about the business of the boat; and, second, that the mate, Sullivan, was present at the identical time and place when and where the libelant was injured, and then and there caused the same, although duly warned of the danger, as specifically set forth in the fifth article of the libel above quoted. The evidence shows that the master of the Natchez, after landing her at the wharfboat in question, retired to his room; but there is no evidence to show that thereby he abdicated his command as master, and turned it over to the first mate. It is true that the matter of loading the cotton from the wharfboat on the Natchez was under the direction of the first mate, Andy Sullivan, and that he was generally superintending the same; but the real issue is whether, at the time the libelant was injured, he (the mate) was at that particular place, directing and commanding the improper handling of the bale of cotton, the fall of which injured the libelant. On this issue the evidence of the libelant and his witnesses fails to satisfy us, and we think it is fully overcome by the evidence of the claimants, to wit, of the mate, the clerk of the boat, and other intelligent witnesses, who are positive that at the time the bale which injured the libelant was thrown down the mate, Andy Sullivan, was not there, and only came to the place after the injury. The libelant himself, while he says that the mate was present, shows by his evidence, and the circumstances surrounding him at the time, that he did not see the mate. If he did see him, then, while his business required him to be, and his evidence shows that he was, using his best efforts to roll his bale across the deck of the Natchez out of the way of succeeding bales, he was actually stopping and looking backward, which would tend decidedly to show the contributory negligence with which claimants charge him. Charles Gospel, known by some of the crew as "Jamaica," is the libelant's principal witness. He was engaged, with one Simon Jackson, in rolling the bale which caused the injury to libelant, and we quote from him:

"Andy Sullivan asked me what I was stopping for, and I said, 'There is a man down there;' and he said, 'Shove that bale there;' and he put his stick against the bale, and pushed the bale over, and the bale fell over on his leg."

Examined in detail by libelant's proctor, he said:

"Q. And when you got there with your bale of cotton, the mate was—was up there? A. Yes, sir; he was up there. Q. Then the mate says to you, 'What are you stopping for?' A. Yes, sir. I stopped first. Q. Then he said, 'What are you stopping for?' A. Yes, sir. Q. And you said to him what? A. I said, 'I want to let this man cutting through here—this man in front of me with the bale,' and he said, 'Shove that over.' Q. What did you say to the mate? A. I told him I wanted to let this man go up, and he said, 'Shove that

bale of cotton over.' Q. What did you say to him? A. I told him there was a man there in the way. Q. And he said what? A. He said, 'Shove it over,' and he put his stick against the bale, and I turned the bale loose."

Again, he testifies:

"When he said, 'Shove that bale over,' of course I put the bale loose, and he put his stick against it, and it fell down, and struck this man in the leg. Q. Why did it fall down? What made it fall down? A. Because, after he pushed it over, I turned the bale loose, and it fell."

On cross-examination, Gospel gives this account:

"I stood at the end, with the cotton hook in my hand, and he [meaning the mate] stood at the other end, and he told me to shove it over, and I told him the man was standing working below. He had a stick about the size of my two fingers, and he said, 'If you don't shove that bale over, I will skin you,' and I turned it loose, and the bale fell on his leg."

Bill Sherman, a witness for libelant, who says he is a member of the crew who stood by and witnessed the accident, tells how the libelant got hurt as follows:

"Well, he was rolling a bale about the fourth or fifth ahead of me, and he rolled his bale over, and the gang was behind me, and the mate said to him, 'Shove it over.' Question by libelant's proctor: Says to who? Answer: To Jamaica [Charles Gospel] and Simon. They didn't seem to shove it over, and he said, 'Shove it over, you son of a b——'; and he jabbed it over with a stick, and it fell on his leg. Then he said, 'Why did you shove that bale on that man, you son of a b——?' and he jabbed at him, and struck him; that is, Jamaica."

But it would accomplish no useful purpose to go through with all the inconsistent and conflicting evidence of the libelant's witnesses, of which the above is a fair sample. After a careful reading, the story told by them seems to us to be wholly improbable. On the other hand, Simon Jackson, who was assisting Charles Gospel in handling the bale which injured libelant, swears positively that the mate was not there at the time, and he is corroborated by the mate himself, the second mate, the clerk of the boat, and by other bystanders.

The answer in this case alleges, and the evidence shows, that the libelant, after he was injured, received such care and attention as the means at hand permitted; that he was returned to the port of shipment, was paid his full wages, and was given a certificate entitling him to admission to the hospital. It is well settled that in case of injury by the fault or neglect of officers the seaman is entitled to full wages, passage home, and for keep and medical attendance. The Centennial, 4 Woods, 50, 10 Fed. 397, and authorities there cited. Whether in cases of the kind other damages can be recovered by process in rem, we abstain from deciding. The decree appealed from is reversed, and the cause is remanded, with instructions to dismiss the libel.

THE CASCADE.

THE UNADILLA.

(District Court, N. D. New York. March 23, 1896.)

COLLISION--TOW WITH VESSEL AT DOCK--SUDDEN SHEER.

A tug was mooring a tow at Ryan's Elevator, in Black Rock harbor, Niagara river, by dropping her down stern foremost on a hawser, in the

usual manner, when the tow suddenly sheered to port, towards a vessel lying at the dock. To overcome the sheer the tug went promptly to starboard, pulling strong, when the chock on the tow gave way, allowing her to drift to port and strike the other vessel. *Held*, that the proximate cause of the collision was the insufficiency of the chock, and the tow was solely liable.

This was a libel for collision filed against the tug Cascade and the schooner Unadilla to recover damages done by the Unadilla, while in charge of the tug, to the schooner M. J. Cummings.

On the 3d of November, 1893, the schooner M. J. Cummings was moored at Ryan's Elevator in Black Rock harbor, on the Niagara river. Just below where she lay there was, in 1893, a shoal extending for several hundred feet into the river so that a towed vessel could not land at that point in the ordinary way, but was dropped into the desired position at the dock by the force of the current, the tug being headed up stream and steadying the tow while this operation was going on. On the day in question the schooner Unadilla, in tow of the tug Cascade, started from the Buffalo breakwater destined for a position at Ryan's Elevator alongside of the schooner Cummings. The Cascade is one of the largest and most powerful tugs in the harbor of Buffalo. They proceeded in the usual manner down the river until they reached a point about opposite Ferry street, when the tug winded around in the customary way and headed up stream. The schooner was then from 80 to 200 feet from the dock and abreast of, or a little above, the Cummings. After the tug and tow had straightened up the line was shortened about 100 feet leaving from 100 to 150 feet of line between the two. They were then in a proper position to commence the operation of landing. This is accomplished by turning the bow of the tow slightly to port when the force of the current swings the stern in the same direction. The operation is repeated until the landing is accomplished. The office of the tug is to hold the tow against the current. On the day in question this operation had proceeded for some little time when the Unadilla took a sudden sheer to port. The moment the sheer was discovered the tug, by going promptly to starboard, endeavored to overcome it. She was pulling strong with this object in view when the chock, which held the hawser on the Unadilla, suddenly pulled out with a loud report and dropped into the river. The hawser thus subjected to a sudden and violent strain parted, and the Unadilla drifted to port and struck the starboard bow of the Cummings a raking blow which caused the injury complained of. The Unadilla insists that the accident was occasioned by the negligence of the tug in permitting her to drift onto the shoal so that her heel caught and acted as a pivot on which she swung to port. The tug, on the contrary, insists that the accident was due in the first instance to the bad steering of the schooner which produced the sheer, but that the proximate cause was the breaking of the chock which caused the line to part so that the tug lost all control of the tow.

George S. Potter, for libellant.

George Clinton, for the Cascade.

Harvey L. Brown, for the Unadilla.

COXE, District Judge (after stating the facts). The discussion at the argument resulted in establishing the following propositions: First. The libellant was free from fault. Second. The accident was not inevitable. Third. It was not due to an inscrutable fault. Fourth. It was due to the negligence of the Cascade, or the Unadilla, or both. Fifth. If the chock had not broken the collision would have been avoided, or, at least, the force of the blow would have been greatly diminished.

The first four of these propositions are conceded. The fifth is established by a preponderance of evidence. There can be little

doubt that the breaking of the chock was the proximate cause of the accident. Had the chock held the injury would have been averted altogether. The vessels might have come together, but not with sufficient force to cause damage.

It is very difficult to determine, from the testimony, just what caused the sheer in the first instance. It might have been produced either by the heel of the schooner being caught on the edge of the shoal, or by the bad steering of her helmsman. The helmsman was not produced and it would seem that no very diligent effort was made upon the part of the Unadilla to secure his presence. Were it necessary to find definitely upon this proposition I am inclined to think the weight of evidence, direct and presumptive, tends to the conclusion that it was the helmsman's action in swinging the schooner's bow too far to port which caused the commencement of the sheer. No other cause has been established. The evidence fails to show fault upon the part of the Cascade. The master was a competent pilot. He knew the river at Black Rock harbor well. He had landed a large number of vessels at Ryan's dock and always successfully. The course pursued by him was the usual one. He did no negligent act, he omitted nothing which care and prudence dictated. Whether it was prudent or otherwise to shorten line after rounding up it is unnecessary to determine, for the reason that it is clearly proved that the sheer commenced some time after the line was taken in and was in no wise attributable to that maneuver. Although there is considerable dispute upon the testimony as to the position of the Unadilla and the location of the shoal I am convinced that the schooner's heel was not caught upon the shoal. The evidence upon this point is certainly conflicting, but even if it be conceded that it is impossible to say with certainty what caused the sheer, it does not aid the Unadilla when a plain fault, such as the giving way of the chock, is attributable to her. The testimony is that sheers of this kind are very apt to occur at the point in question. There is nothing particularly dangerous about such a situation; if the tackle holds the tug has no difficulty in controlling the movements of the schooner. The Unadilla was required to furnish suitable and sufficient means to enable the tug to tow her safely, and if the accident happened by reason of her failure in this regard she alone is responsible. The chock gave way in a manner which indicates either that it was improperly constructed or else was out of repair from long use. The monkey rail, which was of oak, did not break or give way, indicating that the strain was not an unusual one. The bolts simply pulled out, and the whole structure was precipitated into the river, and, of course, was not produced in court. With such a plain and undisputed fault before the court it is unnecessary to search further for the cause of the accident. The insufficient chock was not the fault of the tug, but of the schooner. The libelant is entitled to a decree with costs against the Unadilla, and a reference to compute the amount. As to the Cascade the libel is dismissed, without costs.

STAFFORD v. WESTERN UNION TEL. CO.

(Circuit Court, S. D. California. March 23, 1896.)

No. 673.

1. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—DAMAGES.

Plaintiff, who was traveling with her sick mother, gave to a telegraph company, at a station on her route, a message, addressed to her brother, and reading as follows: "Mother sick. Meet us this evening at D." The telegraph company failed to deliver the message. *Held*, that damages caused to the sender by being compelled to search at night, in a strange place, for her brother's residence, with exposure producing illness, or caused, either to the sender or the addressee, by the death of their mother in consequence of such exposure, were not the proximate results of the failure of the telegraph company to deliver the message, and could not be recovered from it.

2. SAME—CALIFORNIA STATUTE.

A complaint, alleging a valid contract with a telegraph company for the transmission and delivery of a message, and a breach of such contract by the telegraph company, though alleging no substantial damages resulting proximately from such breach, entitles the plaintiff to nominal damages, and to the penalty imposed by section 2209 of the Civil Code of California, providing that "every person whose message is refused or postponed * * * is entitled to recover from the carrier his actual damages and \$50 in addition thereto."

Sloane & Polk, for plaintiff.

R. B. Carpenter, for defendant.

WELLBORN, District Judge. This is an action for failure to deliver a message. The complaint contains three counts. The first alleges: That plaintiff delivered to the defendant, for transmission over its wires, the following telegram: "Barstow, Cal., 1/3, 1894. To Edward Kimball, Care Frank Kimball, Coronado: Mother sick. Meet us this evening at San Diego. [Signed] Sister." That plaintiff paid defendant its regular and usual charges, and in consideration thereof defendant undertook and promised to transmit and deliver said message, but failed and neglected to do so. That the addressee of said message, at the time the same should have been delivered, resided in said town of Coronado, and within one mile of defendant's office. That "plaintiff, at the time of sending said message, was on the train, with her sick mother, at the said town of Barstow, en route for said town of Coronado; and that she intended to leave the train at San Diego, being the station named in said telegram, and the railway station nearest to said town of Coronado. That she was expecting to arrive at San Diego in the night, and to there meet said Edward F. Kimball, who is her brother, and be by him conducted to his home in Coronado. That she was a stranger in said San Diego and Coronado, and did not know the place of residence of said Edward F. Kimball." "That the train on which plaintiff and her mother were riding reached San Diego on the said 5th day of January, 1894, at a late hour of the night; and that by reason of the failure of defendant to deliver said message as aforesaid there was no one at the train to meet them, and they were for that reason compelled to make search in the night for her said brother's res-

idence, and were in so doing long exposed to the cold and inclemency of the weather, and suffered great hardship, exposure, and anxiety, resulting in and causing to the plaintiff serious illness, for a long time confining her to her bed." "That by reason of the wrongful, negligent, and careless act of the defendant as aforesaid plaintiff was damaged in the sum of one thousand dollars in the manner aforesaid, no part of which has been paid." The second count is substantially the same as the first, except that the only injury therein specified as the result of the negligence charged against the defendant is the death of plaintiff's mother, and the only damages specially alleged are the damages resulting therefrom. The third count is the same as the second, except that it is based upon an assignment to plaintiff, by Edward F. Kimball, of his cause of action growing out of the death of his mother, with a further claim for special damages to the amount of \$93.50, expended by him as the funeral expenses of his mother. The defendant has demurred generally to the whole complaint, on the ground that it does not state facts sufficient to constitute a cause of action, and also specially upon the grounds that it is unintelligible, uncertain, and ambiguous; and also specially to the first count for uncertainty, and to the second for ambiguity, and to the third nominally for ambiguity, but substantially on the ground that it does not state facts sufficient to constitute a cause of action; the language of this last objection being as follows: "It does not appear therefrom that the said Edward F. Kimball, the assignor of the said plaintiff, has suffered, or will suffer, any pecuniary loss * * * by reason of the death of the mother of said assignor and the plaintiff herein." The grounds of demurrer which I have denominated as "special" are omitted in defendant's brief, and I shall not notice them further than to say that, in my opinion, they are untenable. This leaves for consideration only the general demurrer to the whole complaint and to the third cause of action.

With reference to the demurrer to the whole complaint, it is to be observed that, if either count is good, the demurrer must be overruled. *Stoddard v. Treadwell*, 26 Cal. 294; *Fleming v. Albeck*, 67 Cal. 226, 7 Pac. 659. The damages claimed in the first count, because of the alleged facts that the plaintiff was compelled to make search, in the night, for her brother's residence, and was thereby exposed to cold and inclement weather, which resulted in her serious illness, and long confinement to her bed; and in the second and third counts, because of the death of plaintiff's mother, are, in my opinion, disallowable. These misfortunes and afflictions were not proximately caused by defendant's failure to deliver the message. *Thomp. Elect.* §§ 318, 319, 453; *McAllen v. Telegraph Co.*, 70 Tex. 243, 7 S. W. 715; *Telegraph Co. v. Smith* (Tex. Sup.) 13 S. W. 169. The syllabus of this last case is as follows:

"Plaintiff delivered to a telegraph company for transmission a message as follows: 'R. [Addressed.] Meet me in C. Saturday night. S.'—which was not delivered to R., and plaintiff brought an action against the company, alleging that by its negligence he was put to expense in hiring a conveyance to go from C. to R.'s home, and back again; that by loss of time he failed to meet im-

portant engagements; and that, by reason of exposure, his health was greatly impaired, to his damage a named sum. Held, that the petition was bad on demurrer, the damage being too remote, conjectural, and not in contemplation of the parties in case of a breach of the contract."

The only question remaining is whether or not the complaint states a cause of action for nominal damages, and the penalty provided in section 2209, Civ. Code Cal. This section is as follows:

"Sec. 2209. Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto."

To this section the commissioners have appended the following note:

"This new provision is needed to protect the rights of parties who are seriously annoyed by delays which, nevertheless, cannot be shown to have caused them pecuniary damage."

In the case at bar each count of the complaint alleges a valid contract between plaintiff and defendant, and its breach by the latter. These allegations, if proven, would, at least, entitle the plaintiff to nominal damages,—the amount paid for the transmission of the message,—if no more, and the statutory penalty of \$50. *Alexander v. Telegraph Co.*, 66 Miss. 161, 5 South. 397; *Telegraph Co. v. Allen* (Miss.) 6 South. 461.

The foregoing views render it unnecessary for me to pass upon the question, argued in defendant's brief, whether or not mental suffering is, in California, under any circumstances, a proper element of damages. Demurrer overruled.

GLENN v. PORTER.

(Circuit Court of Appeals, Second Circuit. March 12, 1896.)

CORPORATIONS—UNPAID STOCK—LIABILITY OF TRANSFEREE.

One who takes an assignment of stock, accompanied by a transfer to his name on the books, and receives a certificate from the corporation, issued to him in his own name, reciting that he is entitled to so many shares, on each of which a certain sum has been paid, leaving a specified amount "to be paid when called for," is liable, as a subscriber, for the balance due on the stock.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action at law by John Glenn, as trustee of the creditors of the National Express & Transportation Company, against Horace Porter, to recover a balance alleged to be due on stock of the corporation held by defendant. The circuit court directed a verdict for defendant, and entered judgment accordingly. Plaintiff brings error.

Burton N. Harrison (Arthur H. Masten, of counsel), for plaintiff in error.

George Zabriskie, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The court below directed a verdict for the defendant upon the ground that there was no proof of the cause of action set forth in the complaint. The complaint alleges that the defendant "subscribed for fifty shares of the par value of \$100 each of the capital stock of the National Express & Transportation Company, a corporation in the state of Virginia, and thereby, for valuable consideration, agreed to be liable to said corporation, and undertook and promised to pay to said corporation, for each and every share so subscribed for by said defendant the sum of \$100, in such installments and as and when said defendant should lawfully from time to time be called upon and required to pay the same; whereby and by force of which said subscription said defendant became and was received and admitted to be a stockholder in and a member of said corporation."

It was proved upon the trial that the defendant became the holder of a certificate issued to him, and in his name, by the corporation, reciting that he was entitled to "fifty shares of the capital stock of the National Express & Transportation Company, on each share of which has been paid \$5 in cash, leaving \$95 to be paid when called for." The defendant's acceptance of this certificate, and the fact that the shares had been transferred to him upon the books of the corporation, were shown by an assignment of the shares in writing, signed by him.

The ruling at the trial is sought to be upheld upon the theory that, although the evidence was sufficient to show that the defendant became a stockholder in the corporation, the cause of action set forth in the complaint was founded, not upon that fact, but upon the fact that he was a subscriber for the stock, and the proof failed to establish the averment.

Assuming that the complaint should receive the strict construction thus placed upon it, we think the case made was sufficient to charge the defendant as a subscriber for the fifty shares. Whether he was an original subscriber for the shares, or became a subscriber by substitution, is immaterial. It suffices if he assumed towards the corporation the obligation of a subscriber. He did this by the acceptance of the certificate containing the promise to pay for the shares upon call. "When an original subscriber to the stock of an incorporated company, who is bound to pay the installments on his subscription from time to time as they are called in by the company, transfers his stock to another person, such other person is substituted, not only to the rights, but to the obligations, of the original subscriber; and he is bound to pay up the installments called for after the transfer to him. The liability to pay up installments is shifted from the outgoing to the incoming shareholder." Ang. & A. Corp. § 534. This statement should be understood with the qualification that the substitution, to become complete, should be recognized by the corporation, as when the transfer is acknowledged by registry upon the books. *Webster v. Upton*, 91 U.

S. 65. As was said in *Upton v. Tribilcock*, Id. 45, 48: "A promise to take shares of stock means a promise to pay for them. The same effect results from the acceptance and holding of a certificate."

The judgment is reversed.

SPARKS v. NATIONAL MASONIC ACC. ASS'N.

(Circuit Court, S. D. Iowa, C. D. February 6, 1896.)

1. JURISDICTION—FOREIGN INSURANCE COMPANIES—SERVICE OF PROCESS.

When, by the statute of a state, an insurance company, transacting business in such state, is required to file with a designated officer of that state a written appointment of such officer as the person upon whom process, directed against such company, may be served, such officer becomes, from the fact of its so transacting business therein, the representative of the company with regard to the service of such process, irrespective of whether such appointment has been so filed or not.

2. SAME.

A statute of Missouri (Rev. St. 1889, § 5912) provides that any insurance company, not incorporated by that state, desiring to transact business by any agent or agents in the state, shall first file with the superintendent of the insurance department a power of attorney, authorizing him to receive service of process for the company; that service of process upon such superintendent shall be valid and binding, so long as the company shall have any policies outstanding in the state; and that, if such company shall fail to make such appointment, it shall forfeit the right to do business in the state. The general agent and a soliciting agent of the M. Association, an Iowa insurance company, during the months of April and May, 1892, solicited insurance for that company in several towns in Missouri. They forwarded to the company 66 applications for policies, all dated in Missouri, stating the residences of applicants and beneficiaries as in Missouri, and all accompanied by fees, receipts for which, dated in Missouri, and containing an agreement to refund if no policies were issued, were given to the applicants. The policies were mailed by the company from Iowa to the applicants in Missouri, and, from the time of the issue of the policies until 1895, the dues thereon were collected by local collectors, in the various Missouri towns, who gave receipts for such dues, dated in Missouri, on forms furnished by the company. The M. association had never formally authorized the soliciting of insurance in Missouri, nor filed the power of attorney required by the Missouri statute; but the records of the company gave full knowledge to the board of directors, of whom the general agent who solicited the insurance was one, of the solicitation of such insurance and the issue of the policies in Missouri. Plaintiff brought an action against the M. Association, on one of the policies so issued, in a Missouri court. Process was served on the superintendent of insurance, and judgment was obtained by default, on which plaintiff afterwards brought suit in a federal court in Iowa. The defendant pleaded that the Missouri court had no jurisdiction. *Held*, that the M. Association was doing business in Missouri, within the meaning of the statute, and having thereby asserted a compliance with the laws of the state permitting it to do so, was estopped to set up that it had not authorized the superintendent of insurance to receive service of process, in order to defeat the jurisdiction of the court by which the judgment was rendered, and, accordingly, that the service on the superintendent was sufficient.

Cummins & Wright, for plaintiff.

Clark Varnum, for defendant.

WOOLSON, District Judge. The plaintiff, a citizen of the state of Missouri, brings this action against defendant, a corporation organized under the laws of the state of Iowa, upon a judgment re-

covered in her favor and against defendant. The record of said judgment, attached to the petition, and by duly-certified copy introduced in evidence, is as follows:

"State of Missouri, County of Johnson.

"Be it remembered that, at a regular term of the circuit court within and for the Seventeenth judicial circuit of the state of Missouri, begun and holden within and for the county of Johnson, in the state aforesaid, at the courthouse in the city of Warrensburg, on the 9th day of October, A. D. 1893, the following, among other proceedings, were had, made, and entered of record on the eighteenth judicial day of said term, it being the 25th day of November, A. D. 1893, to wit:

"Nannie R. Sparks, Plaintiff, v. The National Masonic Accident Association, of Des Moines, Iowa, Defendant.

"Now, at this day comes the plaintiff, by her attorney, and defendant, though duly summoned according to law, and three times solemnly called, comes not, but makes default; and this cause, coming on to be heard, is taken up and submitted to the court for trial upon the pleadings and the evidence of the plaintiff; and, after hearing the pleadings and the evidence, and being fully advised in the premises, the court doth find the issues for the plaintiff; and, being requested by the plaintiff to make a finding of facts, the court doth find the facts to be: That the defendant is now, and was at all times hereinafter mentioned, a corporation duly organized and existing under the laws of the state of Iowa, and doing a life accident insurance business in the state of Missouri; that personal service was had upon defendant in accordance with the laws of this state, as provided for by section 5912 of the Statutes of 1889, by serving the writ, with a copy of the petition, upon the superintendent of the insurance department of this state, the person authorized by law to receive such service, more than thirty days before the first day of this term. The court further finds that, on the 14th day of May, 1892, defendant duly issued to Samuel P. Sparks, late of Warrensburg, Missouri, then husband of plaintiff, since deceased, in his lifetime, for the benefit of this plaintiff, then his wife, now his widow, in case of accidental death, its certain benefit certificate of insurance, herein sued on, numbered 4,835, for five thousand dollars, under the hand of its president and secretary, with its corporate seal affixed; that said defendant, in and by said certificate, agreed and bound itself to, and thereby did, constitute and accept said Samuel P. Sparks as a benefit member of said association, and thereby agreed and bound itself to pay, in ninety days after there shall have been furnished to said association satisfactory proofs of the death of said member, Samuel P. Sparks, resulting from any bodily injury, during the life of this certificate, through external, violent, and accidental means, which, independently of all other causes, resulted in death within ninety days from the date of said injury, to this plaintiff, as the beneficiary named in said certificate, the sum of five thousand dollars (\$5,000), unless said sum should exceed the amount to be realized by said association from one quarterly payment of two dollars, made and collected from all its members at the date of said accident, and in that event to pay to the plaintiff the sum so to be realized from said quarterly payments, in consideration of the payment to it by the said member, Samuel P. Sparks, the membership fee of five dollars, and in further consideration of the warranties in the application of the said Sparks for this certificate, which application is indorsed upon said policy, and in further consideration of such future payments and conditions of, or as may be required under, the articles of incorporation and by-laws of said association, and in further consideration that he accepts said certificate subject to all the conditions indorsed thereon. The court further finds that Samuel P. Sparks duly paid the defendant the said sum of five dollars, membership fee, upon receipt of said certificate, and paid all further payments and assessments demanded of or required of him by the defendant, or that are provided for by said certificate, or required by the articles of incorporation or the by-laws of said association, as soon as the same became due; that said Samuel P. Sparks departed this life on the 16th day of September, 1892; that his death was the result of a bodily injury, which was effected through external,

violent, and accidental means, which, independently of all other causes, brought about his death immediately, to wit, the result of a deep gash cut in his throat, with a razor, in his own hands, while he, the said Samuel P. Sparks, was insane, mentally deranged, and wholly incapable of forming any mental design; that his death was not the result of any exposure to unnecessary danger, nor medical nor surgical treatment, nor of the violation of law or the rules of any corporation, nor of taking poison, nor of inhaling gas, nor disease, nor bodily infirmities. The court further finds that said Samuel P. Sparks, from the time of the issuance of said certificate to the date of his death, kept all the covenants, performed all the conditions, complied with all the rules and requirements provided for by said certificate, his said application, and the articles of incorporation and by-laws of said association. The court further finds that, immediately after the happening of the accident and injury which resulted in the death of the said Samuel P. Sparks, the insured under said certificate, plaintiff gave notice, in writing, to the defendant, at its home office, in Des Moines, Iowa, of the happening of said accident, the result of said injury, the particulars thereof, and the death of said Samuel P. Sparks, giving the time and place of his death and her relationship to him and right to claim under said certificate. The court further finds: That, on the 18th day of November, 1892, plaintiff caused to be made, furnished, and forwarded to said defendant, at its home office, at Des Moines, Iowa, satisfactory proofs of the said accident and injury to said member Samuel P. Sparks; the time, place, and manner in which it occurred; the time, place, and manner of his death resulting therefrom,—showing valid claim of this plaintiff for the sum of five thousand dollars on account of the accidental death of said Samuel P. Sparks, resulting from said injury, under the terms of said certificate. That said proofs comprised a sworn certificate of the attending physician, of the attending undertaker, of the attending clergyman, of the claimant, and of a disinterested friend, and were made upon and in accordance with the blanks furnished by said association. That said proofs were received, accepted, and retained by defendant, on the 21st day of November, 1892. The court further finds that the sum realized by said association from one quarterly payment of two dollars, made and collected from all its members at the date of said accident, would amount to more than the sum of five thousand dollars. The court further finds that, by reason of the premises, plaintiff is entitled to have, receive, and recover from defendant association, on the 21st day of February, 1893, ninety days after the receipt of said proof by said defendant, the sum of five thousand dollars on account of said certificate; but that said defendant then and ever since has failed, refused, and neglected to pay this plaintiff this sum, or any part thereof, although often requested so to do. Wherefore it is considered and adjudged by the court that the plaintiff do have and recover of and from the defendant the said sum of five thousand dollars, with six per cent. interest thereon from said February 21, 1893, amounting at this date to five thousand two hundred and twenty-five dollars, with interest thereon from this date till paid at the rate of six per cent. per annum, together with her costs in this behalf expended, and have execution therefor."

The defense to said judgment is that the court rendering the same was without jurisdiction of defendant, and therefore the judgment is void. More particularly stated, defendant asserts that the defendant association never appeared in said action wherein said judgment was rendered; denies it was ever served with process, or summoned to appear in said action or in said court; says that it never had an office in the state of Missouri, and never kept or maintained any agents or officers in said state; never appointed the superintendent of the insurance department of the state of Missouri, or any other person within said state, as a person on whom process or service of process might be made or served on defendant within said state; never applied to said insurance department to be admitted to do business within said state; has never been, by any of its officers or agents, or any person upon whom service of process could be

lawfully made, or who was appointed thereto, within said state of Missouri; that no person, authorized to accept service of process for defendant, or to have service of process made upon him, for defendant, was ever cited to appear, or personally served or notified, with summons or process, or did appear for defendant in said action. Defendant also avers that said action was begun by plaintiff in said Missouri court and judgment therein obtained through the fraud of plaintiff, who then well knew the facts to be as stated above, and who instituted and prosecuted said action in said court; and that plaintiff, for the purpose of preventing defendant from making therein any defense, well knowing that said court had no jurisdiction to hear and try said case, caused notice or summons to be served on said superintendent of insurance, and refused to have the same served on defendant, or any notice whatever to be given defendant of the pendency thereof, etc.

Under the pleadings and proof herein, the sole question to be herein determined is, did the circuit court of Johnson county, Mo., by the service of process in said action upon the superintendent of the insurance department of that state,—as found and recited in the judgment above given,—obtain jurisdiction over defendant in said action? The evidence herein shows defendant's principal place of business—the office from which all its policies (or certificates) of insurance issue—is at Des Moines, Iowa; that its business is issuing, etc., life accident insurance; that no action was ever taken by its board of directors or executive committee (which are by its constitution and by-laws charged with conducting its business) authorizing any application to be made to the proper authorities of the state of Missouri for authority to do business in said state; that defendant had or kept no office for transaction of business in said state; and that defendant did not personally appear in said action. But the proof does show that at least two of its agents—one its general agent, and the other a soliciting agent—were, during a part of the months of April and May, 1892, in said state of Missouri, soliciting insurance for defendant; that said agents, at different places in said state, solicited and procured, from residents of said state, applications for insurance with defendant; that the general method in which this business was carried on was the method pursued in the case of decedent, Sparks, viz.: The agent, having procured, at Warrensburg, Mo., the assent of the applicant, took from him a written application, signed by him, in which were stated the name, residence, etc., of applicant, his occupation, amount of insurance desired, name and residence of beneficiary, name and location of the Masonic lodge to which applicant belonged, and some other particulars relating to insurance. Thereupon the agent signed and gave to the applicant a receipt, on blanks furnished for that purpose by defendant, the receipt given to decedent, Sparks, being as follows:

"Amount, \$5,000.

"Fee, \$25.

Warrensburg, Mo., May 1, 1892.

"Received of Saml. P. Sparks five dollars to be forwarded to the National Masonic Accident Association, of Des Moines, Iowa, for a certificate of mem-

bership, and insurance until October 1st, 1892. If risk is declined, money will be refunded.

"[Signed]

R. L. Clarke, Genl. Agent."

The application was then sent (or brought) by the agent to the defendant at Des Moines, where a certificate of membership was made out, signed by the proper officers of defendant, and mailed to the applicant, to the address in Missouri as given on the application. Thereafter quarterly notices were mailed from the home office in Des Moines to the applicant (now member), in Missouri, of the dues then falling due, and of any special assessments made on the members. The applicant (member) at times mailed, from his home in Missouri, directly to defendant, at Des Moines, the amount of which he had been notified. But the proof shows that the general practice was for the members to pay these dues or assessments to some person in their home town, who acted as collector for defendant, and who collected and remitted to defendant at Des Moines the amounts thus collected. The receipts given by the collector for such payments to him were upon blanks furnished by defendant for that purpose, and their general form was as follows (I copy one introduced in evidence):

"Warrensburg, Mo., July 1, 1893.

"Received of Bro. C. A. Shepard three dollars, to be forwarded to the National Masonic Accident Association, in payment of premium call for the quarter commencing July 1, 1893.

"[Signed]

E. N. Johnson, Collector."

It is shown, by the proof herein, that in the months of April and May, 1892, 66 membership certificates were issued to residents of the state of Missouri, 28 in April, and 38 in May. Of these members, 10 resided at Warrensburg, 9 at Marshall, 7 at Slater, 7 at Lexington; and the record of these certificates, as kept by the secretary of defendant, shows quarterly payments thereon during 1892, 1893, 1894, and into 1895.

Article 5, c. 89, Rev. St. Mo. 1889, contains the following:

"Sec. 5912. Process against Foreign Companies, Appointment of Superintendent to Receive or Accept Service of. Any insurance company not incorporated by or organized under the laws of this state, desiring to transact any business by any agent or agents in this state, shall first file with the superintendent of the insurance department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing said superintendent to acknowledge or receive service of process issued from any court of record, justice of the peace, or other inferior court, and upon whom such process may be served for, and in behalf of, such company, in all proceedings that may be instituted against such company, in any court, of this state or in any court of the United States in this state, and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other state. Service of process as aforesaid, issued by any such court, as aforesaid, upon the superintendent, shall be valid and binding, and be deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this state, although such company may have withdrawn, been excluded from, or ceased to do business in this state; and in case such process is issued by a justice of the peace or other inferior court, the same may be directed to and served by any officer authorized to serve process in the city or county where said superintendent shall have his office, at least fifteen days before the return day thereof, and such service shall confer jurisdiction. Every such instru-

ment of appointment executed by such company shall be attested by the seal of such company, and shall recite the whole of this section, and shall be accompanied by a copy of the resolution of the board of directors or trustees of such company similarly attested, showing that the president and secretary or other chief officers of such company, are authorized to execute such instrument, in behalf of the company; and if such company shall fail, neglect or refuse to appoint and maintain, within the state, an attorney and agent in the manner herein before described, it shall forfeit the right to do or continue business in this state."

Under the proven facts, is defendant brought within the terms of said section 5912,—“any insurance company not incorporated by or organized under the laws of this state [Missouri], desiring to transact any business by any agent or agents in this state”? To my mind, but one answer can be given to this question. I am not now considering whether such business was legally or rightfully transacted, according to such section. Nor are the terms of the membership certificate now under construction. Nor am I concerned with the question whether this membership contract is to be construed according to the laws of Missouri or Iowa. The matter under consideration in this action, wherein a judgment obtained upon one of these membership certificates is sought to be enforced against defendant, is whether defendant was, at the date of service of process in the action where such judgment was rendered,—whether defendant was “transacting business” in Missouri, “by any agent or agents,” within the meaning of the section above quoted. If the facts proven do not constitute the “transacting of business” in such state, then it is possible for defendant to solicit insurance in Missouri, Nebraska, Illinois,—indeed, in every state and territory in the United States, other than Iowa; to have its soliciting agents forward to the home office the applications taken; then to mail its membership certificates to the applicants, and collect by mail and by local collectors the quarterly and other dues; and yet to be “transacting business” in no state except Iowa, even though practically all its business transactions, in carrying on its insurance business, may be with, and its insurance effected on, persons living in other states than Iowa. I cannot bring my mind to assent to this view. While it was carrying on this business—“transacting business”—in Missouri, in the matter of the insurance shown to have been therein obtained by its general and other agents, it was defendant’s duty to have complied with the laws of the state, and to have had in said state its duly-appointed representative for the service of process upon it. And, as to insurance then and thereby effected, this duty remained with defendant as long as it continued to carry the insurance thus obtained, whether it had agents therein soliciting new insurance or not.

If it be claimed that, in the case I have above supposed, the action and location of the soliciting agents of such company would be presumed—if not, by the facts, indeed, proven—to be with the knowledge, and thereby with the assent and direction, of the officers controlling the company, so that the company might then properly be charged with having “transacted business” within such other states, we may inquire how the facts are in the case at bar as to the knowl-

edge of the controlling officers of defendant, and thereby of defendant. The proof is convincing that the officers of defendant could not have been ignorant that its general agent, R. L. Clarke, was soliciting, within the state of Missouri, insurance for defendant. The records produced in court, as kept by the secretary of defendant, show (taking the insurance at Warrensburg, Mo., as an illustration) that this general agent solicited and procured, in the early part of May, 1892, 10 applications at Warrensburg, on which defendant issued membership certificates. The applications sent to defendant named that city as the residence of these applicants. The record of policies issued states their residences as at "Warrensburg, Mo.," and the residence of the beneficiaries as in that city. Defendant's local collector at Warrensburg collected and remitted to defendant dues from these members (or some of them), at Warrensburg, during 1892, 1893, 1894, and into 1895. The policy record of defendant also shows the residence of various other members (of all the other 56 above referred to) as in Missouri. Under the articles of association and by-laws of defendant, introduced in evidence by defendant, defendant's business was under the control of a board of directors, and the secretary and general agent were chosen from the membership of that board. The secretary, as part of his duties, is required (by-law 16) to "keep a complete register of the name, age, residence, and resulting beneficiary of each member of the association, with the date of admission, and the name of the agent, if any, transmitting the application." He is also required to (same by-law) "perform all duties incident to the notification of members of, and the collection of, required payments, and the receipting to the members therefor," etc. Under by-law 19, the general agent is given "power to appoint and remove local and soliciting agents, subject to such restrictions as the executive committee may impose." This executive committee is chosen from the membership of the board of directors. Such by-law further provides that the general agent "shall have the general supervision of such [soliciting] agents, and it shall be his duty to exercise a watchful care over such agents, and so control and direct their efforts as to be most beneficial to the association."

No proof was offered that the executive committee had at any time imposed any restrictions upon the general agent as to the localities where he or the soliciting agents, over whom the by-laws give him control, should solicit insurance. It is true that Mr. Clarke, in his testimony, says he was but "nominally" the general agent of defendant when soliciting insurance for defendant in Missouri. But he signed as general agent the receipts he gave to the applicants from whom he received applications; and the pamphlet of articles of association and by-laws, introduced in evidence by defendant, contains his name as general agent, in the list it gives of the officers of defendant. Evidence was introduced tending to show that neither the board of directors nor the executive committee of defendant ever authorized or directed the soliciting of insurance in the state of Missouri. But that avails nothing as against a certificate holder or beneficiary therein named, when the application was taken in

Missouri by the general agent of defendant, who was a member of the board of directors, and who by the by-laws was invested with the power and charged with the duty of "exercising a watchful care" over agents soliciting insurance for defendant, and of "controlling and directing their movements," subject only to "such restrictions as the executive committee may impose," and no restrictions were imposed. This knowledge to defendant that its agents were actually soliciting and taking applications for insurance with it from residents of Missouri, and within that state, is made yet more certain from the fact that to the secretary, a member of the board of directors, came the applications so taken, which disclosed (and were required so to do) the residences in Missouri of the applicants, and said secretary was required to send notices to these members at their residence. He must have known, as shown by his records, that the general agent himself was in Missouri, at least during the months of April and May, 1892, soliciting insurance from residents of that state. Further, the local collectors of defendant in the several Missouri towns collected and forwarded to the secretary, from quarter to quarter, the dues paid in on insurance held by residents of that state, and to him the secretary furnished receipts, to be delivered to those so paying.

It is beyond belief that, with the policy record, as shown in evidence, with the general agent in person soliciting insurance for so extended a period in Missouri, with the applications making known the residences of the applicants, and the correspondence of the defendant advising all who looked at it of the fact that defendant was thus accepting applications from residents of Missouri taken in that state, issuing certificates of insurance to them there, and carrying on the insurance business with said members in the manners described,—it is beyond belief that the board of directors of defendant, of whose membership the secretary, general agent, and executive membership were a part, could have been ignorant of these facts. From the foregoing it necessarily follows that, at the date of the issuance to decedent, Sparks, of his certificate of membership in the defendant association, and at the date of the service of process upon the superintendent of the insurance department of the state of Missouri in the action wherein the judgment herein sued on was rendered, the defendant was transacting business in the state of Missouri, within the meaning of the section of the Missouri statutes above quoted. The law applicable hereto is plainly pointed out in the decisions rendered by the senior circuit judge of this circuit. *Berry v. Knight Templars, etc., Co.*, 46 Fed. 439, while not "on all fours" with case at bar, has many points in common. In considering therein as to how the defendant company was affected by the laws of Missouri, with regard to the very statute now under consideration, Circuit Judge Caldwell forcibly remarks (page 441):

"Corporations are artificial creations, and have no natural rights, and their constitutional and legal rights, in some respects, fall short of those of natural persons. A state cannot deny to the citizens of other states the right to do business within its limits; but it may deny such right absolutely to corporations of other states, or may admit them to do business on such terms and con-

ditions as it may please to prescribe. And when an insurance company of one state does business in another, the laws of the latter state prescribing the terms and conditions upon which it is allowed to do business in the state are obligatory upon it. These conditions may extend to the form and legal effect of the company's policies, and if, in the course of its business in a state, it issues policies on the lives or on the property of the citizens of the state which contain conditions prohibited by or in contravention of the laws of the state, such conditions are void. Doing business in the state, brings the policy within the operation of its laws, notwithstanding the policy may be signed, and the loss made payable, in another state. In such cases the company cannot, by any contrivance or device whatever, evade the effect and operation of the laws of the state where it is doing business. *Wall v. Society*, 32 Fed. 273."

The next contention of the defendant is that, although it was doing business in the state at the time the policy was issued, it had not then done those things which, by the laws of the state, were conditions precedent to its right to do business in the state, and that therefore, in the language of its counsel, "the defendant did not in any way submit to the jurisdiction of the state," and is in no manner bound by its laws. The state laws referred to were enacted for the benefit of the state and the protection of the policy holders. By failing to comply with them, the defendant and its agents incurred the prescribed penalties; but such failure does not affect the validity of its policies, or in any manner operate to the prejudice of its policy holders. By the fact of doing business in the state, it asserted a compliance with the laws of the state, and, after enjoying all the benefits of that business, and receiving the money of the assured, it will not be heard to say that it never submitted "to the jurisdiction of the state." It can reap no advantage from its own wrong. To sustain this defense would be giving judicial sanction to business methods much below the standard of common honesty.

In *Ehrman v. Teutonia Ins. Co.*, 1 McCrary, 123, 1 Fed. 471, the statutes of Arkansas were considered in their relation to that case. The statutes then under consideration differ somewhat from the Missouri statute above quoted, but the general line of reasoning as hereinafter given is applicable to both statutes. After declaring, as in the *Berry Case*, that the failure of the insurance company to conform to the laws of the state with reference to appointment of agent on whom service of process should be made, would not affect the validity of the policy, nor operate to the prejudice of the policy holder, Judge Caldwell proceeds to consider how the failure of the company to file its stipulation under the statute, as to state authorities on whom service was to be made, affects the right of a policy holder to serve process on the state authorities designated by the statute. He says (page 128, 1 McCrary, and page 476, 1 Fed.):

"By the provisions of section 3561, Gantt, Dig. every insurance company of another state is required to stipulate, in terms, that service on the auditor shall be service on the company. If the stipulation is filed, service may be on the auditor or the person designated by him, or the agent designated by the company, at the election of the plaintiff. *Cunningham v. Express Co.*, 67 N. C. 425. And if the auditor does not designate a party, and the company does not specify an agent, then the auditor alone is the proper person to serve with the process. And such service binds the company. The citizen insuring his property in this state is not required to search the files of the auditor's office for the purpose

of ascertaining whether the company has filed the required stipulation, and otherwise complied with the statute. The receipt of the premium, and the execution and delivery of the policy by the company, are equivalent to an assertion by the company that it has complied with the requirements of the statutes to entitle it to do business in this state; and, as between the assured and the company, the latter is estopped, upon the soundest principles of the law and morals, to say that it has not done so. That the stipulation was not in fact filed with the auditor is of no consequence, if the company has done those things which imposed upon it the obligation and duty to file it. The law deduces the agreement on the part of the company to answer in the courts of this state, on service made upon the auditor, from the fact of its doing business in the state; and the presumption, from that fact, of assent to service in the mode prescribed by the statute, is conclusive, and no averment or evidence to the contrary is admissible to defeat the jurisdiction. The reason of this rule is that the obligation to file the stipulation is imposed for the protection of the citizen dealing with the company, and when by its own act its obligation to file the stipulation is perfect, as between the company and the citizen, the company will not be permitted to relieve itself from a liability which the written stipulation would have imposed, by pleading its own fraud on the law of the state and her citizens. In such cases the law conclusively presumes that to have been done which law and duty, and the rights of the parties contracting with the company, required to be done. It is a familiar principle that jurisdiction cannot be acquired by fraud, nor can it be evaded by such a fraud as is here attempted to be set up. The maxim that no man shall take advantage of his own wrong is as applicable to corporations as to natural persons, and applies as well to the kind of agreement under consideration as to any other. Insurance companies incorporated by the laws of one state have no absolute right to do business in another state, without the consent, express or implied, of the latter state. This consent may be given on such terms as the state may think fit to impose, and these conditions are binding on the company, and effect will be given to them in the courts of all the states and the United States. *Insurance Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168. 'One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly.' *Railroad Co. v. Harris*, 12 Wall. 65."

It necessarily follows, therefore, that service, as stated in the judgment record in evidence, upon the superintendent of the insurance department of Missouri, gave the court which rendered judgment jurisdiction therein over the defendant, and that the judgment is valid. I find that plaintiff is herein entitled to recover from the defendant herein the sum of \$5,225, with interest thereon from November 25, A. D. 1893, at the rate of 6 per cent., and the costs of this action; and judgment is ordered accordingly, this judgment to draw interest at the rate of 6 per cent. per annum until paid. The clerk will compute the amount, and enter judgment accordingly, and notify counsel of record herein of the same. To all of which defendant duly excepts, and is given 60 days from entry of judgment within which to have signed and filed bill of exceptions.

JONES v. ROWLEY.

(Circuit Court, S. D. California. March 22, 1896.)

No. 664.

1. PLEADING—FOLLOWING STATE RULES—PLEA IN ABATEMENT.

Though a defendant be permitted by the state practice and rules of pleading, adopted by the federal courts, in accordance with Rev. St. § 914, to

unite a plea to the jurisdiction of the court with pleas to the merits, he need not necessarily do so, but he may and the better practice ordinarily is to present his objections to the jurisdiction, before pleading to the merits; and the fact that such a plea is called a "plea in abatement," though properly designated, under the state practice, as an "answer," is no reason for striking it out.

2. SAME—DENIAL OF DAMAGE—JUDGMENT ON THE PLEADINGS.

A denial, in a plea in an action to recover land, of the allegations in the complaint of the amount of damages caused to the plaintiff by being deprived of the land, and of the amount of the rents and profits, is sufficient of itself to defeat a motion for judgment on the pleadings in such action.

3. FEDERAL COURTS—JURISDICTION—AMOUNT IN DISPUTE.

Whether, when a plaintiff sues for a large tract of land, and the defendant is in possession of and claims only an inconsiderable part thereof, and disclaims as to the rest, the amount in dispute is the value of the whole tract, or only of the part claimed by defendant, quære.

Motion to Strike Out Plea, and for Judgment on the Pleadings.

Tanner & Taft, for plaintiff.

Thos. R. Owen, for defendant.

WELLBORN, District Judge. This action is brought to recover possession of certain real estate described in the complaint, and the sum of \$1,000, damages alleged to have been sustained by the plaintiff through the act of the defendant in withholding possession of said land, and the further sum of \$500, rents, issues, and profits of said property. The complaint alleges that the matter in controversy exceeds the sum of \$2,000. Defendant has filed what he calls a "plea in abatement," in which it is alleged, that "the matter in controversy in this action does not exceed the value of two thousand dollars"; that, of the land sued for, defendant is in possession of only 50 acres, whose value does not exceed \$10 per acre; and that he disclaims all right, title, or interest to or in the balance of said land; and that the damages for withholding possession of said land, and the rents, issues, and profits thereof, do not exceed the sum of \$1. Plaintiff moves to strike out said plea, on the ground that the same is not authorized by law, and also moves for judgment on the pleadings, on the ground that said plea presents no issuable fact, and the time for answer has expired. These two motions will be considered in the order in which they have been stated.

1. Plaintiff's argument in support of his motion to strike out is that by section 422, Code Civ. Proc. Cal., made applicable, by section 914, Rev. St. U. S., to the federal courts in this district, a plea in abatement is not authorized, but that the matters which, at common law, would be thus properly presented, must, under said section, be set forth by way of answer. This contention, I think, is untenable. That a defendant may plead to the jurisdiction of the court does not admit of question; and the fact that he calls his pleading "a plea in abatement," instead of an answer, as, perhaps, strictly speaking, would be the appropriate designation, under the state practice of California, is no ground for striking out the pleading. Where objections are offered to the jurisdiction of the court, the better practice, for obvious reasons, is to determine such objections before the trial upon the merits, although, since the act of congress approved

June 1, 1872 (17 Stat. 197), carried into the Revised Statutes as section 914, conforming the rules of pleading, etc., in actions at common law, in the courts of the United States, to those prevailing in the courts of the several states, objections to the jurisdiction of the court and matters in defense of the cause of action may be united in the same answer. *Roberts v. Lewis*, 144 U. S. 653-658, 12 Sup. Ct. 781. In that case, the court, among other things, says:

"Doubtless, so long as the rules of pleading in the courts of the United States remained as at common law, the requisite citizenship of the parties, if duly alleged or apparent in the declaration, could not be denied by the defendant, except by plea in abatement, and was admitted by pleading to the merits of the action. *Sheppard v. Graves*, 14 How. 505. But since 1872, when congress assimilated the rules of pleading, practice, and forms and modes of procedure in actions at law in the courts of the United States to those prevailing in the courts of the several states, all defenses were open to a defendant in the circuit court of the United States, under any form of plea, answer, or demurrer, which would have been open to him under like pleading in the courts of the state within which the circuit court is held. Act June 1, 1872, c. 255, § 5 (17 Stat. 197); Rev. St. § 914; *Bank v. Lowery*, 93 U. S. 72; *Glenn v. Sumner*, 132 U. S. 152, 10 Sup. Ct. 41; *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 39, 40, 11 Sup. Ct. 478."

The court then proceeds to hold that, according to the Code of Nebraska, diverse citizenship of the parties may be put in issue by a general denial. Such I understand to be also the rule under the California practice. The case of *Sheppard v. Graves*, 14 How. 505, lengthily quoted from by the defendant, was decided in 1852, and hence the disapproval, there expressed, of uniting pleas in abatement with pleas to the merits, has not, since the act of 1872, above mentioned, been of controlling influence in those districts where, according to the state law, matters in abatement and to the merits may be joined in the same answer. While a defendant, however, is permitted to thus present the issue of jurisdiction, he need not necessarily do so, but may and the better practice ordinarily is to present such questions preliminarily. The motion to strike out is denied.

2. The other motion—that is, the motion for judgment on the pleadings—raises the question as to the sufficiency of said plea. Among the material parts of the complaint are the allegations that the plaintiff, by being deprived of the possession of his land, has been damaged \$1,000, and that the value of the rents, issues, and profits of said land, since he has been excluded therefrom, is \$500. The plea, besides its jurisdictional allegations, avers that said damages and rents, issues, and profits do not exceed \$1. These averments are equivalent to denials of plaintiff's allegations of the amount of his damages, and the value of the rents, issues, and profits of the land. As to these matters, therefore, the plea is, in substance, a plea to the merits; and the fact that it bears an erroneous appellation, and may be otherwise inartificially drawn, does not destroy its substantial character.

With reference to the jurisdictional allegations, it may be well to observe now, without, however, determining its sufficiency, that the plea seems to be approved by numerous authorities. *Simon v. House*, 46 Fed. 317; *Greene v. City of Tacoma*, 53 Fed. 562; *Hilton v. Dickinson*, 108 U. S. 174, 2 Sup. Ct. 424; *Railway Co. v. Smith*, 135

U. S. 195, 10 Sup. Ct. 728; *Grant v. McKee*, 1 Pet. 248; *Kanouse v. Martin*, 15 How. 208; *Maxwell v. Railway Co.*, 34 Fed. 290. Nor is there anything to the contrary in the quotation which plaintiff makes from *Schunk v. Moline, Milburn & Stoddart Co.*, 147 U. S. 500, 13 Sup. Ct. 416, as follows:

"In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say, in advance, that that defense will be presented by the defendant, or, if presented, sustained by the court."

In the case at bar, if the defendant asserted title to all the land sued for, and was in possession of the same, then the whole of said property would unquestionably be the matter in dispute, even though the defense should be adjudicated valid; and this illustrates the meaning of the quotation. But where the plaintiff sues for a large tract of land, and the defendant is in possession of and claims only an inconsiderable part thereof, it may well be doubted if his disclaimer, as to the balance, is such "a valid defense to a cause of action" as that referred to by Judge Brewer in said quotation. Whether that part of the plea, however, which goes to the jurisdiction of the court, is good or bad,—that is, whether the matter in dispute is the whole of the land sued for, or only that part to which the defendant alleges and may prove his claim and possession to be limited,—it is unnecessary now to decide, since the plea must be held good in the particulars above indicated, namely, its denials of the amount of damages, and value of rents, issues, and profits.

Motion for judgment on the pleadings denied.

UNITED STATES v. REID.

(District Court, W. D. Michigan.)

1. VIOLATION OF POSTAL LAWS—OBSCENE MATTER—INDICTMENT—SCIENTER.

An indictment charging that defendant did "unlawfully and knowingly deposit" certain newspapers in the mails, "each then and there containing, amongst other things, a certain obscene," etc., printed article, is insufficient to charge knowledge of the offensive character of the publication, when this objection is taken on motion to quash before trial, though the defect would probably be regarded as waived after verdict.

2. SAME—AVERMENTS IDENTIFYING THE OBJECTIONABLE MATTER.

If the indictment omits to set out the offensive matter, on the ground that it is unfit to be spread upon the record, there must be such other allegations as will identify the subject-matter of the charge; and, where the objectionable matter was contained in a newspaper, it is not enough to aver that defendant was publisher of a newspaper named, and did deposit "certain newspapers, to wit, two thousand printed newspapers," without further identifying them by name, date, or otherwise.

3. SAME.

Whether the statute includes those publications which are simply filthy and vulgar, quære.

This was an indictment against Edwy C. Reid for mailing obscene matter, founded upon Rev. St. § 3893, as amended by section 2, Act Sept. 26, 1888. Heard on motion to quash.

John Power, U. S. Atty.
F. A. Maynard, for defendant.

SEVERENS, District Judge. The counsel for the defendant in this case have founded their motion to quash upon the following points, in substance: (1) That the indictment fails to charge that the defendant knew the character of the contents of the paper deposited in the mail; (2) that the bare allegation that he deposited a number of papers of the character mentioned in the statute does not sufficiently describe the papers said to have been deposited; and (3) that the statute forbids the mailing of matter which is lewd or lascivious, and does not include matter which is simply foul and vulgar.

With respect to the first point, the allegation in the indictment is that the respondent "did unlawfully and knowingly deposit, and cause to be deposited, in the post office of the said United States, at Allegan, aforesaid, for mailing and delivering, certain printed newspapers, to wit, two thousand printed newspapers, then and there addressed to divers persons, and each then and there containing, amongst other things, a certain obscene, lewd, lascivious, and indecent article in print." It will be observed that, while this language charges an unlawful and conscious depositing in the mails of the offensive matter, it does not in terms charge that the respondent knew that that which he so deposited contained offensive matter. It is undoubtedly an element of the offense prescribed by the statute on which this indictment is framed that the party charged must have known the character of the publication when it was deposited by him in the mail, and the ground of the present objection is that it is nowhere charged in this indictment that the respondent had such knowledge. The decisions in the various federal courts upon the question whether the employment of the words "unlawfully and knowingly" applies not only to the depositing, but also to the character of the thing deposited, are apparently in some conflict. The result to be drawn from an analysis of all of them would seem to be that the determination of the question depends upon the time when the objection is made; whether upon the arraignment and before trial, or after trial and verdict, the objection not having been previously made. There is a difference in the rule to be applied, and which is applied, in all pleadings, whether civil or criminal, at one of these stages from that which applies at the other. The rules of criminal pleading, especially, require a reasonable precision and fullness of statement to describe all of the elements included in the offense; and, if it is not done, the pleading is open to challenge, if such challenge is seasonably interposed. If, however, no objection is made to the allegations of the pleading, but those allegations do contain some informal and technically uncertain averments, from which the inference can be fairly drawn that the intention was to charge the existence of that element of the offense, and the defendant, by not interposing his objection thereto, has accepted the same as sufficient, and gone on with the trial of the case, it will not be competent for him, on a motion in arrest of judgment, to then allege that the averments in the indictment were not sufficient to charge

the characteristic fact in question. The authorities upon the precise question now under consideration may be nearly all harmonized by this distinction: that the word "knowingly," in connection with the words charging the deposit and character of the matter deposited, will, after trial and verdict, be admitted to have applied to both those elements of the offense, upon the ground that in common speech that would be the ordinary interpretation of such form of expression,—that is to say, it would have been an inference by common intendment; and, on the other hand, that it would not be regarded as a sufficient averment of knowledge of the character of the thing deposited, under the more stringent rule which applies to pleadings when tested by a seasonable objection to their sufficiency. And it appears to be the conclusion justly to be drawn from the mass of decisions on the subject that the form of pleading here employed is not sufficient when tested by the rule of pleading to which I have adverted.

The second ground of the objection is that there is no sufficient description of the newspapers charged to have been deposited in the mail. The indictment, regarding the matter as too offensive to be spread upon the records, charges that in this case the article was of that character, and, for the reason that it is too offensive and indecent to be spread upon the records of the court, excuses the failure to set the same out. This has been held to be a permissible mode of pleading, but the law of pleading requires that, if this is done, there should be sufficient else stated in the indictment to describe the thing alleged to have been mailed, and distinguish it from other matter, so that the respondent may be apprised with reasonable certainty of the identical matter which he is charged with having deposited. In this case there is no identification of the matter deposited, except that they were newspapers. It is true, it was stated in the early part of the indictment that the defendant was the proprietor and publisher of the Allegan Gazette, but there is no allegation even that the newspapers deposited for mailing were publications of the Allegan Gazette. Certainly, there could have been no difficulty in stating what newspapers the defendant deposited, or of what date of issue, or what was the caption or other characteristic of the offensive article. The indictment does not, therefore, comply with the requirements of the rule that, if the exposition of the contents is excused for the reason already stated, there must be other allegations, which, it can be seen, it was within the power of the prosecutor to make, identifying the subject-matter of the charge. The allegations of this indictment would be supported by proof of the depositing of any newspaper, whether it be the Allegan Gazette or a newspaper published by somebody else at any other place, and have any date or any other incidents of description, at any time within the period covered by the statute of limitations. Under the doctrine of criminal pleading in this regard, it seems clear that such bald allegation cannot be held to be sufficient.

As to the third point: The language of the offensive article has been, during the progress of the argument, submitted to the court. The question whether it falls within the statute depends upon the

construction to be given to the words employed in the act. Some of the decisions in the United States courts hold that the statute includes only such publications as are of a lascivious character, and does not include those which are simply filthy and vulgar. Others hold that the language is of more extensive signification, and includes those which are obscene (using that term in a wide sense) and indecent. Probably the later decisions must be admitted to tend towards the former construction; but I do not find it necessary to pass upon that question, in view of the conclusion which is reached upon the first two grounds, and the court does not undertake to determine, in the sharp conflict of the authorities, which of them are the soundest interpretation of the statute. The motion to quash will therefore be sustained.

Since this opinion was written a decision of the supreme court of the United States has been published, by which it is determined that upon the proper construction of the act above mentioned, it does not include those publications which are simply coarse and vulgar. *Swearingen v. U. S.* (decided March 9, 1896) 16 Sup. Ct. 562.

UNITED STATES v. HACKER.

(District Court, S. D. California. March 9, 1896.)

TIMBER LANDS—CUTTING—INTENT—ACT OF JUNE 3, 1878.

The clause specifying intent, in section 4 of the act of June 3, 1878 (1 Supp. Rev. St. 168), which declares it unlawful "to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, * * * or remove or cause to be removed any timber from said public lands, with intent to export or dispose of the same," qualifies the cutting as well as the removal of timber; and an indictment for cutting timber on the public lands specified in the act, which does not allege that the defendant intended to export or dispose of the timber so cut, is fatally defective.

The District Attorney, for the United States.
Murphy & Gottschalk, for defendant.

WELLBORN, District Judge. This prosecution is for an alleged violation of section 4 of an act of congress entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada and in Washington Territory," approved June 3, 1878 (1 Supp. Rev. St. 168). The indictment alleges that the defendant cut timber on certain public lands, but does not allege that he intended to export or dispose of the timber so cut; and the question raised by the demurrer is whether or not such an intent is an essential ingredient of the offense, denounced in said section, of cutting timber on lands of the United States. The section is as follows:

"Sec. 4. That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said states and territory, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined

for every such offense a sum not less than one hundred nor more than one thousand dollars: provided, that nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act."

The government contends that the words in said section, "with intent to export or dispose of the same," qualify only the removal, and not the cutting, of timber. This construction, it seems to me, does not find support either in the grammatical arrangement of the section or in the policy of the law which prompted its enactment. It is true, as claimed by the government, that the overt acts to which the section relates are three,—the cutting of timber, the destruction of timber, and the removal of timber; and that the statement of the intent to export or dispose of the timber concludes the enumeration of all of these acts; and also it may be conceded that an intent to dispose of timber is wholly inconsistent with its "wanton" destruction. Yet it does not follow that the words, "with intent to export or dispose of the same," qualify only one of the other two overt acts. Even from a grammatical point of view, it is more reasonable to apply the qualification to both of the acts with which it is consistent, and to withhold it only from that one to which, in the nature of things, it is inapplicable. The correctness of this view is made manifest by transposing the words "wanton destruction" so as to insert them immediately after the word "unlawful." The section would then read as follows:

"That after the passage of this act it shall be unlawful to wantonly destroy, cut or cause or procure to be cut, any timber growing on any lands of the United States, in said states and territory, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same," etc.

Nor is the proviso to the section inconsistent with this interpretation. This proviso is, as I view it, a specification of the purposes for which timber may be lawfully cut or removed, and expressly legalizes some acts, both of removal and cutting, which would otherwise be forbidden by the body of the act. The government, however, contends that the proviso relates only to the cutting of timber, and that upon the principle, "the expression of one thing is the exclusion of another," the words, "with intent to export or dispose of the same," in the body of the act, are, in effect, simply an abbreviation of what is detailed in the proviso; and, therefore, to hold that said words relate also to the cutting of timber, makes the proviso superfluous, whereas, if the requirement as to intent be limited to the removal of timber, not only is the act harmonious, but every part thereof, including the proviso, operative. The government's argument on this point is as follows:

"Second. The construction claimed for the act by defendant renders unnecessary and superfluous the proviso contained in section 4 of the act, which declares, substantially, that it shall not be unlawful for any miner or agriculturist (1) to clear his land in the ordinary working of his mining claim, or (2) to prepare his land for tillage, or (3) to take the timber necessary to support his improvements. No one of these three acts involves a removal of the tim-

ber from off the land of the miner or agriculturist. Each of said three acts, however, does involve a cutting of timber, but the cutting so involved does not involve an exporting of the timber, or a disposition thereof. The word 'export,' as used in this act, probably has a broader meaning than that usually given to it when it is used to denote a taking out of the country to some foreign port or place. It probably means any removal from the state wherein the land is situated. The word 'dispose' is used in connection with the word 'export,' and should therefore be construed according to the maxim *'noscitur a sociis.'* When thus construed, it does not mean simply to put in place, arrange, or manage; it means, in this connection, to alienate, sell, or transfer. 'Dispose of; to alienate; to effectually transfer.' 5 Am. & Eng. Enc. Law, p. 703. 'If not always synonymus with, it is akin to, the word "sell." Taylor v. Kymer, 3 Barn. & Adol. 320. If it is not an offense to cut timber upon public lands of the United States, in the states mentioned in the act, unless the cutting be coupled with an intent to remove the timber from the land, or to sell, transfer, or alienate it, it would constitute no offense if a miner or agriculturist should cut timber for the purpose of clearing his land in the ordinary working of his mining claim, or for the purpose of preparing his farm for tillage, or for the purpose of taking the timber necessary to support his improvements, and there would, therefore, be no necessity for the proviso in section 4. But that construction should be avoided which renders a part of the act superfluous and useless.'

Conceding that this extract correctly defines the words "export" and "dispose of," still the argument is fatally vulnerable, and its infirmity lies in the assumption that the proviso relates only to the cutting of timber, not its removal. By this proviso, as analyzed in the foregoing extract from the government's brief, the lawful acts of a miner and agriculturist, so far as concerns timber on public land, are as follows: "(1) To clear his land in the ordinary working of his mining claim, or (2) to prepare his farm for tillage, or (3) to take the timber necessary to support his improvements." After making this analysis, it will be observed, the brief proceeds to assume that "no one of these three acts involves a removal of the timber from off the land of the miner or agriculturist. Each of said three acts, however, does involve a cutting of timber, but the cutting so involved does not involve an exporting of the timber, or a disposition thereof." This assumption, it seems to me, is erroneous. While it is true that neither of said acts necessarily involves the sale of timber, or its removal from the land where cut, it is equally true that all of them may involve both removal and sale. For instance, if the agriculturist clears his land for tillage, and thus cuts more timber than is necessary to support his improvements, he may lawfully sell the surplus. The Timber Cases, 11 Fed. 81; U. S. v. Williams, 18 Fed. 478. In the former of these cases the court says:

"The timber standing on the land intended for cultivation the claimant may cut, and, after applying such portion as can be used and is needed for the improvement for that purpose, he may sell or dispose of the balance to the best advantage. The law is not so unreasonable as to require timber which has to be removed for the purpose of cultivation to be burned or otherwise wasted, but will allow the pre-emptor to have the benefit of it, to aid him in accomplishing the design of the law."

In the case last cited (U. S. v. Williams, *supra*), at page 478, the court says:

"And yet I think the act of 1878 ought to be construed as authorizing a settler to dispose of timber which he cuts in good faith for the purpose of clearing

his land for present cultivation. Whatever timber it is necessary to cut to prepare the land for tillage, the settler ought to be allowed to dispose of to the most advantage to himself,—to sell it rather than destroy it."

So that the cutting of timber for tillage, made lawful by the proviso, may involve either its removal or sale or both.

Thus it will be seen that the proviso does relate to the removal, as well as the cutting, of timber; and I am satisfied the words, "with intent to export or dispose of the same," also qualify both the cutting and removal of timber. Nor does this interpretation render the proviso useless, but, as is apparent from what has already been said, the proviso subserves an important end. It limits the scope of the words, "with intent to export or dispose of the same," by making it lawful for a homestead settler to cut timber, even though he intend at the time to sell it, provided the cutting be done in the necessary preparation of the land for tillage.

The above interpretation is further strengthened by a consideration of the object for which the law was passed. The policy of the government in this and kindred legislation was to protect the timber on the public domain, except as against certain necessary and specified uses in tillage and mining. Besides these uses, recognized as lawful, there was but one other purpose for which timber on public lands was likely to be taken, namely, its sale. Here was the menace, and, except as below indicated, the only menace, to timber on the public domain. In some localities the lands of the government were being denuded of their growing trees, not for occupancy and improvement, but solely for exportation and sale of the timber. This was the mischief, and, outside of wanton destruction, the only mischief, present to the mind of congress, and against which the section in question was designed to afford a remedy. The structure of the section, and the whole course of legislation on the subject to which it relates, satisfies me that the words, "with intent to export or dispose of the same," relate to the cutting, as well as the removal, of timber. This conclusion is approved by decisions in at least two cases, where the section in controversy has been examined. *U. S. v. Childers*, 12 Fed. 586; *U. S. v. Williams*, 18 Fed. 475. In the first of these two cases occurs this paragraph:

"The premises upon which the defendant cut the timber in question being a part of these unearned lands, he is guilty of violating section 4 of the act of June 3, 1878 (20 Stat. 90), which enacts that any person who shall unlawfully cut any timber growing on any land of the United States in Oregon, with intent to export or dispose of the same, shall be guilty of a misdemeanor, and, on conviction thereof, fined not less than \$100 or more than \$1,000." 12 Fed., at page 589.

In the latter of the two cases the first paragraph of the syllabus is as follows:

"(1) Cutting Timber on the Public Lands. Section 4 of the act of June 3, 1878 (20 Stat. 89), prohibits the cutting of any timber on the public lands with intent to dispose of the same; but the proviso thereto permits a settler under the pre-emption and homestead acts to clear his claim as fast as the same is put under cultivation, and the timber cut in the course of such clearing may be disposed of by the settler to the best advantage." 18 Fed., at page 475.

In the body of the opinion, at page 477, occurs the following:

"The proviso does not license the cutting of timber for the purpose or with the intention of disposing of the same. The section expressly forbids this, and the proviso does not allow it. A mere settler on the public lands has no right, as such, to cut timber thereon for the purpose of disposing of it by sale or otherwise."

It is true that the precise point now under consideration was not necessarily involved in either one of the two cases cited, but the section in question was critically examined in both, and therefore the opinions are strongly persuasive, although probably not entitled to the same weight they would receive had the point been an essential one. The same may be said of the cases of *U. S. v. Garretson*, 42 Fed. 22, and *Leatherbury v. U. S.*, 32 Fed. 780, with the qualification that, while these cases arose under section 2461, Rev. St. U. S., yet that part of the section construed is substantially the same as the corresponding part of the act of June 3, 1878, now under discussion.

My opinion is, that the indictment is defective, because of its failure to allege that the timber was cut with intent to export or dispose of the same. The demurrer is sustained.

WERTHEIMER et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 5, 1896.)

CUSTOMS DUTIES—EMBROIDERED GLOVES.

The provision in paragraph 458 of the act of 1890 for "all embroidered gloves with more than three single strands or cords" includes all gloves embroidered on the back with three decorations, each of which is composed of more than a single strand or cord. 68 Fed. 186, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal by Wertheimer & Co. from the decision of the board of general appraisers affirming the action of the collector of customs at the port of New York in the classification for duty of certain ladies' kid gloves, embroidered. The collector assessed an additional duty of 50 cents per dozen pair, under the provisions of par. 458 of the act of 1890, and the particular clause thereof which reads: "On all embroidered gloves with more than three single strands or cords, 50 cents per dozen pairs." The importers protested, claiming that, while the gloves were embroidered, they were not embroidered with more than three single strands or cords. The evidence tended to show that gloves of this character were known in trade as "three-row embroidered gloves." The gloves in question had more than three single strands or cords in the embroidery, although there were but three rows of embroidery on the back. The circuit court affirmed the decision of the board (68 Fed. 186), and the importers appealed.

Wm. Wickham Smith, for appellants.

Henry C. Platt, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. According to the evidence in the record, all gloves, when commercially finished, have embroidery upon the back, consisting of three decorations, and those in which the decoration is formed of a single strand or cord are commercially known as "plain" gloves. We conclude that the embroidered gloves "with more than three single strands or cords" of paragraph 458 of the tariff act of October 1, 1890, are all those except the three single-strand embroidered gloves, and that, as the gloves in controversy have three decorations, each of which consists of more than a single strand or cord, they were properly subjected to the additional duty of 50 cents per dozen pairs. The judgment of the circuit court is therefore affirmed.

HOSTETTER CO. v. BECKER. SAME v. BAUER. SAME v. BOWER.

(Circuit Court, S. D. New York. April 8, 1896.)

UNFAIR COMPETITION—CONTRIBUTING TO FRAUD.

Complainant had sold for many years an article known as "Hostetter's Bitters." Defendant manufactured an article resembling it in color and in other particulars, and sold the same to retail dealers, under the name "Host-Style Bitters," in large demijohns, without labels, and was shown in several instances to have given to the purchaser of his bitters an empty bottle bearing all complainant's labels. *Held*, that defendant, though the purchaser from him was not deceived, had furnished the means of deceiving the public, and should be enjoined from selling Host-Style Bitters, and, at the same time and in connection with the sale, giving to the purchaser empty Hostetter bottles.

Albert H. Clarke and James Watson, for complainant.
Charles Putzel, for defendants Becker and Bower.

COXE, District Judge (orally). In the cause argued yesterday, Hostetter Company against Emil Becker, I am inclined to think that, upon the conceded facts, the complainant is entitled to relief. Many propositions have been advanced upon one side and disputed upon the other which, in my view of the case, it is not necessary now to determine. The following facts are either conceded or are established by a great preponderance of testimony: The defendant makes an article of bitters which is light in color, and in other particulars resembles the bitters which have been sold by the complainant for a great number of years. These bitters made by the defendant are called "Host-Style Bitters," the name not being derivative, but purely arbitrary. The proof shows no possible reason for the adoption of this name unless it be that in sound and general appearance it resembles the complainant's name. No one of the witnesses called for the defendant gives any plausible explanation for adopting this name. In view of the other evidence I cannot doubt that it was adopted with an intent upon the part of the defendant to deceive the public and confound his bitters with those made by the complainant.

The defendant's bitters are sold in large demijohns, with no label or mark at all resembling complainant's labels. But it is admitted

that in four instances these bitters were sold and at the same time an empty bottle containing all the labels of the Hostetter bottles was given away to the purchaser. Admitting that nothing was said upon the occasion when these bottles were given away with the demijohn, I think the inference is almost conclusive that it was the intention of the defendant and his agents that the contents of the demijohn was to be poured into the bottle and sold in that way. No other presumption can arise from that conjunction of facts. Therefore, to draw an analogy from the patent law, it is a case of contributory infringement. Of course the buyers of defendant's bitters were not deceived. It is not pretended that they were, and that is not the theory of the bill as I understand it. But the defendant placed in the hands of the buyers implements which enabled them to deceive the general public. It cannot be successfully disputed that it would be a fraud upon the complainant's rights if a retail dealer should fill an old Hostetter bottle with spurious bitters and sell it to retail purchasers as the genuine Hostetter bitters; and yet this is, in the eye of the law, precisely what the defendant does. While not doing that himself he enables others to do it, and he suggests to them the way in which it can be done successfully.

Upon the conceded facts the case is brought directly within the decision in the Western circuit which was read yesterday, and where the law is laid down precisely as I understand it to be. *Hostetter Co. v. Brueggeman-Reinert Distilling Co.*, 46 Fed. 188.

Mr. Putzel: If your honor please, there is a more recent case.

The Court: It does not change the law because that is the law which has been enunciated ever since the doctrine of unfair competition in trade has found a place in the law books.

The complainant is entitled to a decree enjoining the defendant and his agents from selling Host-Style Bitters, and at the same time and in connection with the sale giving to the purchaser empty Hostetter bottles. The court should not go to the extent of saying that the defendant should not sell his bitters by whatever name he sees fit in demijohns without labels, but as I said yesterday it would seem that he is treading upon dangerous ground in adopting a name which so closely resembles the complainant's name. I do not go to that extent, because I think the court would not be justified in saying that the defendant should not use "Host-Style" as the name for his bitters provided he does not simulate any of the labels of the complainant, but I do think he should be stopped from selling these bitters and giving to the purchaser empty Hostetter bottles in such circumstances that the purchaser could hardly doubt that it was the intention that he should sell the bogus bitters in the genuine bottle.

In the case of the Hostetter Company against Bauer, the defendant was a retail dealer who sold spurious bitters in a Hostetter bottle. That is undisputed. As to him there should be a decree as prayed for in the bill.

As to the case of the Hostetter Company against Bower, I will take the record and examine the testimony, because in that case there is a somewhat difficult question of fact.

Decrees to be prepared by complainant's counsel, copies of which are to be handed to the counsel for the defendant; the same to be settled Friday morning, April 10th.

WELKER v. WELLER et al.

(Circuit Court, W. D. Pennsylvania. February 13, 1896.)

1. PATENTS—INFRINGEMENT—FASTENINGS FOR TABLE LEGS.

The Welker patent, No. 480,536, for a fastening for table legs of knock-down tables, cannot, in view of the prior state of the art, be expanded to cover constructions which do not embody the elements of "longitudinal, segmental kerfs," and "tenons secured in the grooves or kerfs," and in which the joint used is of a different and well-known construction.

2. SAME—DESIGN FOR TABLE LEGS.

The Welker design patent, No. 22,997, for a design for table legs, is void for want of novelty.

This was a suit in equity for the infringement of certain patents relating to table legs for knockdown tables.

John G. Reading and Frank L. Dyer, for complainant.

S. P. McCandless, H. C. Parsons, and C. D. & W. R. Davis, for respondents.

BUFFINGTON, District Judge. This suit is brought by Louis Welker against H. M. Weller and William Decker for alleged infringement of letters patent No. 480,536, granted August 9, 1892, for a fastening for table legs, and also for the infringement of letters patent for a design for a table leg, No. 22,997, granted January 2, 1894, to said Welker. As touching the first patent, infringement of the third claim is alleged, which is as follows:

(3) In a knockdown table, the combination of the frame, having its side pieces provided with the longitudinal, segmental kerfs or grooves, arranged as described, the corner piece or brace having its chamfered ends provided with the tenons secured in the grooves or kerfs, the solid head leg fitted against the imperforate ends of the side pieces, and the screw bolt secured in the head of the leg, and having a nut bearing against the corner piece or brace, substantially as described.

The defenses alleged are noninfringement, prior use, and lack of patentability. The subject of dispute is what is known in the furniture trade as a "knockdown table." For convenience of shipping and handling, tables are constructed with adjustable legs placed therein, and the whole crated and shipped. The legs are not attached until they reach the dealer. In this way freight is saved, and damage to the tables avoided, while the adjustable legs make it possible to use such tables in flats and houses with narrow halls, into which the same table, with nonadjustable legs, could not be carried. Decided advance in the art had been made before Welker's patent. It is not necessary to refer to all of it in detail. The examples selected are sufficient to show the comparatively narrow field for advance left when Welker entered the field. Prior thereto, we find in knockdown tables a corner brace connecting the side rails,

and connection of these parts made with an adjustable leg by a wood screw, which passed through a hole in the corner brace, and was screwed into the leg or by a lag screw which had a nut head, instead of the flat screw head of the wood screw. The objection to this method was that when the table was taken apart the screw had to be taken completely out of the leg, and when this was done a few times the hole became enlarged, and the tables ceased to be rigid and firm. This objection was in part obviated by the St. John construction, in which an opening of keyhole shape was made in the cross brace of sufficient size at the lower end to permit the nut of the lag screw to slip through. When this was done the leg was pushed upward to its proper place, and a rigid connection made by turning the nut. By this method the screw was only given a few turns, and it was not necessary to remove it entirely from the table leg. The next advance showed a method in which there was no abrasion of the leg whatever. In it the interior corner of the leg was slotted so as to permit an iron hook to slip down and engage with an iron cross-piece in the slot. The outer end of the hook was threaded, passed through a hole in the corner brace, and by means of a nut with washer the parts were drawn into rigid connection, the ends of the rails seating themselves in bevels on the sides of the legs. This method was embodied in Goedeke's patent, No. 456,377, of July 21, 1891. Subsequent to this, complainant conceived the idea of permanently placing a rigidly connecting hanger bolt in the leg itself, and also of attaching the corner brace to the side rails by a peculiar form of joint. A hanger bolt has a wood screw thread at one end, and a nut thread at the other. It will be noted that the idea of threading the exterior end of the connecting bolt, and forming a rigid connection by a nut, was not original with complainant, and his advance in this respect was simply in making the connecting pin primarily rigid, as opposed to Goedeke's attaching a hooked bolt to a cross pin in the leg slot. The third claim originally made was:

In a table, the combination with side pieces, a corner block, and a leg, of a screw bolt rigid with the leg, and passing through the corner piece, and a nut fitted on the screw bolt, substantially as described.

This claim, which was clearly broad enough to cover defendants' device, was rejected on the Goedeke patent, and because the lag screw was common in furniture; and in the subsequent proceedings the applicant, in effect, disclaimed originality in the lag screw itself, saying:

Applicant regards it as important to use a bolt having a lag screw at one end to rigidly fasten the bolt in a solid leg, and with a metal-nut thread on its other end. The bolt is not claimed, per se, but the organization of the several parts is new.

In all the claims finally granted, there was a limitation of longitudinal, segmental kerfs, and tenons secured in the kerfs or grooves. In view of these proceedings in the patent office, and of the prior advance in the art, it is manifest the claim should not be expanded to cover constructions which do not embody the elements of "longitudinal, segmental kerfs," and "tenons secured in the grooves or kerfs," and in which the joint employed was another and well-known

prior form of construction. Indeed, such a construction would be fatal to the patent. The claim being thus construed, it is clear the respondents' device does not infringe.

The question still remains, can the bill be sustained upon the design patent for a table leg? On November 29, 1893, the complainant applied for a design patent for a table leg, which was granted January 2, 1894. "The leading feature in my design," the specification recites, "consists of a table leg with an upper end of a generally square shape, with one of its corners beveled off, and with a projection protruding from the beveled corner." He had on December 2, 1891, applied for a mechanical patent for a fastening for table legs, which, in substance, showed in combination the form of leg embodied in the design patent. The complainant testifies that he made his invention in the latter part of the summer of 1891, and began manufacturing the tables in the fall, or the latter part of the summer, of 1891. Conceding for present purposes that a table leg which had been embodied in combination in a mechanical patent issued before the present application was made, which is not in itself an article of commerce, and which, when used in a table, so far as the "projection protruding from the beveled corner" is concerned, is wholly hidden from view, and in no way appeals to the eye; conceding, we say, that it can be the subject of a design patent, and conceding that a design patent could issue on an application made November 29, 1893, for a design which, by the applicant's admission, had been perfected more than two years previously, and had been publicly used and manufactured in the fall or latter part of the summer of 1891,—the question still remains whether there was any novelty in the design shown. On this point the issue is with the respondents. Exhibit G, introduced by complainant, and admitted by him to have been manufactured by respondents before the device in suit, shows a table leg with an upper end of a generally square shape, with one of its corners beveled, and a projection protruding from such beveled corner. The only difference between it and the design-patent device is that Exhibit G has a fixed nut on the end of the projection. Such being the case, there certainly was no patentable novelty in dispensing with the nut. Where the two designs are, in their prominent features, identical, as they are here, and their sole difference lies in that the protuberance of one has a small nut at the end, and the other has none, the difference is not of such material character as to afford ground for the grant of a design patent. We are therefore of opinion the design patent is void for want of patentable novelty. Let a decree dismissing the bill be drawn.

TROY LAUNDRY MACHINERY CO. v. ADAMS LAUNDRY MACHINERY CO. et al.

(Circuit Court of Appeals, Second Circuit. March 17, 1896.)

PATENTS—INFRINGEMENT—LAUNDRY DAMPENING MACHINES.

The Wendell and Wiles patent, No. 401,770, for an improvement in dampening machines, is so limited by the action of the patent office and

the acquiescence of the patentees therein, and by the specific language of the claims and specifications, that the thin textile covering of the dampening rollers, which is an element of each claim, cannot be construed to include a thick covering of felt.

Appeal from Circuit Court of the United States for the Northern District of New York.

This was a suit in equity by the Troy Laundry Machinery Company against the Adams Laundry Machinery Company and others for alleged infringement of a patent for a dampening machine. The circuit court dismissed the bill, and complainant appealed.

E. B. Stocking, for appellant.

Wm. W. Morrill and Nelson Davenport, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The object of the invention described in the patent in suit, No. 401,770, its novel features of construction, and the particular object and beneficial effect of the thin textile covering which is one of the elements of the patented combinations, are fully stated in the opinion of Judge Coxe in *Troy Laundry Machinery Co. v. Sharp*, 54 Fed. 712, and the necessity of a restatement of these facts is obviated. In view of the limitations placed upon the claims of the patent by the action of the patent office, and acquiesced in by the patentees, and in view of the specific language of the claims and of the description in the patent, we are of the opinion that the "thin textile covering" of the dampening rollers which is an element of each claim cannot be construed to include a covering of felt of the thickness used in the machines of the defendant, and consequently that the defendants have not infringed the patent. The decree of the circuit court is affirmed, with costs.

STATE OF MISSOURI, to use of PUBLIC SCHOOLS OF CAPE GIRARDEAU COUNTY, v. ALT et al.

(Circuit Court, E. D. Missouri, E. D. April 14, 1892.)

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—NOMINAL PARTIES.

An action by a county school board against an alien to cancel, for the benefit of the public schools, a deed to certain swamp lands, made by the county commissioner, was brought, by permission of a statute, in the name of the state of Missouri. The ground alleged was that the deed was invalid for want of a seal, and the county was made a defendant because it refused to join as a complainant. *Held*, that both the state and the county were merely nominal parties, and the alien defendant was entitled to remove the cause.

This was a bill in the name of the state of Missouri, in behalf of, and to the use of, the public schools of Cape Girardeau county, against William John Alt and Cape Girardeau county, to procure the cancellation of a deed. The cause was removed by defendant from a state court, and is now heard on motion to remand.

THAYER, District Judge (orally). In a case removed to this court from the circuit court of Cape Girardeau county, I find a motion to remand to the state court. The motion is general. It does not assign any reason why the cause should be remanded, except the general reason that this court has no jurisdiction. The motion was not argued orally, no brief has been filed, and, in deciding it, I am compelled to strike in the dark. I observe that the case is entitled, "The State of Missouri, in Behalf of, and to the Use of, the Public Schools of Cape Girardeau County, against William John Alt and Cape Girardeau County;" and it has occurred to me that the motion to remand may have been filed upon the theory that this court has no jurisdiction because the state of Missouri is a party. If that is the view entertained by the complainant's attorney, it is untenable, for the reason that the state of Missouri, as the record in the case discloses, is not the real complainant. The action is brought by the board of education for the benefit of the public schools of Cape Girardeau county, and it is brought in the name of the state, under a state law (section 8040, Rev. St. Mo. 1889) which permits the board to bring actions in the name of the state in all suits affecting swamp lands to which the board lays claim in behalf of the public schools of the county. The real complainant in the case is a quasi corporation, called the "Board of Education." The state is merely a nominal party. The fact that it is made a party, pursuant to the provisions of the statute above referred to, does not make it a suit by or against the state, in any such sense as to deprive the federal courts of jurisdiction of the controversy.

It has further occurred to the court that the motion to remand may have been filed because one of the defendants (Cape Girardeau county) is a municipal corporation of this state. Under the circumstances, I do not think that that fact deprives the federal courts of jurisdiction of the controversy. The other defendant, William John Alt, is a citizen of the kingdom of Great Britain and Ireland. The bill alleges that some time in the year 1873 the county commissioner of Cape Girardeau county conveyed to William John Alt an extensive tract of swamp land, lying in Cape Girardeau county, which, under the laws of the state, belonged to the public schools of the county; that the deed bore no seal, and therefore conveyed no title; and, furthermore, that the conveyance was made without a sufficient consideration. It is further averred that Alt went into the possession of the lands, and has cut off much valuable timber. In view of the premises, the complainant asks to have the commissioner's deed canceled as a cloud upon its title, and to have an account taken of the value of the timber appropriated by the defendant Alt, and a decree entered against him for the value of the timber so appropriated. Inasmuch as the suit is brought to have a deed declared to be invalid for want of a seal, it would seem that the only necessary parties to the controversy are the board of education and William John Alt. Cape Girardeau county is not a necessary party defendant, so far as the settlement of the present controversy is concerned. I judge, from one of the averments of the bill, that complainant's solicitor considered Cape Girardeau county

a necessary party plaintiff, but not a necessary party defendant, because it is averred that Cape Girardeau county is made a defendant because it has refused to join in the suit as a party complainant. In my judgment, the county may be left out of the controversy. The real question to be determined in this case is whether the commissioner's deed, under which Alt claims title, should be canceled and annulled. The only necessary parties to the settlement of that controversy, as before stated, are the board of education and the defendant Alt, who is an alien. The record discloses no reason why the case should be remanded to the state court, and the motion to reman^d is therefore overruled.

STATE OF MISSOURI, to Use of PUBLIC SCHOOL FUND OF NEW MADRID COUNTY, v. NEW MADRID COUNTY et al.

(Circuit Court, E. D. Missouri, E. D. March 17, 1896.)

No. 3,899.

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FORMAL AND NECESSARY PARTIES.

The state of Missouri granted to the county of M. the swamp lands, donated to the state by congress and located in said county, to be drained and sold for the benefit of the school fund of the county. Many years after such grant, a bill in equity was filed, in a state court, by the state, on behalf of the school board of M. county, against that county and sundry persons, citizens of other states, alleging that the county had committed various breaches of trust in the disposition of the lands so granted to it, by disposing of them without consideration, or for purposes not within the trust, by misapplying moneys received from their sale and otherwise; that the conveyances so made were fraudulent and void; that the lands, so disposed of in breach of the county's trust, had come to the hands of the other defendants, with knowledge of such breaches of trust,—and praying that such conveyances be set aside, and the land restored to the county and for general relief. The defendants, other than the county, sought to remove the cause to the federal court, on the ground of diverse citizenship. *Held*, that the county of M. was a necessary, and not merely a formal, party to the suit, and an adversary party to the complainant, and, such county and the real complainant in interest being both citizens of Missouri, the suit could not be removed.

In Equity.

Lee & McKeighan, H. N. Phillips, and C. L. Keaton, for complainant.

R. B. Oliver and Brown & Geddes, for defendants.

ADAMS, District Judge. This cause came here by removal from the circuit court of New Madrid county. The complainant now appears by counsel, and moves to remand the cause for the alleged reason that the same does not present a controversy "wholly between citizens of different states," and is, therefore, not removable to this court. Although the cause is instituted in the name of the state of Missouri, it is manifest, from the statute under which it arises (Rev. St. 1889, § 8040), that the real party complainant is the school board, for and in behalf of the common schools of New Madrid county, and, as such, is a citizen of the state of Missouri, within the mean-

ing of the act of congress relating to removal of causes. The defendants are all, with the exception of New Madrid county, citizens of states other than Missouri. New Madrid county, being a municipality of the state, is a citizen of the state, within the meaning of such act. If, therefore, the county is a necessary party to this cause, it does not present a controversy wholly between citizens of different states, and is not removable to this court. If, on the other hand, the county is a mere nominal party, and not a necessary party, the controversy is wholly between the school board, acting in behalf of the public schools of the county, and the other defendants, who, as already seen, are citizens of other states, and the cause is removable to this court. The question for determination, therefore, is whether New Madrid county is a necessary party.

The bill of complaint shows that, by act of congress approved September 28, 1850, the United States granted to the state of Missouri certain swamp and overflowed lands, to be drained and reclaimed for the ultimate benefit of the public schools of the state; that the state of Missouri afterwards, by different acts of its general assembly, granted such of these lands as were located in New Madrid county to that county, to be drained and reclaimed by it, and afterwards sold at not less than \$1.25 per acre, the net proceeds thereof to become a part of the common school fund of that county; that, by the provisions of such acts, the county court of said county alone had the right to make the sales and issue patents for the lands sold, provided, however, that this should be done only after full payment of the purchase price therefor had been made. It appears that New Madrid county, as a municipality, became vested with the legal title of the swamp and overflowed lands in its territory, in trust for the benefit of the common schools of the county, and that an elaborate scheme was devised by the legislature of the state for the execution of the trust, so as to secure proceeds of the sale of the lands, in money, for the benefit of the school fund of the county. It further appears, as averred in the bill of complaint, that said county, by and through its county court, committed divers breaches of trust in handling and disposing of said lands, as follows: That it disposed of large tracts thereof without consideration, and particularly without securing the upset price fixed by the acts of the general assembly therefor; that it donated other large tracts of said lands to a certain alleged corporation, or to its stockholders, ostensibly for the purpose of draining and reclaiming the same, but really as a subsidy only, to secure the construction of a railroad through the county; that it conveyed other portions thereof to divers persons in order to secure the dismissal of certain suits instituted by them against the county of New Madrid; that the county court required the payment, in one instance, of \$10,000 as partial consideration for a conveyance, and that no part or portion of said sum, or other proceeds of the sale of said lands, was ever turned over to the school fund of said county; that all said transactions were made contrary to law, and in violation of the trust imposed upon the county by the act of congress (*supra*) and the several acts of the general assembly above referred to; that said county, by and through its county court,

combined, confederated, and conspired with the other defendants in this cause, to so dispose of said lands, in the way and manner aforesaid, as to deprive the school fund of the benefit thereof. It is further alleged, in the bill of complaint, that for the reasons aforesaid, and other similar reasons set forth at great length, all said conveyances and transfers of the lands, which are particularly described in the bill of complaint, were fraudulent and void, and that the defendants, other than New Madrid county, now hold, either by direct or mesne conveyance from said New Madrid county, with full knowledge of the facts aforesaid, deeds or patents to said lands, and claim to be the beneficial owners thereof. The complainant prays that all the contracts, deeds, patents, and conveyances so made by said county be set aside and for naught held, and that all of said lands be restored to the possession of said county, to be held and disposed of by it for the purposes of the trust conferred upon it. There is also a prayer for general relief.

It is manifest, from this very general analysis of the bill of complaint, that the county of New Madrid is charged with a direct and willful breach of trust in transferring the title to the lands described in the bill of complaint to the defendants or their grantors, through whom they claim. By virtue of the acts of the general assembly creating the trust above referred to, New Madrid county undoubtedly became a statutory trustee, charged with the duty of so disposing of the swamp and overflowed lands within its territory as to create a fund for the benefit of the common schools of the county. It, and it alone, had the power to act as such trustee, and one of the purposes, if not the main purpose, of the bill of complaint in this case is to restore to the county the legal title to the lands in controversy, and to compel the county to proceed and execute the trust imposed upon it by law. Divers contracts, deeds, and conveyances are alleged to have been made by the county in the execution of a scheme to defraud the schools, and deprive them of the lands in controversy. In order to do complete equity in this cause, it will be entirely proper and necessary, in the event the complainant prevails, not only to set aside the deeds and conveyances under which the defendants claim the land in controversy, but to reinvest the title to said lands in the county, with directions to proceed and execute the trust imposed upon it by law; and, under certain possible contingencies, it may be proper and necessary to require the county to account in this action for a diversion of the trust funds. The county is, therefore, essentially an adversary party to the complainant in this cause. It is a trustee charged with having fraudulently disposed of trust property, and is a necessary party to a suit against the fraudulent grantees to reclaim the same. This proposition has been recognized and asserted in numerous cases in the supreme court of the United States and in the circuit court of appeals, and must be regarded as the settled doctrine of this court. The leading cases are: *Barth v. Coler*, 9 C. C. A. 81, 60 Fed. 466; *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259; *Thayer v. Association*, 112 U. S. 717, 5 Sup. Ct. 355; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287; *Rust v. Silver Co.*, 7 C. C. A. 389, 58 Fed.

611; *Railway Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738; *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154. Applying the doctrine of the foregoing authorities, New Madrid county cannot be held to be a mere nominal party in this cause. On the contrary, it is an indispensable and necessary party to a complete disposition of the matter in controversy, and, inasmuch as it is a citizen of the same state with the complainant, the cause was not removable to this court on the ground of diverse citizenship, and the motion to remand must be sustained.

My attention has been called to an opinion in the case of *Missouri v. Alt*, 73 Fed. 303 (decided *nisi prius* by Judge Thayer), as direct authority in a similar cause for a different conclusion than that reached by me. I have carefully considered the opinion in that case, and it is manifest that the facts there presented to the court were essentially different from the facts shown in the bill of complaint in this cause. So far as disclosed by the bill, the county of Cape Girardeau was there but a nominal party. Again, in that case it clearly appears that the county was not an adversary party to the complainant. It appears, by the opinion, that the county refused to join as a complainant in the cause, and was therefore made a defendant. For this reason the court held that, in the arrangement of parties for the purpose of determining jurisdiction, the county should be treated, as complainant's counsel obviously treated it, as the same in interest with complainant, and in no sense an adversary party. The case last referred to is therefore not applicable to the facts of the case now before the court.

HERNDON v. SOUTHERN R. CO.

(Circuit Court, E. D. North Carolina. April 7, 1896.)

REMOVAL OF CAUSES—LOCAL PREJUDICE—NOTICE.

An application for the removal of a cause from a state to a federal court on the ground of local prejudice, under the act of congress of March 3, 1887 (amended August 13, 1888), should not be granted without giving to the plaintiff notice and an opportunity to be heard, though the court has power to grant the application *ex parte*.

F. H. Busbee, for the motion.

SEYMOUR, District Judge. It appears, from a proper reading of the act of March 3, 1887, that, in cases where there is a controversy pending in a state court between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being a citizen of another state, may remove such suit into the United States circuit court, when it shall be made to appear to the circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court, or in any other state court to which defendants may, under the laws of the state, have the right, on account of such prejudice, to remove said cause. The subsequent clause, in regard to the right to remand, appears only to apply to cases removed under the former law, under which an affidavit

not assigning any grounds of belief was sufficient to authorize a removal. It allows the court, on motion to remand, to examine into the truth of the affidavit for removal, and the grounds thereof. In a removal for local prejudice, under the act of 1887, the court is required to make such examination before removal. A motion to remand is merely, in such case, a motion for a rehearing of the grounds of the original motion. But, this being the law, the motion for removal ought not to be decided without notice, and an opportunity to present affidavits on the part of the party opposing. This has not been given in this case. It is true that the right to remove on *ex parte* affidavits exists. In *re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141. In that case Bradley, J., says:

"Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. * * * The amount and manner of proof required in each case must be left to the discretion of the court itself. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered."

See, also, *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207.

In *Adelbert College of Western Reserve University v. Toledo, W. & W. Ry. Co.*, 47 Fed. 836, Jackson, J., says:

"There is no requirement in the statute that the opposing side shall have notice of the application to remove, and be allowed an opportunity to be heard thereon. It would, perhaps, be better practice to give the opposite party notice of the application to remove, before action thereon by this court."

In making the precedent for the practice in this district, I am unwilling to grant the motion to remove without a hearing. The same course was pursued in *Springer v. Howes* (heard last December) 69 Fed. 849. In this case no allegations in regard to any other county than Durham were made. This, however, I do not consider material. After a full hearing in *Springer v. Howes*, and after argument by very learned counsel, I decided that a defendant had no absolute right to a removal to an adjacent county under the state statute, and that it was sufficient if the circuit court be satisfied that a fair trial could not be had in the county in which the venue was laid. *Smith v. Lumber Co.*, 46 Fed. 822. The decision of the motion to remove is continued, that 10 days' notice of the motion may be given to defendant.

DECKER et al. v. WILLIAMS.

(District Court, D. Alaska. March 11, 1896.)

1. DISTRICT COURT OF ALASKA—JURISDICTION—APPEALS FROM UNITED STATES COMMISSIONERS.

This court has no jurisdiction over cases brought here by appeal from United States commissioners, acting as justice courts under the statutes of Oregon, unless the amount involved is \$200 or more. Organic Act, § 7; 23 Stat. 24; 1 Supp. Rev. St. p. 430.

2. SAME—JURISDICTIONAL AMOUNT.

The amount involved is determined by the case as it appears in this court, and not the sum in controversy in the court below.

3. SAME—AMOUNT OF JUDGMENT BELOW.

Where the defendant appeals, and no question is presented growing out of a partial defense to the action, or a counterclaim or set-off, the amount involved is determined by the judgment below.

4. SAME.

The amount of the judgment in this case being less than the statutory sum, the appeal is dismissed.

Johnson & Heid, for plaintiffs.

C. S. Blackett, for defendant.

DELANEY, District Judge. The plaintiffs brought suit before United States Commissioner Mellen, acting as a justice court, against the defendant, for an amount stated in the complaint at \$249.85, which is within the jurisdiction of Alaska commissioners, acting as such courts, under the statutes of Oregon. Hill's Ann. Code, p. 643, § 908. Judgment was had by plaintiff for \$171.77, from which defendant appeals. Plaintiff moves to dismiss the appeal, on the ground that the amount involved is not large enough to bring the case within the appellate jurisdiction of this court, under the provisions of section 7 of the act providing a civil government for Alaska, commonly known here as the "Organic Act." 23 Stat. 24; 1 Supp. Rev. St. p. 430. The section referred to provides, among other things, that "an appeal shall lie in any case, civil or criminal, from the judgment of said commissioners to the district court where the amount involved in any civil case is two hundred dollars or more." The fate of the motion, therefore, depends upon the construction placed on said section 7 as to the words "the amount involved." The defendant in the court below, who is the appellant here, contends that the amount involved is the sum demanded in the complaint; while the respondent here, who was plaintiff below, takes the position that the amount involved must be determined by the sum for which judgment was recovered in the lower court.

Whatever conflict there may be in the decisions of the courts of last resort in the several states of the Union, the principle here involved has been too often and too emphatically adjudicated in the federal courts to be open for consideration by this court. Since the decision of the supreme court of the United States in the case of *Gordon v. Ogden*, 3 Pet. 33, rendered at the January term of that court in 1830, the rule has been inflexible that, in cases like the one here at bar, the jurisdiction of the appellate court depends upon the amount in dispute between the parties as the case stands upon the appeal or writ of error in the appellate court, and not upon the amount in dispute in the court below. Where the plaintiff appeals from a judgment in his favor the amount is held to be that stated in the complaint. Where such judgment is appealed from by the defendant, and no question is presented growing out of a partial defense to the action, or a counterclaim or set-off, the amount is fixed by the judgment. The decisions of the supreme court have reference to its own appellate jurisdiction, as defined in the twenty-second

section of the judiciary act of 1789, now known as section 691 of the United States Revised Statutes. The language used in this section is "the amount or value in dispute"; but, from the decision of the supreme court in *Reynolds v. Burns*, 141 U. S. 117, 11 Sup. Ct. 942, it appears that the supreme court uses the words "amount involved" as equivalent to "amount in dispute." The syllabus states that the case is dismissed because the amount involved is not sufficient to give the court jurisdiction, and the concluding language of the opinion is that under no possible theory can the case be said to involve the amount requisite to give the court jurisdiction. This court is not at liberty to hold that this language was inadvertently used; but, on the contrary, its use implies at least that the terms "amount in dispute" and "amount involved" are regarded by the supreme court as having the same legal significance. In principle, therefore, the question presented in this case, under section 7 of the organic act, is precisely like that arising under section 691, Rev. St. U. S. Both sections relate to appellate jurisdiction in so far as it depends upon the amount involved. It follows, therefore, that the adjudications of the United States supreme court on the question are conclusive upon this court.

The question first appears in the federal courts in the case of *Wilson v. Daniel*, 3 Dall. 401, decided in 1798. By a divided court it was there held that the amount in dispute was to be determined by the foundation of the original controversy,—the amount in dispute when the action was instituted. In support of this view, Ellsworth, C. J., in speaking for the court, says:

"This construction not only comports with every word in the law, but enables us to avoid an inconvenience which would otherwise affect the impartial administration of justice; for, if the sum or value found by a verdict was considered the rule to ascertain the magnitude of the matter in dispute, then, whenever less than \$2,000 was found, a defendant could have no relief against the most erroneous and injurious judgment, though the plaintiff would have a right to a removal and reversion of the cause, his demand (which is alone to govern him) being for more than \$2,000. It is not presumed that the legislature intended to give any party such an advantage over his antagonist; and it ought to be avoided, as it may be avoided, by the fair and reasonable interpretation which has been pronounced."

Justices Chase and Iredell presented dissenting opinions, the latter in the following language:

"When the legislature allowed a writ of error to the supreme court, it was considered that the court was held permanently at the seat of the national government, remote from any parts of the Union, and that it would be inconvenient and oppressive to bring suitors hither for objects of small importance. Hence it was provided that, unless the matter in dispute exceeded the sum of \$2,000, a writ should not be issued. But the matter in dispute here meant is the matter in dispute in the writ of error."

This court, even after the long lapse of years since this decision was made, and even at this remote distance "from the seat of national government," cannot refrain from expressing the judgment that the rule stated by Chief Justice Ellsworth appears to be the better one, and the reasoning in support of it the more cogent and logical. It was, however, overthrown by *Gordon v. Ogden*, supra, in 1830, and the doctrine stated by Justice Iredell set up in its place, which has

met with the continuous and unbroken support of the decisions of the supreme court ever since. *Smith v. Honey*, 3 Pet. 469; *Knapp v. Banks*, 2 How. 73; *Walker v. U. S.*, 4 Wall. 165; *Merrill v. Petty*, 16 Wall. 338; *Telegraph Co. v. Rogers*, 93 U. S. 565; *Town of Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. 484; *Hilton v. Dickinson*, 108 U. S. 165, 2 Sup. Ct. 424; *Jenness v. Bank*, 110 U. S. 53, 3 Sup. Ct. 425; *Dows v. Johnson*, 110 U. S. 223, 3 Sup. Ct. 640; *Bradstreet Co. v. Higgins*, 112 U. S. 227, 5 Sup. Ct. 117; *New York El. R. Co. v. Fifth Nat. Bank*, 118 U. S. 608, 7 Sup. Ct. 23; *Henderson v. Wadsworth*, 115 U. S. 264-276, 6 Sup. Ct. 40; *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066; *Reynolds v. Burns*, *supra*; *Cameron v. U. S.*, 146 U. S. 533, 13 Sup. Ct. 184; *Abadie v. U. S.*, 149 U. S. 261, 13 Sup. Ct. 836; *Railway Co. v. Saunders*, 151 U. S. 105, 14 Sup. Ct. 257; *Railway Co. v. Booth*, 152 U. S. 671, 14 Sup. Ct. 693; *Jones v. Fritchle*, 154 U. S. 590, 14 Sup. Ct. 1171; *Pittsburgh Locomotive & Car Works v. State Nat. Bank of Keokuk*, 154 U. S. 626, 14 Sup. Ct. 1180.

The rule in the United States courts also appears to have been very generally adopted by the state courts, notably by the supreme court of California, when Mr. Justice Field, now of the supreme court of the United States, was chief justice in that state. *Gillespie v. Benson*, 18 Cal. 410; *Votan v. Reese*, 20 Cal. 90.

The amount involved in this case not being sufficiently large to vest this court with jurisdiction within the rule above stated, this appeal must be dismissed. So ordered.

LANDERS v. FELTON et al.

(Circuit Court, D. Kentucky. April 18, 1896.)

1. MASTER AND SERVANT—NEGLIGENCE OF SERVANT—JOINT LIABILITY.

Mere negligence of a servant does not create a joint liability of such servant and his master for damage resulting from the negligence. *Warax v. Railway Co.*, 72 Fed. 637, followed.

2. REMOVAL OF CAUSES—JOINDER OF DEFENDANT TO PREVENT REMOVAL—BAD FAITH.

When a complaint states a cause of action against two defendants, one of whom is a citizen of the same state as the plaintiff, an averment, in a petition for removal of the cause to a federal court, that the allegations involving such defendant are made in bad faith, to prevent removal, must be sustained by circumstantial and detailed proof, in order to justify removal; and the mere verification of the petition for removal, containing such averment, is not sufficient.

3. SAME—SUIT AGAINST RECEIVER OF UNITED STATES COURT AND OTHERS JOINTLY.

An action brought, without leave of court, against a receiver appointed by a federal court, and other parties, who are citizens of the same state as the plaintiff, to establish a joint liability of all the defendants, is a suit arising under the laws and constitution of the United States, and, if originally brought in a state court, may be removed to a federal court.

Bell & Bell, W. C. Bell, and Gaither & Vanarsdall, for plaintiff.
Edward Colston, for defendants.

TAFT, Circuit Judge. This is a motion to remand. Plaintiff brings his action against S. M. Felton, receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company, appointed by the circuit court of the United States for the district of Kentucky. The Cincinnati, New Orleans & Texas Pacific Railway Company is a corporation organized under the laws of Ohio, and a citizen thereof; the Southern Railway in Kentucky is a corporation organized under the laws of Kentucky; and Jerry Pannell is a citizen of Kentucky. The petition of the plaintiff, after alleging the citizenship of the corporate defendants, and the fact that the defendant Felton was appointed receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company by the circuit court of the United States for the district of Kentucky, alleges that the tracks of the two companies are operated jointly by the receiver and by the Southern Railway in Kentucky, at Burgin; that Jerry Pannell was the employé, under the joint control of both the receiver and the Southern Railway, in charge of the yard engine; and "that said defendant Pannell, then in charge of said yard engine at said time and place, as such employé of the other defendants, by gross neglect and carelessness, did run said engine, jointly owned and operated by said receiver and the Southern Railway Company in Kentucky, over and against plaintiff's intestate, and did then and there so injure the plaintiff's intestate that he died." Two petitions for removal were filed. One was filed by S. M. Felton, receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company, and the Cincinnati, New Orleans & Texas Pacific Railway Company. This petition averred that Felton and the Cincinnati, New Orleans & Texas Pacific Railway Company were citizens of states other than Kentucky, that the plaintiff was a citizen of Kentucky, and that the controversy was between citizens of different states. The petition continued:

"And your petitioners aver that the persons named as co-defendants in this case, to wit, the Southern Railway Company in Kentucky and Jerry Pannell, are not proper parties defendant to this case, and are improperly and fraudulently joined as defendants herein for the sole purpose of preventing the removal of this cause to the circuit court of the United States; it being alleged that the said Jerry Pannell and the Southern Railway Company in Kentucky are jointly liable with your petitioners for the acts and omissions in the petition complained of; the facts being that the said Jerry Pannell was, at the time of the said acts and omissions, acting in the employ of the said S. M. Felton, receiver, and not in the employ of any other of the defendants, and the said acts and omissions were done by him solely in carrying on the business of the said S. M. Felton, receiver, and as his servant, and not in carrying on the business of the Southern Railway Company in Kentucky, and that the Southern Railway Company in Kentucky is not liable for said acts or omissions of the said Pannell, or otherwise, to the plaintiff. All of which facts are, and at the time of the bringing of this suit were, well known to the plaintiff."

The second petition for removal was filed by S. M. Felton, as receiver, on the ground that the suit arose under the constitution and laws of the United States, and was brought against Felton under that clause of the jurisdiction acts of 1887 and 1888 which permits receivers appointed in the federal court to be sued without first obtaining leave of the court to sue. These petitions for removal were

demurred to in the state court. The state court sustained the demurrers, and overruled the motion of the defendant to remove the cause. A transcript has nevertheless been filed in the court below, and the motion is now made to remand.

It is very clear that under the decision of this court in the case of *Warax v. Railway Co.*, 72 Fed. 637, on the face of the plaintiff's petition, Pannell is improperly joined as a party defendant with the receiver and the Southern Railway Company, because the petition seeks to hold the defendants for the negligence of their servant without showing in any way any other ground for their liability, except the negligence of the servant. On such averments a joint liability is not shown. Nor is the Cincinnati, New Orleans & Texas Pacific Railway Company properly joined as defendant in the suit, because no cause of action is stated against it. It is not liable for the torts of the receiver. *Railroad Co. v. Hoechner*, 14 C. C. A. 469, 67 Fed. 456. The averments of the petition do, however, justify the joinder of the Southern Railway Company with the receiver. The petition for removal seeks to question the bona fide character of these averments. The petition is verified by the receiver, but no evidence is offered to show that these averments were fraudulently made, unless the affidavit of the receiver to the petition can be regarded as such proof. I do not think that it can be. If such an averment is to be proven, it should be by circumstantial and detailed evidence, so that the court may judge whether the charge of bad faith in the averments, for the purpose of evading the jurisdiction of the court, is sustained. The burden in such a case, and on such an issue, is, of course, upon the removing party.

This brings us, therefore, to the second petition for removal. It was filed by Felton, receiver, alone, and the right to remove is based therein on the ground that the action brought arises under the laws and constitution of the United States. The petition of the plaintiff avers that Felton is a receiver appointed by the circuit court of the United States, and the judgment is asked against him as such receiver. There can be no doubt, under the decisions of the supreme court, that an action against the receiver, as sole defendant, arises under the laws and constitution of the United States, and that he would have the right to remove such a case from the state to the federal court. This is established by the case of *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905. The purport of the decision is succinctly stated by Mr. Justice Gray, in delivering the opinion of the court in the case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 463, 14 Sup. Ct. 654, where he said:

"The difference between the act of March 3, 1875, and the later acts, is illustrated by the recent case of *Railway Co. v. Cox*, in which receivers, appointed by a circuit court of the United States, of a railroad corporation deriving its corporate powers from acts of congress, were sued in the same court, without previous leave of the court, after the act of 1887 took effect. This court, speaking by the chief justice, after observing that the corporation would have been entitled, under the act of 1875, to remove a suit brought against it in a state court, maintained the jurisdiction of the circuit court of the United States of the action against the receivers, under the act of 1887, upon the ground that the right to sue (without the leave of the court which appointed them) receivers appointed by a court of the United States was con-

ferred by section 3 of that act, and therefore the suit was one arising under the constitution and laws of the United States. 145 U. S. 593, 601, 603, 12 Sup. Ct. 905."

The question here arises whether an action brought against the receiver of a United States court, and others, who are citizens of the same state as that of the plaintiff, to establish a joint liability of all the defendants, is a suit arising under the laws and constitution of the United States. I do not see how it can be otherwise. No separate liability could be asserted against the receiver, as receiver, except under the laws of the United States. If no separate liability could be asserted against him, except by virtue of those laws, certainly no joint liability with another can be asserted against him, except by virtue of the same laws. Therefore the joint liability of the defendants with the receiver arises under the laws and constitution of the United States. If the plaintiff wished to sue the other defendants without joining the receiver, he had his election to do so, because the liability of joint tort feorsors is also several. He might, therefore, have maintained his action against the resident defendants in a state court, without any possibility of removal to a federal court. He elected, however, to join the resident defendants with a person against whom he could establish no liability, in the capacity in which he sues him, except by virtue of the laws of the United States. Therefore the joint cause of action which he asserts against all the defendants must find its sanction in the federal statutes. Hence the cause of action is removable. The state court was in error in denying the petition of the receiver, and the motion to remand is overruled.

FARMERS' LOAN & TRUST CO. v. CHICAGO & N. P. R. CO. (DAENELL, Intervener).

(Circuit Court of Appeals, Seventh Circuit. March 26, 1896.)

No. 282.

1. APPEAL—TIME AND MANNER OF TAKING.

On May 7th an intervener in foreclosure proceedings in the circuit court filed an assignment of errors, and prayed an appeal to the circuit court of appeals. It was thereupon ordered "that said appeal be allowed, upon the intervening petitioner * * * filing an appeal bond" for \$500, "with security to be approved by the court." An appeal bond was approved September 5th, and filed September 9th, and on that day a citation was issued, returnable October 8th. *Held*, that the allowance of an appeal was perfected on September 9th.

2. SAME—SIGNING OF CITATION.

When one of the judges of the circuit court has approved an appeal bond, it is competent, under Rev. St. § 999, for another judge of that court, who might have granted the appeal and approved the bond, to sign the citation. His signing thereof without requiring security is equivalent to an express approval of the existing bond.

3. SAME—TIME OF FILING TRANSCRIPT.

Where the transcript was filed within 30 days after the appeal was perfected, but not until the next day after the return day of the citation, *held*, that the appeal would not be dismissed; it appearing that the transcript was carried at 5 o'clock on the previous day to the door of the clerk's office, to be filed, but that the office had then been closed for the day.

4. SAME—RETURN DAY OF CITATION.

There is no rule in the Seventh circuit requiring the citation to be returnable to or before the next ensuing term of the circuit court of appeals.

5. SAME—DEFECTIVE BOND—AMENDMENT.

If the appeal bond is defective, in that it runs to only one of the several parties whom the citation makes respondent to the appeal, this defect may be cured after the cause is in the appellate court.

6. SAME—PRINTING RECORD.

On a motion to dismiss, argued a little over a month after the appeal was perfected, *held*, that it was no ground of dismissal in the Seventh circuit that the record had not yet been printed, or any briefs filed; there being no allegation that appellant had failed to give the required undertaking for costs, or to pay the clerk the estimated cost and fees for printing the record, or to file a printed brief within 20 days after delivery by the clerk of the printed record. Rules 14, 23, 24 (Seventh Circuit) 11 C. C. A. lxxiv., lxxvi., lxxvii.

Clark Varnum, for appellant.

F. H. Wickett, for appellee Chicago & N. P. R. Co.

William Burry, for appellee Farmers' Loan & Trust Co.

Before WOODS and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This suit was brought by the Farmers' Loan & Trust Company, as trustee, against the Chicago & Northern Pacific Railroad Company and others, to foreclose a mortgage upon the property of the latter company in Illinois. Seven holders of bonds secured by the mortgage were afterwards joined as co-plaintiffs. The appellant, Daenell, a judgment creditor of the railroad company, was permitted to file an intervening petition, denying the validity of the mortgage on the ground that the trust company, complainant, was a foreign corporation, and not qualified to act as trustee in the mortgage. The attorney general of Illinois, also, was allowed to file an intervening petition; and two of the defendants, the Chicago & Northern Pacific Railroad Company and the Northern Pacific Railroad Company, filed pleas assailing the mortgage on the same ground. The petitions and pleas were heard together by Judge Jenkins, who on April 3, 1895, made an order overruling the pleas and dismissing the intervening petitions, each for want of equity. The facts are more fully stated in the opinion of the court. 68 Fed. 412. On May 7, 1895, Daenell filed an assignment of error, and prayed an appeal, whereupon it was "ordered that said appeal be allowed upon the intervening petitioner, Louis Daenell, filing an appeal bond in the sum of five hundred dollars, with security to be approved by the court." No other formal order allowing an appeal was entered. An appeal bond, approved by Judge Jenkins on September 5, was filed September 9, 1895, and on that day a citation, made returnable on October 8, 1895, and signed by Judge Showalter, was issued, and on October 4, 1895, was served upon the Farmers' Loan & Trust Company, and service on the railroad companies named was accepted by counsel. The terms of this court begin each year on the first Monday of October, which in 1895 was the 7th day of the month. The Farmers' Loan & Trust Company alone, and appearing only for the purpose of making the motion, moved to dismiss the appeal on the following grounds: (1) The order granting the appeal did not make

it returnable within 30 days. (2) No citation was issued or served within said 30 days. (3) The citation issued was not returnable on or before the first day of the October term, 1895, of this court. (4) The citation issued was not signed by the judge granting the appeal. (5) The bond was not presented or approved within 30 days from the time of granting the appeal. (6) The citation makes respondent to the appeal all of the complainants and the two railroad companies mentioned, but the appeal bond runs only to the Farmers' Loan & Trust Company, and is therefore defective. (7) The record was not in fact filed in the appellate court within 30 days, and not even by the return day of the citation, or the first day of the October term of this court. (8) The record was not filed in this court until October 9, 1895. (9) The attorney general of Illinois, whose petition of intervention was dismissed by the same order, does not join in the appeal, and no severance has been made from him, and he is not made a respondent to the appeal. (10) The record has not yet been printed, and no briefs have been filed.

"The statute makes no provision, in terms, for the form of the allowance of an appeal. Rev. St. § 692. But as there can be no appeal without the taking of security, either for costs, or costs and damages, and this is to be done by the court, or a judge or justice, the acceptance of the security, if followed, when necessary, by the signing of a citation, is, in legal effect, the allowance of an appeal. * * * Until the security has been accepted, the allowance of an appeal cannot be said to have been perfected." *Sage v. Railroad Co.*, 96 U. S. 712, 714; Rev. St. § 1012. "The circuit judge, by taking the security and signing the citation, allowed an appeal. No formal order of allowance was necessary." *Brandies v. Cochrane*, 105 U. S. 262. In this case the bond was approved on September 5th, was filed September 9th, and on that day the citation, returnable October 8th, was signed and issued, and on October 4th was served. An allowance of an appeal in this case was perfected, therefore, on September 9th, unless the fact that the citation was not signed by the same judge who approved the bond is material. In the case of *Insurance Co. v. Mordecai*, 21 How. 195, 202, Chief Justice Taney declared that the act of congress required the citation "to be issued by the judge or justice who allows the writ of error, and it cannot be legally issued by any other judge or court"; but the later cases indicate a more liberal construction of the statute, which provides, in terms (Rev. St. § 999), that the "citation shall be signed by a judge of such circuit court, or a justice of the supreme court"; and, while it is required by the next section that every judge or justice signing a citation on any writ of error shall take good and sufficient security for the prosecution of the writ or appeal, it does not follow, in our opinion, that when, in a given instance, a bond has been approved by one of the judges of the circuit court, another judge of that court, who might have granted the appeal and approved the bond, may not sign the citation. His signing thereof without requiring security is equivalent to an express approval by him of the bond already approved by the other judge. A citation, as has often been declared, is intended only for the purpose of notice, is not jurisdictional, and may

be waived, or may be substituted by proof of other equivalent notice. See *Sage v. Railroad Co.*, supra; *Dayton v. Lash*, 94 U. S. 112; *Grigsby v. Purcell*, 99 U. S. 505; *Railroad Co. v. Blair*, 100 U. S. 661; *Dodge v. Knowles*, 114 U. S. 430, 435, 5 Sup. Ct. 1108, 1197; *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319; *Tripp v. Railroad Co.*, 144 U. S. 126, 12 Sup. Ct. 655; *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159.

In *West v. Irwin*, 4 C. C. A. 401, 9 U. S. App. 547, to which reference has been made, the appeal was prayed and granted on July 22d, and on the next day an appeal bond was approved and filed, but not until the ensuing October 10th was a citation issued; and it was held to be ineffective, because there was no subsisting appeal. In this case the bond was filed and the citation issued on the same day, and on October 8th, the return day of the writ, as is shown by affidavit, the transcript of the record was carried, at 5 o'clock p. m., to the door of the office of this clerk, to be filed, but, the office having been closed for the day, it was not filed until the next day. The "thirty days" mentioned in the first, second, and seventh reasons stated in the motion to dismiss, it is to be noted, refer, if they can be said to have a definite commencement, to the order of May 7th, and no question is raised by the motion whether after September 9th, when there was a complete and effectual allowance of an appeal, timely and proper steps to perfect the appeal were taken. Within 30 days after that date the transcript was filed, and, though not until one day beyond the return day of the citation, the default in that particular is sufficiently explained. See *Chicago Dollar Directory Co. v. Chicago Directory Co.*, 13 C. C. A. 8, 65 Fed. 463. We therefore hold that the appeal should not be dismissed for either the first, second, fourth, fifth, seventh, or eighth reason stated in the motion. In respect to the other reasons, it is enough to say that there is no rule which requires the citation to be returnable on or before the first day of the next ensuing term of this court; that, if the bond is defective for the reason suggested, the defect is curable; that the intervening petitions of the appellant and the attorney general of Illinois were separate and distinct, and no severance was necessary; and that it is not cause for dismissing the appeal that, as stated, "the record has not yet been printed, and no briefs have been filed." It is not alleged that the appellant had failed to give the required undertaking for costs, or to pay to the clerk the estimated cost and fees for printing the record, or to file a printed brief within 20 days after the date of the delivery by the clerk of the printed record. See rules 14, 23, 24, of this court. 11 C. C. A. lxxiv., lxxvi., lxxvii. The motion to dismiss is overruled.

AETNA LIFE INS. CO. v. SMITH.

(Circuit Court, E. D. North Carolina. April 7, 1896.)

EQUITY PRACTICE—ADEQUATE REMEDY AT LAW — BILL FOR PERPETUATION OF TESTIMONY.

A suit in equity cannot be sustained to cancel an insurance policy, on the ground of fraudulent misrepresentations which would be a defense to a pending action at law on the policy; nor is such a case aided by a demand in the bill for the perpetuation of testimony, since a bill for the latter purpose is multifarious if it also asks for relief.

F. H. Busbee, for complainant.

MacRae & Day and J. C. & S. H. MacRae, for defendant.

SEYMOUR, District Judge. The complainant brings this bill, praying for the cancellation and surrender of a policy of insurance which was issued by it upon the life of one George W. Wightman, now deceased, in favor of his aunt, the defendant, Mary H. Smith, and also for discovery and perpetuation of testimony. The defendant demurs to the bill.

It appears, on the face of the bill, that the complainant has a perfect remedy at law. The ground alleged for canceling the policy is that it was obtained by fraudulent misrepresentations of material facts. These misrepresentations will, if proved in the suit at law brought by the defendant on the policy, and now pending, as is admitted by counsel for complainant, constitute a perfect defense to that action. The judiciary act provides that suits in equity shall not be sustained in the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. The remedy here is plain, complete, and adequate. *Insurance Co. v. Bailey*, 13 Wall. 616. But it is contended that a right to the perpetuation of testimony exists, and that that right will aid the defectiveness of complainant's case for relief. All that complainant asks for in regard to the procurement of evidence can be obtained in the suit at law in the state court under section 1357 of the Code of North Carolina. But, independently of that fact, the authorities abundantly sustain the position, taken by defendant's counsel, that a bill for the perpetuation of testimony is multifarious if it also asks for relief. The complainant has no primary equity. Neither has it an equity for the perpetuation of testimony.

The demurrer is sustained, and the bill dismissed, but without prejudice.

SHIELDS v. McCANDLISH.

(Circuit Court, N. D. Georgia. March 23, 1896.)

1. EQUITY—RESCISSION OF CONTRACTS—ADEQUATE REMEDY AT LAW.

Complainant alleged in her bill that defendant had been guilty of certain frauds and misrepresentations in regard to the investment of a sum of \$1,800, intrusted to him by complainant, and which he had invested in a bond and mortgage which he transferred to her. She also alleged that, after such investment, she had been obliged to expend \$374 in litigation

over the investment, and in insurance on the property, and prayed that the transaction might be rescinded, and defendant decreed to refund to her the \$1,800 and the \$374. *Held*, that the bill stated merely a right of action at law against defendant for misapplication of complainant's funds, and was not within the jurisdiction of equity.

2. FEDERAL COURTS—JURISDICTION—AMOUNT IN DISPUTE.

It seems that, even if a case were made for the rescission of the original transaction, the United States circuit court would have no jurisdiction, as the \$374 subsequent expenses could not be added to the \$1,800, to make the jurisdictional amount.

Wharton O. Wilson, for complainant.

Clay & Blair, for defendant.

NEWMAN, District Judge. The bill filed by the complainant, Mrs. Lizzie A. Shields, shows that the defendant, Charles S. McCandlish, is a relative of hers; that, he being a man of wide business experience, etc., she placed implicit confidence in his integrity, ability, etc., as a business man; that he lived in Marietta, Cobb county, Ga.; that in the early part of 1892 she had a loan of \$1,800 maturing, which loan had been previously made for her by McCandlish, and that she asked him, as her agent, to make some reinvestment of the same, that it be made in the vicinity of Marietta, Ga., where he lived, and where it could be under his supervision, and that it should bear interest at 7 per cent.; that McCandlish allowed the parties who owed the loan to anticipate the payment of the same by several months, and that he collected the same; that he made a pretended purchase for her of an interest in a certain bond and mortgage to secure it, on land in the state of Washington. There are several charges of fraud in connection with the transaction, as to misrepresentation of the rate of interest, as to the amount really paid, and as to the rank of the lien of the mortgage. The general ground of complaint is the improper investment of the money of complainant by defendant. It seems from the bill that the complainant, at one time, whether she approved it or not, accepted the transfer by McCandlish to her of the interest in the bond and mortgage; and she sets forth in her bill that, by his advice, she expended some \$374.15 in keeping up the insurance on the house situated on the property, and employing an attorney to go to Spokane Falls, Wash., to represent her interest in certain litigation in connection with the property, and in paying off a prior mortgage, and in other counsel fees. The prayer of the bill is for a rescission of the transaction, the exact language of the prayer being:

"That the said transaction be rescinded and canceled, and that the court, by its decree, order the said McCandlish to refund to your oratrix the aforesaid sums of \$1,800, principal invested, and \$374.15, expended in protecting her interest in said investment, with legal interest."

In the first place, it may be said as to this case that the amount involved in the original transaction which complainant seeks to rescind and to cancel is only \$1,800, which would be insufficient to give this court jurisdiction. The effort is to add to that \$374.15, the amount expended by complainant in connection with the property since the trade. If complainant has any right as to the latter, it

would seem to be such a right as must be enforced by an action at law, and that it cannot properly be added to the \$1,800, for the purpose of making the jurisdictional amount. It would seem, therefore, that this court would be without jurisdiction, on account of the insufficiency of the amount involved. But, even if this is not true, it is not believed that the bill presents a case for equitable relief. The complainant may, on the facts alleged in her bill, have a case against the defendant; but, if she has, it is a case at law, and not cognizable in a court of equity. The cases cited by counsel for complainant—*Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, and *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340—do not support this contention. In each case much clearer grounds for equitable jurisdiction are shown than exist here. While the cancellation and rescission of fraudulent contracts would, in a proper case, be ground for equitable cognizance, it should present a different state of facts from that shown here. The case of *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, lays down the rule which appears to be applicable to this case; and the facts here seem to fall within it rather than the cases above referred to, cited by counsel for complainant.

But how can this contract be rescinded by this court? According to the bill, the money of complainant was invested in a mortgage on land in the state of Washington. Neither the mortgagor nor any of the other parties to that transaction, except her agent, McCandlish, are brought before the court. The contract by which her money was invested in this bond and mortgage very clearly cannot be rescinded, as the case now stands. McCandlish simply transferred to her or delivered to her the securities in which he had invested her money. If the prayer that the transaction be set aside refers to the transfer from McCandlish to complainant, it shows how simple the matter is, and makes it clear that her rights can be enforced at law, and that a case is not made for a court of equity. It is quite plain that she has merely a money demand against McCandlish for misapplication of her funds in his hands, which she can enforce by a proper action in a court of law.

The demurrer must be sustained, and the case dismissed.

LINDER v. HARTWELL R. CO. et al.

(Circuit Court, N. D. Georgia. January 8, 1896.)

1. RAILROAD MORTGAGES—FORECLOSURE—REQUEST OF BONDHOLDERS.

Complainant, a holder of the stock and bonds of the H. R. Co., filed his bill against that company and the R. & D. Ry. Co., alleging that the H. Ry. Co. had been operated by the R. & D. Ry. Co., which owned a majority of its stock and more than three-quarters of its bonds; that the earnings of the H. Co. had been misapplied by the officers of the R. & D. Co., and diverted to their own use, to the injury of the minority stockholders and creditors of the H. Co., causing the interest on its bonds to fall largely into arrear, and rendering the company insolvent; that the officers of the R. & D. Co. had refused the minority stockholders and creditors a statement of the earnings of the road and an inspection of its books, and thereupon

complainant, after averring the refusal of the trustees under the mortgage securing the bonds to sue, asked for an accounting from the R. & D. Co., and for foreclosure of the mortgage. *Held*, on demurrer by the R. & D. Co., that complainant would not, under the peculiar circumstances, be debarred from maintaining the suit for foreclosure by a provision of the mortgage requiring a request of one-fourth of the bondholders to authorize a foreclosure, since such a requirement would enable the R. & D. Co., holding more than three-fourths of the bonds, to delay the foreclosure indefinitely.

2. SAME—DIVERSION OF EARNINGS—ACCOUNTING.

Held, further, that though the mortgagor company could use the income of the mortgaged property until foreclosure, without being called to account, the complainant had a right to require an account from the R. & D. Co. of profits it was alleged to have made by the diversion of the earnings of the H. Co., while in control of that company by its officers.

Erwin, Cobb & Wooley, for plaintiff.

A. G. McCurry, for defendant.

NEWMAN, District Judge. This is a bill filed by T. J. Linder, originally against the Hartwell Railroad Company and the Richmond & Danville Railroad Company, in the superior court of Hart county, and removed by the Richmond & Danville Railroad Company to this court. Recently the Southern Railway Company has made a party defendant, and since the argument the plaintiff has conceded the necessity for making John B. Maxwell, trustee, a party, and an order has been taken to that effect. The case made by Linder's bill is that the Hartwell Railroad Company is a corporation of Georgia organized for the purpose of constructing a railroad from Bowersville to Hartwell, Ga.; that the Richmond & Danville Railroad Company is a foreign corporation of the state of Virginia; that the capital stock of the Hartwell Railroad Company is \$21,000, in shares of \$100 each, of which Linder owns 5 shares, the Richmond & Danville Railroad Company owns 139 shares, making it a majority stockholder; that the Hartwell Railroad Company, on the 2d of January, 1880, issued its first mortgage bonds in the sum of \$20,000, in denomination as follows: 20 of said bonds being for \$100 each, and 36 bonds at \$500 each, all bearing interest at 10 per cent. per annum from the 1st of September, 1879, and due and payable September 1, 1889. No part of the interest on these bonds was due or payable before the 1st of January, 1884, at which time all accrued interest was to be paid, and the interest thereafter to be paid semi-annually on the 1st of March and September of each year. On said 2d of January, 1880, a mortgage was executed in favor of John B. Maxwell, R. E. Saddler, and John Snow, trustees named therein, on said railroad and appurtenances, to secure the payment of said bonds. Linder is the owner of \$3,800 of these bonds, with a large amount of accrued interest; and the remainder were owned by the Richmond & Danville Railroad Company, which, as alleged in the amendment, passed into the hands of the Southern Railway in 1884, after the bonds had matured. The Hartwell Railroad was constructed by a construction company under a contract by which the construction company was to own and operate the road, and receive the profits of the same until January 1, 1884. In the meantime the con-

struction company sold out the balance of its term to the Richmond & Danville Railroad Company, who operated the road from the time of this sale, in 1881, to the 1st day of January, 1884, when the railroad was turned over to the Hartwell Railroad Company. This change was a mere formality, indicated by some entries in books; the road continuing to be operated, as it had been before, by the officers of the Richmond & Danville Railroad Company, as the officers of the Hartwell Railroad Company. The bill charges, further, that the road was operated by the Richmond & Danville Railroad Company, for its benefit, and without regard to the interest of the minority stockholders or the creditors of the road; that the books of the company were kept in Virginia, where they were inaccessible to the minority stockholders and creditors, or, at least, inaccessible without great inconvenience and expense; that the Richmond & Danville Railroad Company has failed and refused to furnish a statement of the gross income, expenses, and net income of the road, and that it has failed to furnish an exemplification from the books showing the accounts of the Hartwell Railroad, and the disposition made of its earnings, and has refused to allow an inspection of the books; that the majority stockholders have fraudulently withdrawn the earnings of the road from the treasurer, and applied them to their own private use, and refuse to account therefor. The bill further alleges that the complainant, not having access to the books of the company, cannot state positively as to amounts, but that since January, 1884, the gross receipts of the Hartwell Railroad have averaged \$9,000 per annum, amounting in all to \$72,000 at the time the bill was filed; that the legitimate expenses of said road had not exceeded \$3,000 per annum, leaving as a net profit \$6,000 per annum, or a total of \$48,000, or some other large sum, in the hands of the Richmond & Danville Railroad Company; that the effect of this fraudulent conversion of the income of the Hartwell Railroad was to leave it insolvent and unable to pay the demands against it; that R. E. Sadler, one of the trustees, has died since his appointment, and before the filing of this bill; that John Snow refused to act as trustee; and that John B. Maxwell refused to sue. The prayers are for the appointment of a receiver; for an injunction; for a mandamus requiring the Richmond & Danville Railroad Company to turn over certain property (which is described in the bill as having been wrongfully taken by it, and which has not been alluded to because deemed immaterial); for an accounting between the majority stockholders, the Richmond & Danville Railroad Company, the Hartwell Railroad Company, and the plaintiff as to the earnings of the road; for the foreclosure of the mortgage; and for subpoena.

The demurrers are on the grounds—First. That Maxwell, trustee, is not made a party. This has been cured by the amendment referred to. Second. That there is no allegation that the officers of the Hartwell Railroad Company were requested to act and institute this proceeding by Linder before he filed his bill. Third. That the trustee, by the terms of the mortgage, has no right to proceed to foreclose against the mortgagor for default in payment of principal and interest, except upon the request of holders of not less than one-fourth

of the bonds upon which default shall have occurred. Fourth. That Linder, as a bondholder (assuming that, for the reason stated in the second ground, he cannot proceed as a stockholder), has no right, as mortgagee, to the income and profits of the road while it was in the possession of the mortgagor, and before proceedings to foreclose. This states the substance of all the demurrers filed by the Hartwell Railroad Company, the Richmond & Danville Railroad Company, and the Southern Railway Company.

It will be perceived that there are three questions for determination: First. As to the right of Linder, as a stockholder in the Hartwell Railroad Company, to maintain this suit. There is no allegation in the bill of any request made to the officers of the Hartwell Railroad Company to institute this proceeding before Linder commenced it. So that it would be necessary that he should have the right, under the peculiar circumstances of this case, to bring this bill as a stockholder without first making a demand on the officers of the Hartwell Railroad Company to proceed. What would be true as to this, under the facts of this case, it is not necessary to determine, as the plaintiff's counsel have stated in open court that they do not rely upon Linder's rights as a stockholder, but upon his rights as a bondholder.

As to third ground of demurrer, the power given the trustees, by the terms of the mortgage, upon the default in the payment of principal and interest, is to take possession of the mortgaged property, and to sell the same. Even if the trustees had no power to proceed to foreclose the mortgage in court except upon the request of one-fourth of the holders of bonds ordinarily, the situation of the bondholders here, and their relation to each other and to the Hartwell Railroad Company, makes an exceptional case, and justifies this proceeding. The Richmond & Danville Railroad Company owns more than one-fourth of the bonds, and therefore has it in its power, if the request of one-fourth of the bonds is necessary, to delay proceedings indefinitely. It would be remarkable if the Richmond & Danville Railroad Company could do what it attempts by this ground of the demurrer to do,—that is, admit that it has acted wrongfully and fraudulently in this matter, as charged in the bill; that it has not, notwithstanding eight years' default in the payment of interest, and three years' default in the payment of the principal, made any request of the trustees to proceed,—and yet, as it holds three-fourths of the securities of this road, it can stand by and prevent the minority bondholder from obtaining his right, and collecting his long past due debt by foreclosure of the mortgage. It should not be allowed in this way to take advantage of its own wrong, and bring about such a palpable denial of justice, even if the provision of this mortgage requiring the request of one-fourth of the bondholders is applicable to a proceeding to foreclose in court.

The only remaining question for determination (except as to the position of the Southern Railway Company in the matter) is as to the right of Linder to require an accounting of the Richmond & Danville Railroad Company as to the large profits which he alleges were made during the eight years it, by its officers, operated the

Hartwell Railroad. It is said that, prior to the foreclosure of a mortgage, the mortgagor has the right to use the income and profits of the mortgaged property, and that no accounting could be demanded of the mortgagor in this respect. *Gilman v. Telegraph Co.*, 91 U. S. 603. The general doctrine contended for is unquestionably correct, but in this case, according to the allegations of the bill, the Richmond & Danville Railroad Company, owning and controlling majority of stock and bonds, took possession by its officers of the Hartwell Railroad, and operated the same for its own use and benefit, made large profits, and fraudulently appropriated the same to its own use, without regard to the interests of the minority stockholders and bondholders. It is not the case of a mortgagor retaining the use and income of a road, but it is the case of a third party having in his possession large earnings and profits derived from the mortgaged property, and which have been diverted from the proper channel, and fraudulently appropriated to its own private use. The allegation is that the effect of this conduct on the part of the Richmond & Danville Railroad Company has been to render the Hartwell Railroad Company insolvent and unable to pay its debts. Conceding this and the other facts, as the demurrer does, to be true, the Hartwell Railroad, when sold, will not pay its bonds and interest; and here is a large fund derived from the operation of the road, and which legitimately belongs to the Hartwell Railroad Company, which the Richmond & Danville Railroad Company fraudulently withholds, and for which it refuses to account. Why may not a creditor of the Hartwell Railroad Company, and especially one having a lien on the property from which the fund was derived, follow this fund, and have it appropriated to the payment of his debt? The right to do so seems to be clear.

As to the attitude of the Southern Railway Company in this litigation, it took these bonds from the Richmond & Danville Railroad Company, after maturity, and while this proceeding was pending, claiming that they were subject to certain credits by reason of the amounts improperly withheld from the Hartwell Railroad Company. So far as the facts are now disclosed, it must stand in the shoes of the Richmond & Danville Railroad Company.

The demurrers will all be overruled.

OFFICE SPECIALTY MANUF'G CO. v. COUNTY OF ELBERT.

(Circuit Court, N. D. Georgia. December 7, 1895.)

MUNICIPAL CORPORATIONS—INDEBTEDNESS—GEORGIA CONSTITUTION.

Under paragraph 1, § 7, art. 7, of the constitution of Georgia (which forbids any county or municipal corporation to incur debt in excess of 7 per cent. of the assessed value of the taxable property, and provides that no county or municipal corporation "shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum" of such assessed value, without the assent of two-thirds of the qualified voters at an election), a contract made by a county for the purchase of supplies, to be paid for, one-half in 13 months,

and one-half a year later, no election to authorize any debt having been held, is invalid, and not binding on the county.

Glenn & Rountree, for plaintiff.

King & Spaulding and Mr. Tutt, for defendant.

NEWMAN, District Judge. This is a suit by the Office Specialty Manufacturing Company, a corporation of New York, against the county of Elbert, of this state and district, to recover damages for the breach of a contract made by the county commissioners of Elbert county with the plaintiff for furnishing certain compressing files and roller shelves to be placed in a new courthouse which was at the time of the contract being erected for said county. The contract was made on the 10th day of October, 1894, and the furniture was to be delivered on or before the 15th of November, 1894. The total amount of the contract price was \$2,067; and it was to be paid, one half on or before December 30, 1895, and the remaining half on or before December 30, 1896, without interest.

Certain questions have been raised by the demurrer, and argued, as to whether these compressing files and roller shelves were fixtures; whether furnishing and putting up of the same comes within the term "building and repairing courthouses"; and also as to whether certain preliminaries which the statutes require have been complied with; and, further, as to whether or not it is necessary to set out in the declaration a compliance with all the prerequisites of the statutes for entering into a contract by a county, or whether they will be presumed. A discussion of these questions is rendered unnecessary by the view the court takes of the effect of this contract of certain provisions of the constitution of the state.

Paragraph 1, § 7, art. 7, of the constitution of Georgia, so far as material here, is as follows:

"The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county municipalities, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law."

This provision of the constitution has been before the supreme court of the state several times.

In the case of *Hudson v. Mayor, etc.*, of Marietta, 64 Ga. 286, the city authorities had contracted for the exchange of an old engine for a new one, and incurred a debt of \$3,000, and it was held that it could not be done.

In the case of *Spann v. Commissioners*, Id. 498, the first-named decision was affirmed.

In the case of *Cabaniss v. Hill*, 74 Ga. 845, the first headnote is as follows:

"Certain iron doors, cells, pipes for sewers, etc., were furnished to a county, under a contract which provided that the contractors agreed 'to take and accept the sum of \$3,510 in warrants on county treasurer, payable on December

25, 1894, and bearing eight per cent. interest after that date until paid, in full payment for said cells and wrought-iron works.' At the November term of the court of ordinary, orders were issued to 'pay out of any money now being collected for new jail fund.' Semble, that this contract created a new debt, and was unconstitutional."

There is some question in this last case as to whether the contract was not for the payment of a debt out of the current revenue, and within the year in which the contract was made; but the court held that inasmuch as it provided that if the debt was not paid at maturity, to wit, on December 25th, it should bear interest at 8 per cent. (a higher rate than it should bear but for the contract), it was obnoxious to the constitutional provision.

The last case which I have seen, and to which my attention has been called, is *Lewis v. Lofley*, 92 Ga. 804, 19 S. E. 57. This case, while there were other questions involved in it not material here, clearly affirms and adheres to the doctrine announced in the former cases cited.

Under these decisions of the supreme court, construing the constitutional provision, which has been quoted, it is clear that this contract is invalid. The debt is made in October, 1894. The first payment is to be made in December, 1895, and the second in December, 1896. No county can incur any new debt under this constitutional provision except for a "temporary loan or loans to supply casual deficiencies of revenue * * * without the assent of two-thirds of the qualified voters thereof." It is not set out in the declaration, nor is it pretended here, that any such election has been held. This contract provides for the payment for this furniture in one and two years after it is delivered. It is clearly the creation of a new debt not in existence at the time of the adoption of the constitution of 1877. It is not to supply casual deficiencies of revenue for the current year, and it is not authorized by a proper vote of the county. So, it seems that the action of the county authorities was in violation of the clause of the constitution quoted, and is not binding on the county.

In the case of *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, the supreme court, in discussing this question, say:

"It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decision of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state."

There can be no question of the correctness of the views above stated when tested by the decisions of the highest court of the state, and by what seems to be the settled construction of the constitution in this respect. The demurrer must be sustained, and the case dismissed.

THOMSON et al. v. CRANE et al.

(Circuit Court, D. Nevada. March 23, 1896.)

No. 588.

1. FRAUDULENT CONVEYANCES—VOLUNTARY DEEDS.

A voluntary deed is fraudulent, by operation of law, where the facts and circumstances clearly show that existing creditors are thereby prejudiced, without regard to whether there was any actual or moral fraud in the conveyance.

2. SAME—CREDITORS—CONTINGENT OBLIGATION.

The creditors entitled to object to a voluntary conveyance, by which the means of the grantor are impaired to their prejudice, include the holders of contingent obligations of such grantor, by way of guaranty or otherwise, as well as those to whom debts are due from him.

3. SAME—HOMESTEAD.

A voluntary conveyance of a homestead cannot be set aside, as in fraud of creditors, since, being exempt from execution, its transfer could not hinder or prejudice them.

4. JUDGMENTS—COLLATERAL ATTACK.

In a suit to set aside a voluntary conveyance as in fraud of creditors, a judgment of a competent court, having jurisdiction, in favor of the plaintiff, and against the grantor in such conveyance, is conclusive, as against such grantor, as to the existence of a debt to the creditor, and the grounds of such judgment cannot be inquired into.

5. SAME.

It may be, however, that the grantee in such conveyance, not having been a party to the judgment against his grantor, is not precluded from examining into the grounds thereof.

This is a creditors' bill, brought to set aside certain conveyances of real estate, executed by the defendant E. Crane, upon the ground that said conveyances were voluntarily made, without consideration, for the purpose of avoiding and defeating a claim and demand held by complainants against him.

On the 19th day of February, 1876, E. Crane conveyed to his daughter, Mrs. A. G. Styles, certain land, for the expressed consideration of \$5. On June 18, 1892, he conveyed to his wife, Mary E. Crane, certain real estate in Reno, Nev., for the expressed consideration of \$5 and love and affection. On July 7, 1892, he conveyed to his daughter, Amelia H. Howard, 40 acres of land valued at \$3,000, for the expressed consideration of \$5 and love and affection. On October 5, 1892, the defendants E. Crane and his wife, Mary E. Crane, conveyed to their son, E. O. Crane, 80 acres of land, valued at \$4,000, and 15 shares of stock in a reservoir and ditch company, of the value of \$1,650, for the expressed consideration of \$1,000. The conveyance to Mrs. Styles was executed long prior to the time of the transactions between E. Crane and the complainants, and no claim is or could be made against that conveyance. At the time the conveyances were made in 1892, the defendant E. Crane was about 80 years of age, and in ill health, and the conveyances were made for the purpose of dividing his property for the benefit of his children, and when he was solvent, and not indebted to any one, unless from the facts hereinafter stated, he had incurred a liability to complainants. The conveyances were all voluntary, and for the expressed consideration therein named, except the conveyance to the son, E. O. Crane, who had, previous to the conveyance, advanced to his father about \$200, and the expressed consideration of \$1,000 had been paid by him prior to the commencement of this suit. The daughters of defendant reside in California, and the only conveyances sought to be set aside herein are those made to Mary E. Crane and E. O. Crane.

On the 10th day of May, 1892, the complainants entered into a written agreement with the Reno Manufacturing Company, the substance of which was

that Stanton Thomson & Co. appointed the Reno Manufacturing Company their agent "for the sale of their farm implements and other goods." The corporation accepted said agency, and agreed to pay freight charges, taxes, insurance, and other expenses, and not to sell any goods on credit except to persons of undoubted solvency, and, when credit sales were made, to take notes payable to Stanton Thomson & Co., and to guaranty their payment; to transmit to Stanton Thomson & Co. cash received on Saturday of each week, and at the close of each month to make and transmit to them an account of sales for the current month, together with all notes on hand; that at any time after six months after date of shipment of goods, if so required, the Reno Manufacturing Company should give notes for balance of consignment unpaid, and that nothing should be construed as amounting to a sale without such requirement; that the goods were to be invoiced at regular wholesale prices, and that the amounts realized over and above the specified prices were to be "full commission" for the sales; that, for the violation of any of the covenants contained in the agreement, Stanton Thomson & Co. had the option to terminate the contract and take possession of the goods. Attached to this agreement as a part thereof, was the following guaranty:

"Know all men by these presents, that, in consideration of one dollar, to me in hand paid by Stanton Thomson & Co. * * * I hereby guaranty that the party of the second part to the within contract will in all respects fulfill the said contract, and that I will pay to Stanton Thomson & Co. any and all damages that they may suffer by reason of the failure of the party of the second part to perform each and all of the said covenants, and I further guaranty the payment to said Stanton Thomson & Co. of any and all notes made, indorsed, or guarantied by said Reno Manufacturing Company, without protest, waiving all notice of protest or nonpayment of said notes.

"In witness whereof I have hereunto set my hand and seal the day and year first above written.

"[Signed]

E. Crane. [L. S.]
"J. L. Stevenson. [L. S]"

J. L. Stevenson was the manager of the Reno Manufacturing Company.

On the 10th day of October, 1892, Stanton Thomson & Co. commenced an action against the Reno Manufacturing Company, J. L. Stevenson, and E. Crane, and in their complaint alleged the execution of the agreement and the guaranty, and set the same out in full; alleged that the Reno Manufacturing Company, "subsequent to the execution and delivery of said agreement, and at divers times and dates between the 10th day of May, 1892, and the 7th day of October, 1892, under and by virtue of said agreement, and in pursuance thereof, purchased and received from the plaintiff, and the plaintiff at divers times between the dates last aforesaid, to wit, in the year 1892, sold and delivered unto said defendant, Reno Manufacturing Company, certain goods, wares, and merchandise, at an agreed price, and to the full amount of \$3,217.59." It was further alleged "that said goods, wares, and merchandise were purchased, sold, and delivered in pursuance of said contract and agreement, and since the date thereof, at defendant's special instance and request," and that demand for the payment thereof had been duly made, "but to pay the same, or return said goods, said defendant Reno Manufacturing Company has, and still does, wholly fail and refuse," and that defendants E. Crane and J. L. Stevenson were duly notified of such refusal, and that they refused to pay for or return the goods. On the same day that the complaint was filed and summons issued and served, the defendants therein appeared in court, and, without employing any counsel, filed their answer denying "each and every material allegation alleged in plaintiff's complaint." Proof was made, and the court thereupon rendered judgment in favor of the plaintiff for the full amount claimed.

In the present suit the defendant E. Crane denies ever having executed the guaranty attached to the agreement, and claims that his signature thereto is a forgery. His version of the transaction is to the effect that he gave a guaranty to Stanton Thomson & Co. for \$1,000, on condition that they would let Stevenson have \$1,000 worth of goods and that he (Crane) would guaranty that, as fast as the goods were sold, the money would be refunded to Stanton

Thomson & Co. The proofs upon the part of the complainants show that the goods were delivered to the Reno Manufacturing Company upon the faith and credit of the guaranty given by the defendant E. Crane.

Trenmor Coffin and L. T. Hatfield, for complainants.

Robert M. Clarke, and Chas. A. Jones, for defendants.

HAWLEY, District Judge, after stating the facts, orally delivered the opinion.

The statute of Nevada concerning fraudulent conveyances of real property provides, in substance, that all conveyances made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, debts, or demands are, as against such persons, utterly null and void. Gen. St. Nev. § 2638; *Parish v. Murphree*, 13 How. 92, 99; *Collinson v. Jackson*, 8 Sawy. 357, 14 Fed. 305; *Clay v. McCally*, Fed. Cas. No. 2,869; *Shaw v. Manchester*, 84 Iowa, 247, 50 N. W. 985; *Wagener v. Mars*, 27 S. C. 97, 2 S. E. 844. The statute also provides that:

"The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact, and not of law; nor shall any conveyance or charge be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration." Gen. St. Nev. § 2641.

The general rule is that fraud may be shown in conveyances of property, made to hinder, delay, and defraud creditors, by the conduct and appearances of the parties, the details of the transaction, and the surrounding circumstances, and may be inferred when the facts and circumstances are such as to lead a reasonable man to believe that the property of a debtor has been attempted to be withdrawn from the reach of his creditors. *Cox v. Cox*, 39 Kan. 121, 17 Pac. 847; *Reynolds' Adm'rs v. Gawthrop's Heirs*, 37 W. Va. 3, 16 S. E. 364; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Clinton v. Rice*, 79 Mich. 355, 44 N. W. 790.

There is some evidence tending to show that the defendant E. Crane manifested some anxiety or uneasiness about the financial affairs of the Reno Manufacturing Company, or lack of confidence in its manager, prior to the time of the execution of the conveyances; but, from all the facts and circumstances of the case, as appears from the record, there is not, in my opinion, sufficient evidence to justify the inference that the conveyances in question, or either of them, were made or executed for the purpose of hindering, delaying, or defrauding creditors. The evidence shows that the conveyances were made apparently in good faith, and for a laudable purpose, and at a time when the grantor was solvent, and free from all debts and liabilities, save such as may have existed from the transactions growing out of and arising from the guaranty given by the grantor to the complainants for the faithful performance of the agreement on the part of the Reno Manufacturing Company.

The deeds having been executed and delivered by the grantor to the grantees without any intent on his or their part to hinder, defraud, or delay creditors of the grantor, it devolves upon the complainants to show that they were creditors of the grantor at the time

he executed the deeds. A voluntary deed is fraudulent by operation of law, where the facts and circumstances clearly show that existing creditors are thereby prejudiced, without regard to whether there was any actual or moral fraud in the conveyance. *Parish v. Murphree*, 13 How. 99; *Jackson v. Lewis*, 34 S. C. 1, 12 S. E. 560; *Du Rant v. Du Rant*, 36 S. C. 49, 14 S. E. 929; *Cook v. Johnson*, 12 N. J. Eq. 51; *Baker v. Hollis*, 84 Iowa, 682, 51 N. W. 78; *Park v. Battey*, 80 Ga. 353, 5 S. E. 492; *Raymond v. Cook*, 31 Tex. 375; *Marmon v. Harwood*, 124 Ill. 104, 16 N. E. 236; *Benson v. Benson*, 70 Md. 253, 16 Atl. 657; *Knapp v. Day* (Colo. App.) 34 Pac. 1008; *Rogers v. Verlander*, 30 W. Va. 620, 651, 5 S. E. 847; *Schaible v. Ardner*, 98 Mich. 70, 56 N. W. 1105; *Frederick v. Shorey* (Wash.) 29 Pac. 766.

This general doctrine is founded upon the principle that the law always requires that every person must be just before he is generous. It will not permit any person, who is indebted at the time, to give his property away, provided such gift proves in any manner prejudicial to the interest of existing creditors. The motive which prompts the person to make the gift is wholly immaterial. If the grantor or donor is indebted at the time, and the future event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed, for the purpose of paying such indebtedness, the voluntary conveyance will be set aside, and the property subjected to the payment of such indebtedness, upon the ground that it would otherwise operate as a legal fraud upon the rights of creditors, even though it might be perfectly clear that the transaction was entirely free from any trace of moral fraud. The statute is designed to prohibit frauds, by protecting the rights of creditors. If the facts and circumstances clearly show a fraudulent intent, the conveyance is void against all creditors. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on subsequent creditors, it is void, under the statute. And if a voluntary conveyance be made, without any fraudulent intent, yet if the amount of property thus conveyed so impairs the means of the grantor as to hinder or delay his existing creditors, it is, as to them, void. But a voluntary conveyance is good, as against subsequent creditors, unless executed as a cover for future schemes of fraud. *Horbach v. Hill*, 112 U. S. 144, 149, 5 Sup. Ct. 81; *Schreyer v. Scott*, 134 U. S. 405, 411, 10 Sup. Ct. 579; *Lawson v. Warehouse Co.*, 73 Ala. 293; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 38; *Todd v. Nelson*, 109 N. Y. 316, 327, 16 N. E. 360.

It is claimed that complainants were not creditors of E. Crane until the entry of the judgment against him; that the guaranty, if signed by E. Crane, only created a contingent liability upon his part which might result in his becoming indebted to the complainants in the event that the Reno Manufacturing Company failed to faithfully perform its agreement; that such obligations are to be distinguished from those by note or bond to pay a specific sum of money at a given time where an indebtedness can be said to exist upon the signing of the note or bond, whereas the only obligation assumed by the guaranty in this case only became a fixed indebtedness when it was as-

certained and determined, by the judgment, that the Reno Manufacturing Company, had not kept its agreement, and the extent of its failure so to do. If this proposition can be maintained, by authority and reason, it is an end of this case; for the judgment was not obtained until after the execution and delivery of the deeds in question, and the defendants would be entitled to a judgment in their favor.

Can this contention be sustained? The judgment is, of course, competent evidence of the debt. 2 Freem. Judgm. § 418. As was said by the court in *Lawson v. Warehouse Co.*, *supra*:

"When rendered by a court of competent jurisdiction, in the regular course of judicial proceedings, in the absence of fraud or collusion, it is a conclusive evidence of a debt existing at the time of its rendition. * * * It is not evidence of an indebtedness existing at any time anterior to its rendition; and if the conveyance is impeached as merely voluntary, as wanting only in a valuable consideration, if the time of rendition is subsequent to the conveyance, there must be other evidence than the judgment affords to show the existence of the debt when the conveyance was made."

See *Robinson v. Rogers*, 84 Ind. 539; *Gordon v. McIlwain*, 82 Ala. 247, 2 South. 671.

The complainants in this case do not rely solely on the judgment to establish the date when they became creditors of E. Crane. They introduced the original agreement between complainants and the Reno Manufacturing Company, and the guaranty, as signed by E. Crane, on the 10th of May, 1892, which was prior to the time of the execution of the deeds herein sought to be set aside. A creditor is not simply a person to whom a debt is due, but a person to whom any obligation is due. It is a person who has the right to require the fulfillment of any obligation, contract, or guaranty, and he is to be considered as a creditor of such obligor or guarantor from the time of his entering into the obligation.

The general principle, applicable to the facts of this case, is well expressed in 8 Am. & Eng. Enc. Law, 750, as follows:

"A creditor, in this connection, is not, necessarily, the holder of a debt merely, as that term is generally understood; for one having a legal right to damages capable of judicial enforcement is a creditor, within the meaning of the statutes and law upon the subject of fraudulent conveyances. So, where one incurs liability for another, as surety or the like, he may be considered as a creditor of the latter from the time of entering into the obligation, and various other claims, absolute or contingent, have been held sufficient to constitute the holders thereof creditors."

In addition to the authorities there cited, see *Yeend v. Weeks* (Ala.) 16 South. 165; *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463; *Bowen v. State*, 121 Ind. 235, 23 N. E. 75.

In *Bowen v. State*, the court said:

"It is manifest, as it seems to us, that the liability of a surety on a guardian's bond must be governed by the same general principles which govern the liabilities of sureties on other obligations; that he cannot give away all of his property to the detriment of those for whose benefit the bond is given. The contract of suretyship is in force from the date of the execution of the bond, though the liability of the surety to pay depends upon the conditions of the bond."

In *Yeend v. Weeks*, the court said:

"It must be stated, in this connection, that an administration bond is a continuing obligation of security from the day of its execution to the termination of the administrator's authority to act; and, though it antedates a voluntary conveyance, yet the ascertainment of its breach, by proper judicial proceeding, begun and concluded after the execution of such conveyance, will, as between the judgment creditor and the grantor in the conveyance, relate back to the date of the bond, and be held to be a debt existing at the time. * * * A contingent claim is as fully protected as a claim that is certain and absolute."

The conclusion reached upon this point makes it necessary to consider other questions raised by the defendants against the right of complainants to maintain this suit.

It is contended that the judgment obtained in the district court of Washoe county was erroneous; that the action was not instituted upon the agreement made by the plaintiffs therein with the Reno Manufacturing Company, the faithful performance of which the defendant E. Crane had guaranteed; that the complaint was based upon an entirely different cause of action; and that E. Crane was not in any event liable upon the claim set forth in plaintiffs' complaint. It is further claimed that the defendant E. Crane never signed any guaranty except for \$1,000; that the signature of his name to the guaranty attached to the agreement is a forgery; that he was misled and deceived by the statements made to him at the time the judgment was rendered, in this, that he was informed that the judgment was only for \$1,000. The manner in which the action was brought and the judgment obtained was unusual, perhaps suspicious; and it may, for the purposes of this opinion, be conceded that the judgment was erroneous. But it is evident that the court had jurisdiction to hear and determine the case. The defendant E. Crane was in court, and consented to try the case without employing counsel. Thereafter he employed counsel, and made a motion for a new trial, which was overruled. He allowed the time for taking an appeal to expire, and took no steps to have the judgment set aside on the ground that it was obtained either by fraudulent or deceptive means, or by accident or surprise, or any other sufficient cause for the interposition of a court of equity. The judgment, therefore, as to him, is final. The adjudication of any question arising in the courts is always final, unless corrected by an appellate tribunal, and is never subject to re-examination in any other than an appellate court upon any issue of law or fact, nor upon the ground that the decision therein is contrary to equity or good conscience, except in a direct proceeding to set it aside. The judgment, as entered, concludes the parties thereto, and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose; and it cannot be collaterally attacked. *Cromwell v. County of Sac*, 94 U. S. 351; *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 Sup. Ct. 495; *Dowell v. Applegate*, 152 U. S. 329, 343, 14 Sup. Ct. 611; *Graff v. Louis*, 71 Fed. 591; *Mannix v. State*, 115 Ind. 245, 251, 17 N. E. 565; *McLeod v. Lee*, 17 Nev. 103, 117, 28 Pac. 124.

It may be that the grantees in the conveyances made by E. Crane, not having been parties to the judgment, have the right to attack the validity of the judgment upon the principle announced in *Esty v. Long*, 41 N. H. 105, that:

"Where a creditor calls in question a conveyance made by his debtor, upon the ground of fraud, in an action between him and the grantee, the demand of the creditor must be subject to examination, in order to see whether he has a right, as such, to question the validity of the conveyance. If a judgment has been obtained by him, still, as between him and the grantee, who is no party to it, it will not be regarded as precluding the latter from an examination of the ground of it. The grantee may be allowed to show that it was obtained by fraud, or that the cause of action accrued under circumstances which would not give the creditor a right to impeach the conveyance."

See, also, *Lawson v. Warehouse Co.*, 73 Ala. 293; *Clark v. Anthony*, 31 Ark. 549.

But upon this point we are confronted with the fact that there is a decided preponderance of evidence to the effect that E. Crane signed the guaranty which was offered in evidence, that the signature thereto is not a forgery, and that he must have known the character of the action and the amount of the judgment; and the further fact that the complaint in the action brought in the district court of Washoe county was based upon the conditions of the agreement and the provisions of the guaranty.

There is still another question to be considered. The 80 acres of land conveyed to E. O. Crane was part of a tract of land that E. Crane had owned for many years, and upon which his wife had declared a homestead several years prior to the signing of the guaranty in question. This homestead declaration was duly recorded, and has never been abandoned. If no conveyance had been made to the son, E. O. Crane, and the title thereto had remained in E. Crane, it could not have been subjected to any judgment or execution lien unless the land exceeded in value the amount allowed for a homestead.

Complainants cite the case of *La Point v. Blanchard*, 101 Cal. 549, 36 Pac. 98, as an authority to the effect that the fact that the land might have been claimed as a homestead does not make a transfer the less fraudulent. That case was, however, in many respects totally dissimilar from this. There the party had not filed any declaration of homestead. The land was not subject to any homestead claim, and the court held that the mere fact that the land might have been declared upon as a homestead did not exempt it from execution, and that the assignee of the insolvent was entitled to a decree canceling the conveyance and restoring the property as part of the estate of the insolvent. In the opinion the court said:

"Had the property, when conveyed, been exempt from execution, and therefore then beyond the reach of creditors, there would have been much force in the argument of respondent."

I am of the opinion that the position contended for by defendants' counsel on this point is correct. The complainants could not have enforced their claim, as against this 80 acres of land, if no conveyance had been made to the son; and, this being true, they are not in a position to complain of any voluntary conveyance of this land.

In *Wap. Homest. 519*, the author, after announcing that the rule is axiomatic that debts must be paid before gifts can be made, and that a voluntary conveyance is *prima facie* evidence of a fraudulent intent against creditors, and, if made by a person who is indebted, is a well-recognized badge of fraud, for its natural and probable tendency is to delay, hinder, and defraud creditors, and citing authorities on that point, said:

"Exempt property is not subject to this rule. Creditors are held not defrauded by the conveyance of the homestead without consideration. Having no right to make their money by execution against it, they have no cause to complain. It is incumbent on the creditor, who complains of a fraudulent conveyance, to show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. Until this is done no injury appears. Creditors cannot complain that a conveyance of a homestead is fraudulent as to debts for the payment of which it cannot be taken in execution. They could not reach it, if not conveyed, and hence the motives for the conveyance do not concern them."

The author also quotes with approval the language of the court in *Fellows v. Lewis*, 65 Ala. 343, 354:

"This question has been a great many times before the courts of the country, and in a large majority of cases the ruling was against the right of the creditor to subject the homestead, merely because its owner and occupant had conveyed his right to another, even though the conveyance was voluntary, or made under circumstances which would ordinarily stamp it as fraudulent. There can be no fraud unless there are claims and rights which can be delayed and hindered, and which, but for the conveyance, could be asserted. The law takes no cognizance of fraudulent practices that injure no one. Fraud without injury, or injury without fraud, will not support an action. Unless they co-exist, the courts are powerless to render any relief."

See, also, *Wap. Homest. 516*, and authorities there cited; 1 Story, Eq. Jur. § 367; *Crummen v. Bennet*, 68 N. C. 494; *Edmonson v. Meacham*, 50 Miss. 34; *Rhead v. Hounson*, 46 Mich. 244, 9 N. W. 267; *Stanley v. Snyder*, 43 Ark. 430.

With reference to the shares of stock in the reservoir and ditch company which was conveyed by the same deed, it is only necessary to state that the conveyance was not purely voluntary, although it may be that there was not a full and adequate consideration. The facts are that the son had previously advanced to his father about \$200, and promised to pay \$1,000 more, and that all this money had been paid prior to the commencement of this suit. In all cases where a deed is executed for a valuable consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld; and where the consideration is valuable, inadequacy of price alone will not make the conveyance fraudulent, for in such a case the law will not weigh consideration in diamond scales. *Prewit v. Wilson*, 103 U. S. 22.

It follows from the views herein expressed that complainants are entitled to a decree as prayed for subjecting the land deeded by the defendant E. Crane to the defendant Mary E. Crane, conveying to her lots 3 and 4, in block No. 3, in Lake's addition to Reno, in Washoe county, Nev., to be sold to satisfy the demands of complainants, or so much thereof as may be necessary for that purpose, with costs, and that defendant E. O. Crane is entitled to judgment for his costs.

HARDING v. GIDDINGS et al.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1896.)

No. 249.

1. EQUITY PLEADING—FACTS IN ISSUE.

One G. having applied to H. to advance money required by him to take up a note, it was agreed that he should give H., as security, a mortgage held by him on land previously sold by him to his son, and should give to H. a deed of such land; H. giving back a bond to reconvey his right, title, and interest on repayment of his advances. This agreement was carried out; H. advancing the money and executing the bond to reconvey, and receiving the deed from G., who afterwards assigned the bond to his daughter C. G. H.'s executor afterwards undertook to foreclose the mortgage, which was resisted by C. G., who showed that she had paid or tendered to H., or his executor, all the sums advanced, and claimed to be entitled to the mortgage. A complicated litigation in the United States district court ensued, with numerous pleadings on the part of the various parties. On the hearing an agreement was offered in evidence, purporting to provide for an absolute conveyance of the mortgaged property to H. by G., after G. should have bought it in at a sale by an assignee in bankruptcy, and for the discharge, as part of the consideration, of the debt originally secured by the assignment of the mortgage to H. This was objected to as not within the issues, and no evidence was given to show that it had ever been acted upon; but, on the contrary, it appeared that, after the time for its performance, H. and his executor had treated the debt secured by the assignment as a subsisting one, and the bond to reconvey as an existing obligation. The court reserved the question of the admissibility of the agreement, and ultimately gave judgment for C. G., which was affirmed by the circuit court. Upon an appeal to the circuit court of appeals, the record failed to show what decision had been reached by the court as to the admissibility of the agreement for an absolute conveyance to H., but the pleadings failed to disclose any allusion to it. *Held* that, as well because it was not within the issues as because the facts showed that it had never been acted on, or treated by the parties as existing, this agreement could not avail to bring about a reversal of the judgment.

2. TENDER.

Where the obligations created by a contract, to pay money and to reconvey land upon such payment, are mutual and reciprocal, and not independent, a tender of the money, accompanied by a request to convey the land, is sufficient.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This case is the remnant of a litigation in chancery begun in the United States district court for the Northern district of Illinois, before Judge Blodgett, 22 years ago; the jurisdiction attaching to that court on account of the pendency therein of proceedings in bankruptcy against Harvey W. Giddings, the grantor in the trust deed which the chancery suit was brought to foreclose. The first bill was filed at the December term, 1873, to foreclose a trust deed executed by Harvey W. Giddings to Warren M. Baker for \$11,000, dated February 21, 1871. The notes secured by the trust deed were assigned to Abner C. Harding April 10, 1872. No questions, however, in respect to the proceedings upon that bill are involved in this appeal. The questions here in controversy pertain rather to the ownership of three certain notes aggregating \$18,300, one for \$6,000, being dated January 6, 1868, and two for \$6,150 each, dated January 1, 1868, and the mortgage securing the same being dated January 9, 1868, and executed by Harvey W. Giddings to John W. Giddings, conditioned for the payment of said sum of \$18,300; and also respecting the amount due upon a note for \$4,000, due June 10, 1872, executed by John W. Giddings, Silas Giddings, A. N. Wiswell, and Harvey W. Gid-

dings; and also what amount, if anything, is secured to be paid on these notes under and in pursuance of two certain agreements alleged to be made between A. C. Harding and John W. Giddings, one dated December 13, 1873, and the other February 10, 1874. These notes secured by mortgage are alleged to have been made by Harvey W. Giddings to his father, John W. Giddings, to secure a part of the purchase money on the land described in the mortgage. Various answers and cross bills, supplemental and amended bills, were filed, which were referred to a master for hearing. Some time in 1873 it appears that Harvey W. Giddings became indebted to the First National Bank of Galesburg in the sum of \$5,000, and John W. Giddings became his surety for the debt. The bank wanted its money, and Harvey W. Giddings could not pay; and John W. deposited with that bank the secured notes for \$18,300, with the mortgage securing the same, as collateral security for the \$5,000 due to the bank. In December, 1873, John W. Giddings applied to Abner C. Harding for a loan to take up the debt of Harvey at said bank, which amounted, with interest, to \$5,131.94. The Monmouth National Bank at that time held the note above mentioned for \$4,000, signed by Harvey W. Giddings as principal, and John W. Giddings, Silas Giddings, and A. N. Wiswell as sureties; and Gen. Harding told John W. Giddings that he would furnish the money to take up the Galesburg debt, if Giddings would pay or secure to the Monmouth Bank a portion of this \$4,000 note, to wit, \$868.06 on this note, which was then held by the latter bank, of which Gen. Harding was president. The question was raised how John W. Giddings could repay Gen. Harding, and this mortgage of \$18,300, which was deposited with the First National Bank of Galesburg as collateral security, was the security which Mr. Giddings had to offer to Gen. Harding. It was agreed that Mr. Giddings should make a deed to Gen. Harding of the homestead farm, and that Gen. Harding should give back an agreement to reconvey the farm upon the payment of \$6,000 in four equal installments, with interest at 10 per cent. per annum. Mr. Snyder, the son-in-law of Gen. Harding, paid the \$5,131.94 to the bank, and took up the note of \$5,000, and the collateral, which was \$18,300 of notes, and first mortgage on the homestead, 166 acres. And thereupon John W. Giddings and his wife made a warranty deed conveying to Gen. Harding the 166 acres, which deed bears date the 13th day of December, 1873; and on the same day Gen. Harding entered into a bond to convey the same premises to John W. Giddings, or his assigns, upon the payment of \$6,000 in four equal annual payments, with interest at 10 per cent. payable annually on January 1st of each year. Upon the payment of this money, he bound himself to execute and deliver to John W. Giddings, his heirs or assigns, a deed of conveyance of all right, title, and interest of the said Harding of, in, and to the same premises. At the time of this transaction, Snyder drew a receipt, and executed the same in the name of A. C. Harding, by his direction and in his presence, for \$868.06,—being the difference between the amount paid on the Galesburg note and the \$6,000 named in the bond, which amount (\$868.06) was, by the terms of the receipt, to be credited on the \$4,000 note held by the Monmouth Bank,—and delivered the receipt to John W. Giddings. The bond for \$6,000 was on April 5, 1875, assigned by John W. Giddings to the appellee Caroline Giddings. When George F. Harding, as executor of Abner C. Harding, on May 3, 1876, filed his supplemental bill to foreclose the mortgage of \$18,300, John W. and Caroline Giddings answered, setting up the \$6,000 bond for a deed, and objected to the foreclosure. Afterwards Caroline Giddings filed a separate amended answer, in which she claimed to be the owner of the bond under the assignment from John W. Giddings, and denied the right to foreclose the mortgage. Afterwards, on January 18, 1878, she filed a cross bill against George F. Harding, setting up the history of the \$18,300 notes and mortgage, and the deposit as collateral security, and the making of the bond, and alleging that she had paid all of the money due on the bond, excepting \$1,650, and that she had tendered this amount, and asked the court to decree that the executor deliver up to her the \$18,300 notes and mortgage, and also make a deed to her in accordance with the provisions of the bond. The payments on the \$6,000 bond are shown by the testimony of Almon Kidder, who was the attorney and agent of George F. Harding, as follows: January 1, 1875, \$2,100 from Caroline Giddings.

December 31, 1875, \$1,950 by Caroline Giddings. January 1, 1887, \$1,800 by Caroline Giddings, being the amount due at the date of the last payment. George F. Harding received it all. On January 1, 1878, Caroline Giddings and A. M. Brown tendered to Kidder the sum of \$1,650, being the balance due upon the bond, and demanded a deed in accordance with the terms of the bond, and on the next day deposited this sum in the First National Bank of Galesburg as an abiding tender, where it has remained until the present time. The case, of which these things are but part and parcel, became quite a complicated one, and came on for hearing in the district court, before Judge Blodgett, on July 21, 1881. On the hearing there was offered in evidence by Harding an agreement as follows:

"This agreement, made this 10th day of February, A. D. 1874, between John W. Giddings and Hannah Giddings, his wife, of the one part, and Abner C. Harding, of the other part, witnesses, that said John W. Giddings does hereby agree to bid off and purchase at the assignee's sale, on the 21st inst., all the interest of the estate of Harvey W. Giddings, bankrupt, in the S. E. $\frac{1}{4}$ of Sec. 17, in Floyd township, in Warren county, Ills., and $6\frac{1}{2}$ acres off the N. side of the N. E. $\frac{1}{4}$ Sec. 20, in same township, known as the 'Giddings Homestead Farm,' subject to all liens and incumbrances thereon; one of the incumbrances thereon being a mortgage from said H. W. Giddings to John W. Giddings, for \$18,300, being the purchase money of said premises, which mortgage has been assigned by said J. W. Giddings to said A. C. Harding, heretofore, as security for money advanced, but which said mortgage, and all interest therein, and in all the money thereby secured, is hereby absolutely sold and assigned to said Harding; and upon the purchase of said title at said assignee's sale, as hereinbefore agreed, the said John W. Giddings and Hannah Giddings, his wife, do hereby agree and bind themselves to convey all of said premises to said Harding upon the payment and for the consideration of fifty dollars per acre for said premises, which said consideration money shall be made up as follows: First, the six thousand dollars and interest thereon specified and mentioned in the contract of purchase between said Harding and said J. W. Giddings, dated the 13 day of December, 1873; second, the amount now unpaid upon the note of H. W. & J. W. Giddings to Henry Cable, less two hundred dollars; and the residue of said consideration shall be paid in cash as soon as this agreement is consummated and performed upon the part of John W. Giddings. It is hereby agreed that in case the said land shall be bid up beyond what is advisable, in the opinion of John W. Giddings, to bid, and the same shall be bid off by some one else at said assignee's sale, then the said mortgage now in said Harding's hands shall be foreclosed, for the purpose of making a title to said land, to be by said Giddings deeded to said Harding. The title so to be conveyed by said Giddings to said Harding to be clear of incumbrances. Harding to have the pro rata from the Galesburg & Monmouth Bank debts against said Harvey W. Giddings' estate, and the said \$18,300 mortgage, and shall pay the taxes on said land. If said Giddings shall not be present at said assignee's sale, then said Harding shall bid off the said land at said sale on behalf of said Giddings. Witness the hands of the parties hereto, February 10, 1874.

"[Signed]

J. W. Giddings.

"Hannah Giddings.

"A. C. Harding."

This agreement is dated about four months before Gen. A. C. Harding died, and while he was upon his deathbed. Its exact history and purpose, and whether or not it ever went into effect, do not clearly appear in the litigation. It was executed at Gen. Harding's residence, and remained among his papers until November of that year (1874), when it was sent to Almon Kidder, the agent of George F. Harding, at Monmouth, but did not come to his notice until February, 1876, when he sent it to George F. Harding.

The decree of the district court, so far as it relates to the issues in this case, was in favor of the appellee Caroline Giddings, upon the cross bill, and was as follows: "The court further decrees and declares that the notes and mortgage of January 1, 1868, made by Harvey W. Giddings to John W. Giddings, described in the cross bill of Caroline Giddings, were only held by the decedent

of said complainant as collateral to the amount for which said notes and mortgage were originally pledged to the First National Bank of Galesburg, and that said bond of December 13, 1873, and the deed of said John W. Giddings to Abner C. Harding, of the same date, were merely evidences that the repayment of said sum of six thousand dollars (\$6,000) described in said bond was secured upon the said interest of said John W. Giddings as mortgagee of said lands therein described. The court further finds that on April 5, 1875, said John W. Giddings assigned and transferred his interest in said contract with said Abner C. Harding to said Caroline Giddings; that the tender of the sum of sixteen hundred and fifty dollars (\$1,650) made by Caroline Giddings, January 1, 1878, to Almon Kidder, as agent of George F. Harding, was a good and sufficient tender of the balance due according to the terms of said bond. And it is therefore ordered that said George F. Harding, executor as aforesaid, shall make the conveyance of the said lands described in said bond, according to its tenor, to said Caroline Giddings, assignee thereof, within thirty days, or that Henry W. Bishop, master in chancery of this court, shall make said conveyance." "The court further orders that the said George F. Harding is also directed and decreed to transfer, assign, and deliver to said Caroline Giddings, assignee of said notes and mortgage of January 1, 1868, made by Harvey W. Giddings to John W. Giddings, and the note for five thousand dollars given by J. W. Giddings to the Bank of Galesburg, and held by said Harding, as collateral to said land contract; and the said Caroline Giddings is the owner of the said mortgage, and entitled to hold the same in her own individual right, free and clear from all claims thereon by said complainant." An appeal from this decree was afterwards, and on July 22, 1881, taken to the circuit court by this appellant, and came on for hearing before Judge Woods, and the decree of the district court was affirmed at the May term, 1895.

U. P. Smith, for appellant.

Samuel Kerr and Alfred E. Barr, for appellees.

Before JENKINS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge, after stating the case as above, delivered the opinion of the court.

We think that the decree of the district court, affirmed as it was by the circuit court, was right and should be affirmed. Indeed, it would require a tolerably clear case, after such lapse of time, to disturb a decree of the district court which had been affirmed upon a second hearing by the circuit court. Under such circumstances, when the findings of fact by the district court are affirmed upon appeal, this court will not disturb the decree, unless the error is clear. See *Lammers v. Nissen*, 154 U. S. 650, 14 Sup. Ct. 1189; *Dravo v. Fabel*, 132 U. S. 487, 10 Sup. Ct. 170. But, upon a careful review of the record and the testimony, we think the decree is right. While there were other questions made on the hearing, the contest in this court has centered upon a matter apparently not appearing anywhere in the pleadings, nor passed upon by the district court; and that matter is the agreement of February 10, 1874, providing for a sale of the homestead by Giddings to Gen. Harding for \$8,000, to be paid as follows: A note of Cable, which Harding held, and was unpaid, less \$200; the \$6,000 covered by the bond of December 13, 1873; and the balance in cash; and also providing that Giddings should bid in the homestead at the assignee's sale, which was to occur on February 21, 1874. This agreement was offered in evi-

dence on the hearing in the district court, and was objected to on the ground that it was not mentioned or set up anywhere in the pleadings. The court apparently reserved the question. It nowhere appears that the court ever decided the question of its admissibility in evidence, and no finding in reference to it, or any mention of it, is made by the court in its finding or decree. It seems quite clear that the objection taken to its admission in evidence was good, as it is not set up or referred to in any of the numerous bills, amended bills, supplemental bills, cross bills, or answers in the case. Why such an agreement, if relied upon by the party,—so inconsistent with other agreements, and especially with the \$6,000 bond for a conveyance of the premises to Giddings upon the payment of that sum, and which was afterwards assigned to Caroline Giddings, and also so inconsistent with the course of dealing between the parties, by which Caroline Giddings paid all but \$1,650 of the amount secured by the \$6,000 agreement, and tendered the balance, and Harding, the executor, received these same payments without objection,—was not set up or referred to in any manner in any of the pleadings, it is difficult to conceive. The pleadings were so numerous that it could hardly be expected the court could determine at a glance upon the propriety and force of the objection made to the introduction of the paper, and it would be natural and proper that it should reserve the question for further examination. But whether, upon such examination, it sustained the objection, or believed from the other evidence, as the circuit court found, that the agreement of February 10, 1874, was never acted upon by the parties, and was therefore not properly in the case, cannot be determined from the record. If the court disposed of the agreement upon either of these grounds, we think it justified in so doing. The agreement was not pleaded, and the record shows no offer to amend the pleadings so as to make it admissible in evidence. The agreement itself is quite inconsistent with the agreement of December 13, 1873, for the reconveyance to Giddings upon the payment of \$6,000, and with the subsequent course of dealing in reference to that agreement, and with the payment of money under it by Caroline Giddings, as well as the payment of the Cable note. This Cable note was one made by H. W. Giddings and J. W. Giddings as surety to Henry Cable, and was held and owned by Harding. The agreement of February 10th provided that out of the \$8,000 should be deducted a balance due on the Cable note; and, if the agreement was a subsisting one between the parties, the note should have been paid in that way. But, instead of this, Caroline Giddings paid the balance of the Cable note, in cash, either to Gen. Harding or to his representatives. The payment of this note by Caroline Giddings, and the payment by her of the \$6,000 bond, are quite inconsistent with the agreement of February 10th, and show that either that agreement never had valid existence, and never went into effect between the parties, or that it was abandoned, either of which suppositions would properly account for failure to assert and rely upon it in the litigation. If that agreement, which clearly contemplated that the \$6,000 bond should not be paid

in money, had ever a potential existence, and was ever operative between the parties, the subsequent conduct of the parties, by which this bond, as well as the Cable note, was paid in cash by Caroline Giddings, and the money accepted upon the agreement by the representative of the Harding interest, shows clearly enough that it had been abandoned. The executor of Gen. Harding's estate could not receive this money from time to time from Caroline Giddings upon that bond, and then refuse to comply with the conditions of the agreement upon which the money was confessedly paid. Having received the money upon the contract, he should have made the conveyance according to its terms, and is estopped from claiming that he was not under obligations to do so. It is true that the agreement of February 10th provided that John W. Giddings should bid in the land at the assignee's sale, and he did so bid it in on the first sale, had on February 21, 1874; but that sale was set aside by the court, and a resale ordered, at which resale, on May 4, 1874, Caroline Giddings bid in the property, and the sale was confirmed. Snyder testifies that he thinks J. W. Giddings was present in the clerk's office, adjoining the place, when the second sale was made; that he talked with Harding about the matter of bidding before the sale took place; and that Harding stated it would be proper and right for J. W. Giddings to bid off the property, or that it should be bid off by or for him,—that he did not wish to interfere with the interest of J. W. Giddings in the home farm. This evidence points in the same direction,—to an abandonment of this agreement. Again, Snyder testifies that Harding never purchased the \$18,300 notes and mortgage, to his knowledge, or obtained them in any other way than as security for the money advanced to take up the \$5,000 note, and such is the uncontradicted testimony of Harding's son-in-law and trusted agent. Under these circumstances, it is difficult to give any effect to the agreement of February 10, 1874. The agreement is not under seal, and does not purport to be made upon any consideration. The external evidence of a consideration is equally wanting, the testimony disclosing none. It is suggested that it may have been to secure future advances of money, but evidence is wanting of any such advances. Snyder, Harding's agent, testified:

"I have no recollection of Gen. Harding advancing any amount in cash; but whether he did, or not, his check book will show."

The check book was not produced in evidence.

John W. Giddings testified in regard to the \$18,300 notes as follows:

"Three notes were given by H. W. Giddings (\$6,000 each, about \$18,300), secured by mortgage on the S. E. $\frac{1}{4}$ of section 17. In the fall of 1873 I gave them to the First National Bank of Galesburg as collateral for a note given them, for \$5,000, by H. W. Giddings and myself, as security. Geo. Snyder, agent for A. C. Harding, paid the \$5,000 to the bank, and interest, and the three notes and mortgage were transferred to him as collateral. The three notes for \$18,300 are mine. I never sold them to anybody. I let them go as security for the other note, which I had signed as security for H. W. Giddings; and, when that note is paid, I ought to receive the three notes and mortgage back, for they are mine. I never got a cent for them."

That the payment of the debt for the security of which collaterals are assigned releases the collaterals, hardly needs the citation of authorities. *Biebinger v. Bank*, 99 U. S. 143.

We quite agree with Judge Woods, who heard the case in the circuit court, that the only debatable question of essential merit in the case arises out of the contract of February 10, 1874, and that:

"While this agreement was found among the papers of the deceased, it is clear that it was never acted upon, or treated by either party as binding. John W. Giddings made a purchase of the land of the assignee, it is true, but the said sale was set aside by order of court, and at a subsequent sale the appellee became the purchaser; and from time to time payments were made upon the \$6,000 note, until the debt was discharged. This, of course, was inconsistent with the contract of February 10, 1874. The appellant argues that he ought not to be bound by any estoppel, because when he received any payment he was ignorant of the contract. If there is any proof, outside of the briefs, of that ignorance, I have overlooked it. But even if he acted in ignorance, and under a mistake of his rights as executor, it was necessary, once he acquired knowledge of the agreement, if he desired to enforce it, that he should have made prompt return or tender to the appellee of all sums paid to him and to his testator upon the original obligation for \$6,000, and should have declared his readiness to perform the contract in other respects. He could not retain the moneys so paid and at the same time insist upon a contract by which his right thereto had been extinguished."

We are further of the opinion that because the agreement was not set up, either by bill or answer, in the pleadings, and was not considered or passed upon by the court of original jurisdiction upon the hearing, this court cannot consider or give effect to it. *National Bank v. Com.*, 9 Wall. 353; *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423; *U. S. v. Morgan*, 25 U. S. Sup. Ct. Rep. (Lawy. Ed.) 519; *Board of Suprs of Wood County v. Lackawana Iron & Coal Co.*, 93 U. S. 619; *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131.

The only other contention of any substance made on the hearing was that the tender of the balance of \$1,650 due on the \$6,000 agreement was insufficient, because not an absolute and unconditional tender of the money. But the obligations to pay the money, and reconvey the land upon payment, were mutual and reciprocal, and not independent; and the tender, accompanied by a request to convey, was sufficient, as held by the district court. It was as much the duty of Harding to reconvey upon payment, as it was for Giddings to pay, the two acts being concurrent. The testimony of A. M. Brown, who made the tender, is as follows:

"As the agent of Caroline Giddings, I did make a tender of \$1,650 to Almon Kidder, executor, etc., January 1, 1878, at office of Kidder, in Monmouth, Ill. I went to Monmouth in company with Miss Giddings, at the time before stated, to make the last payment on said contract. I presented Kidder the contract, and told him I desired to make the last payment thereon, and counted out to him \$1,650. As I presented the money, I told him I desired a deed in accordance with the contract. He said he did not have the deed, and therefore couldn't give it. He offered to receipt for the money in Harding's name, as he had before done. I told him I did not desire to do that, but desired to make him a tender of the money. He counted the money carefully, said the amount was all right, and that the notes were all legal tenders. I then tendered said money, and demanded said deed; and, that being refused, I made a memorandum on the back of the contract, which there appears, bearing date January 1, 1878. Kidder refused to sign the memorandum, but said it expressed the facts. I then told him I would make the \$1,650 an

abiding tender, at the First National Bank of Galesburg, and that when Geo. F. Harding, as executor, etc., should present to said bank a deed, conveying to John W. Giddings and his heirs and assigns all the right, title, and interest which the said A. C. Harding possessed or was seised of in December, 1873, in S. E. $\frac{1}{4}$ 17-10, 1, also $6\frac{1}{2}$ acres off the north side of N. E. 20, 10-1, then the bank would deliver said sum of \$1,650. Miss Giddings and myself then returned to Galesburg, and, the bank being closed, we went to the First National Bank the next morning, being January 2, and deposited said \$1,650 with said bank, to be delivered to Harding when he complied with the conditions before named. The money has remained there ever since."

The tender was not refused upon any ground, except that the agent did not have the deed ready. He was willing and ready to accept the money and receipt for it, and it has been in the bank for his principal ever since the time of the tender.

There are no other questions that we desire to notice. The decree of the court below is affirmed.

THE E. A. SHORES, JR.

MANEGOLD et al. v. THE E. A. SHORES, JR., et al.

(District Court, E. D. Wisconsin. March 7, 1896.)

1. SHIPPING—DAMAGE TO CARGO—HARTER ACT—LAKE COMMERCE.

The third section of the Harter law (Act Feb. 13, 1893), which provides that, if the owner of any vessel transporting property "to or from any port of the United States" shall exercise due diligence to make her seaworthy and properly manned, equipped, and supplied, he shall not be liable for damage resulting from faults of navigation or management, etc., applies to vessels engaged in commerce on the Great Lakes, notwithstanding that sections 1, 2, and 4 of said act, which relate to limitations of liability by provisions in contract of affreightment, are expressly confined to shipping "between ports of the United States and foreign ports."

2. SAME—SEAWORTHINESS—DEFLECTION OF COMPASS.

Where a vessel deviated from her course in the night, and ran upon a well-known reef, *held*, that the existence of a deflection of her compass of about $\frac{1}{8}$ of a point was not sufficient ground for finding her unseaworthy, especially in the absence of any showing of its continuance for sufficient time to require notice.

3. SAME—FAULTS OF NAVIGATION.

Faults consisting in failure to heed the warning of a government light, which indicates the location of a reef, and in presuming upon the entire accuracy of the compass or course, or upon deceptive appearances of distances, etc., are "faults or errors of navigation," within the meaning of section 3 of the Harter act.

Libel in rem by Charles Manegold and others, owners of a cargo of wheat shipped on the propeller E. A. Shores, Jr., to recover for damages sustained by alleged negligent stranding of the vessel, and negligence after the stranding.

The E. A. Shores, Jr., is a steam freighter, launched in the fall of 1892, and engaged in general service on the Great Lakes. At the close of the season of 1894, she was laid up for the winter; but before the usual opening of navigation, in the latter part of February, 1895, her owners made oral agreement with the libelants to carry wheat from Chicago to Milwaukee, on a freight of three-quarters of a cent per bushel. This was an unusual and experimental engagement for winter navigation. The steamer was put into commission for the purpose, with Capt. Olsen (who was owner of one-twelfth part of the ves-

sel, and had sailed her the previous two seasons) as master, and Capt. Christopher (a master pilot of many years' experience and excellent reputation) as chief mate, and a full complement of officers and men. The first cargo had been delivered, and on the morning of March 8, 1895, she had taken in her second cargo of 25,000 bushels, but did not leave port until midnight, as it was snowing and stormy. Her course was set for Milwaukee at 12:30 a. m., and, it being the mate's watch, the master left the chief mate in charge, with instruction to keep the vessel "north three-quarters west, or close along the shore, and to haul her out when he thought it fit to go out in the lake a little further, using his own judgment." The weather was cold and clear, and the wind southwest, off land, and of a velocity of about 12 miles an hour, but no ice was encountered to interfere. The mate says he kept her N. $\frac{3}{4}$ W. until abreast of Waukegan, and then due north, a course which would appear to have been generally proper under the circumstances of wind and weather, and, according to the showing as marked out on the chart, would have cleared Racine Reef by about one mile if there were no deviation; but, from some cause, the steamer had been taken too far to the westward, and at about 5:30, or a few minutes earlier, on the morning of March 9th, struck the southeast edge of this reef, and stranded, the vessel going at a speed of about 12 miles an hour, which had been kept up steadily throughout her course. The mate, lookout, and wheelsman were all at their stations, were mariners of experience and good reputation, according to the testimony, and the only excuses which are offered for running upon this well-known reef are (1) that the red light covering the reef was not then visible; (2) that the action of wind and currents must have carried the vessel imperceptibly landward; (3) that the cold weather caused a haze over the surface of the water, which gave deceptive appearance to the lights on shore, as two or three miles further distant than they were in fact. On the part of the libelants it is claimed (1) that there was a manifest deviation of the compasses, which were neither properly tested, corrected, nor was the deviation allowed for in navigation; (2) that there was no proper watch maintained, or the danger would have been shown by the bearing of the flash light, which had been clearly visible for an hour and more. Just north of the port of Racine, Wind Point juts out into Lake Michigan as a prominent landmark of the west shore, and the government has provided a lighthouse there, which is described in the official publication as a "conical tower, 102 feet high," with a "coast light, flashing white light, 30 second intervals, visible $8\frac{1}{2}$ miles, covering Racine Reef from watch-room window." This reef upon which the steamer stranded is a well-known source of danger to navigation along the west shore of the lake, lies about four miles south and slightly eastward of Wind Point, and nearly opposite the harbor entrance. It is about a mile long, and a half mile wide, and is about sixty-five miles from Chicago. The first effort to release the steamer was promptly taken in bringing from Milwaukee the wrecking tug *Welcome*, which made the attempt that same morning, aided by the tug *Dixon*, of Racine; but it was found that the *Shores* filled with water to such extent that she was liable to founder if pulled off. That method was therefore abandoned. The *Welcome* was then sent to Milwaukee for a steam pump and lighter. On their arrival a force of men was taken out. The dry wheat was shoveled upon the lighter from the fore hatch. The pump was placed in operation at the after hatch, taking out wheat with the water, and the vessel was released on the morning of March 11th, but the pump was so far unable to control the inflow of water that she foundered just inside Racine harbor. Another lighter was procured to receive the outflow from the pumps, and save such of the wheat as could be thus held, and the steamer was taken to a dock. A diver was procured, and a jacket adjusted, to enable the steamer to reach Milwaukee. Bulkheads were put in to save wheat, but the libelants claim that there was negligence after the stranding in failure to have steam pumps brought on the *Welcome* from Milwaukee at the outset; in failure to procure lighters immediately (either from Milwaukee, or in utilizing vessels then lying up the river, in the ice, at Racine), to take off the wheat which had not been reached by the water, and to save wheat taken out by the pumping; in general inattention to save and care for the cargo, and neglecting to provide guards, whereby large quantities were stolen or carried off from the steamer and lighter in port; and, finally, in refusing to deliver the remnant

of the cargo at Racine, causing further injury by retaining it in the vessel until arrival at Milwaukee. Capt. Starke, claimant and owner of eleven-twelfths of the steamer, was on board, having taken passage from Chicago, but had no part in her navigation. Upon the stranding, he promptly ordered out the yawl boat for Racine, and by telephone summoned the wrecking tug Welcome (of which he was part owner), and it arrived without delay. Capt. Starke was manager of the principal corporation at Milwaukee engaged in wrecking, had great experience in that line, and was active in aiding the operations in question; but, after the arrival of the wrecking outfit, Capt. Gillen, of Racine, had charge of the operations, and his ability and experience for such purposes are unquestioned.

Van Dyke, Van Dyke & Carter and J. C. Richberg, for libelants.

M. C. Krause, for claimants.

SEAMAN, District Judge (after stating the case as above). The circumstances in this case and the peculiar questions involved have required the taking of a large amount of testimony, all heard in open court, and I have attempted only an outline of the general facts, and of the claims urged on behalf of the libelants, without aiming to summarize the evidence, which would unduly extend the opinion.

Primarily, the rule of liability must be ascertained which governs this contract of affreightment,—whether the provisions of section 3 of the act of congress of February 13, 1893, entitled “An act relating to navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property” (27 Stat. 445) are applicable thereto; and, if that section applies, to what extent does it affect liability under the state of facts here shown. The act referred to, which is generally known as the “Harter Act,” has received construction in several of the courts at the seaboard, including the circuit court of appeals for the Second circuit, but in reference only to carriage between foreign and domestic ports, and, as applied therein, to foreign as well as to domestic vessels, and no adjudication has been found whereby section 3 or any provision of this act was expressly held to govern the transportation contracts of domestic vessels between domestic ports. As here presented, the question is therefore new, is important and far-reaching, affecting all the great shipping interests upon inland waters, and becomes controlling under the view which I must take of the facts established by the testimony; and, for its consideration, acknowledgment is due to counsel for valuable aid furnished by their research and arguments. Sections 1, 2, and 4 of the act refer solely to shipping “between ports of the United States and foreign ports,” and prohibit stipulations or covenants in bills of lading exempting the vessel owner from liability for negligence or faults in navigation or in the care of property carried, or from the exercise of due diligence to equip and make the vessel seaworthy, or to lessen the obligations of master or crew to care for the stowage and delivery of goods. Section 3 provides as follows:

“If the owner of any vessel transporting merchandise or property to or from any port of the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall

become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or for any deviation in rendering such service."

In construing a statute, it is the duty of the courts to give effect to the intention of the lawmaking power, and the intent must first be sought in the language of the act itself. "Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity, of the result, is out of place. It is not the province of the courts to supervise legislation, and keep it within the bounds of propriety and common sense." *Suth. St. Const.* 316. Section 3, above quoted, is clear and explicit in its general application to "the owner of any vessel transporting merchandise or property to or from any port of the United States"; but it is contended by the libelants that because the other sections of the act (both preceding and following) which prohibit the issue of bills of lading containing certain exemptions from liability are confined to contracts of affreightment between domestic and foreign ports, and inasmuch as section 3 does not expressly name vessels engaged in trade between ports of the United States, it should be limited by construction to the class of shipping mentioned in the other sections, namely, to vessels in trade with foreign ports, and of no effect upon the great shipping interests engaged in domestic commerce. Neither the language here employed nor the manifest purpose of the other provisions would permit such restriction to be placed upon this section by interpolation. For the control of provisions in contracts of affreightment which were exclusively domestic, there was no need of congressional enactment against exemptions from the common-law liability of carriers, because such inhibitions had become well established by adjudications, in the federal courts at least. Therefore, the sections relating to the bills of lading may be regarded as treating of contracts which were to such extent foreign in their nature that they were either beyond the reach of these judicial rules or their applicability was left in doubt. Previous to this enactment the supreme court had held, in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, that a bill of lading issued by an English steamship company in an American port to an American shipper for the carriage of goods thence to an English port, where freight was to be paid in English currency, was an American contract, and governed by the American rule of law, which declared that stipulations therein undertaking to exempt the carrier from liability for the negligence of its servants were contrary to public policy and void, and that the English rule allowing such stipulations could not be invoked in their support; but the question was reserved from decision whether the stipulations would be saved by a provision in the contract that it should be governed by the law of

England. It appears from the reports and discussion in congress upon the bill which gave rise to the act in question that urgent complaints came from shippers to and from foreign ports of constant evasions of the rule as thus pronounced, by the insertion in bills of lading of a clause declaring it an English contract, and subject only to the liabilities imposed by English law. These sections respecting the terms of contracts for foreign affreightment were manifestly designed to prevent the evasions whereby those engaged in foreign trade took to themselves immunities which were prohibited to the great class of American vessels confined to domestic trade. That purpose is entirely compatible with the further purpose found in section 3, to relieve all vessels, whether in foreign or domestic trade, from certain of the liabilities which had theretofore attached as insurers of safe delivery, and to establish for all carriers by vessel the same measure of duty and responsibility. It concedes relief to the vessels in foreign trade, as compensation for taking away any right they might otherwise have to limit their liability by contract, and extends the same benefit to the domestic vessels which were previously held to their common-law liabilities.

This view is supported by the opinions of the circuit court of appeals for the Second circuit, construing this act in *The Silvia*, 15 C. C. A. 362, 68 Fed. 230, and *The Carib Prince*, 15 C. C. A. 385, 68 Fed. 254; also, in *The Viola*, 59 Fed. 634, 60 Fed. 296; *The Berkshire*, 59 Fed. 1007; *The Silvia*, 64 Fed. 607; *The Etona*, Id. 880; and in later cases in district courts. And in the history of the growth of the act in its course through congress, as found in 24 Cong. Rec. 147, 148, 171, 172, 1180, 1291, there is clear exposition of this intention in the amendments which were finally adopted. As introduced and adopted in the house, the title of the bill was as "relating to contracts of common carriers," etc. Its provisions applied to common carriers by land and water, but with reference only to shipments to or from foreign ports; and its section 3 related only to foreign shipments, and was not so liberal in limitations as it now appears. The report upon it by the house committee on interstate and foreign commerce (page 148), and the remarks of members, show the understanding that its effect at that stage was only upon vessels engaged in foreign trade. In calling it up, the statement was made that it did not "in any manner concern or touch inland or coastwise commerce" (page 148), and its reputed author remarked, in advocating passage by the house, that it "does not affect one one-hundredth of 1 per cent. of American shipping," but would reach the foreign vessels which were then enjoying monopoly of the foreign trade (page 172). The transformation came when the bill reached the senate, where section 3 was amended by striking out all reference to foreign ports or trade, and applying its provisions to "the owner of any vessel transporting merchandise or property to or from any port of the United States"; and thereupon the new title was given to the act as a whole. From the debate in the house, after its return there, it appears that these amendments were the result of appeals from vessel owners generally for relief in some measure from the responsibilities imposed upon them as carriers; that they were agreed upon

in conferences between the committees of both houses; and that it was the final understanding the act would operate generally to limit this liability for all American vessel owners. Pages 1180, 1291. It is not for the courts to inquire whether the full extent and effect of this change was then in the legislative mind, or whether it was wisely or justly adopted, but the duty is imposed to ascertain the meaning of the language employed in the enactment, and to enforce the purpose thus expressed if within the powers of legislation.

The contention on the part of the libelants that the statute in question should be strictly construed, under the rule pronounced in the recent case of *The Main v. Williams*, 152 U. S. 122, 132, 14 Sup. Ct. 486, respecting the limited liability act (section 4283, Rev. St.), and that the liberal construction sanctioned in *Moore v. Transportation Co.*, 24 How. 1, 39, and the line of subsequent decisions, should not be held, does not seem to me material in view of the history of this legislation and the explicit language employed. In strict construction, "effect is to be given to the plain meaning of the language," and it is only "where the effect is reasonably open to question" that strictness is to be applied. *Suth. St. Const.* § 350. I find no room for doubt of the clear import of the terms of section 3 as applicable to all contracts of affreightment on American waters, and that these provisions are entirely consistent with those specially made in the other sections for the foreign trade, and that section 3 governs this contract for transportation of wheat on Lake Michigan from Chicago to Milwaukee.

The further objection urged at the bar against this construction is not deemed tenable, namely: That it would thereby affect the great class of contracts of affreightment between ports of the same state, as well as those which were of interstate character, and would therefore constitute an exercise of power beyond the regulation of "commerce with foreign nations, and among the several states, and with the Indian tribes," granted by the constitution (article 1, § 8); that it thus interferes with legislation in many of the states respecting the liability of carriers within their jurisdiction, and is unconstitutional. The cases of *The Fashion*, 21 How. 244, *The Goliah*, *Id.* 248, and *Trade-Mark Cases*, 100 U. S. 82, are cited in support of this proposition. Whether the enactment could stand so far as concerns the instant case upon the fact that this contract was for transportation between Chicago and Milwaukee, and was therefore distinctly of interstate commerce, does not require determination (*vide In re Garnett*, 141 U. S. 1, 12, 11 Sup. Ct. 840), for the reason that the later decisions of the supreme court have established the doctrine that the powers of congress in this regard rested on broader ground than seems to have been recognized in the cases cited in 21 How.; holding, in effect, that the navigable waters of the United States are national highways, and subject to the national jurisdiction; that navigation upon such waters is necessarily national in character, and all vessels engaged therein, and all their rights and liabilities are subject to national legislation, without regard to the nature of the trade, whether from port to port within one state, or between the ports of different states; that an enactment in respect

thereof by congress "becomes a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law. *Norwich Co. v. Wright*, 13 Wall. 104, 127; *The Lottawanna*, 21 Wall. 558, 577; *The Scotland*, 105 U. S. 24, 29, 31; *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, 109 U. S. 578, 593, 3 Sup. Ct. 379, 617." *Butler v. Steamship Co.*, 130 U. S. 527, 555, 9 Sup. Ct. 612. The opinion of the court by Mr. Justice Bradley in *Re Garnett*, 141 U. S. 1, 12, 11 Sup. Ct. 840, remarks, in reference to the kindred limited liability act of 1851, that "it is unnecessary to invoke the power given to congress to regulate commerce with foreign nations, and among the several states, in order to pass the law in question." Under these authorities and the further cases of *The Daniel Ball*, 10 Wall. 557, and *Lord v. Steamship Co.*, 102 U. S. 541, affirming 4 Sawy. 292, Fed. Cas. No. 8,506, which are directly applicable, this legislation is clearly within the national purview.

Regarding this statute as operative, a further question of the measure of liability which would otherwise attach for the special shipments contemplated by this contract does not require consideration, namely, whether the respondent became an insurer of safe delivery, either in the character of common carrier or as incurring kindred obligation (vide *The Commander in Chief*, 1 Wall. 43, and *The Lady Pike*, 21 Wall. 1), or whether it was bound only, as bailee for hire, to the use of ordinary care and skill (vide *Sumner v. Caswell*, 20 Fed. 249; *The Dan*, 40 Fed. 691; and, in England, in *Nugent v. Smith*, 1 C. P. Div. 423, 17 Eng. R. 330).

The inquiries established by this statute to relieve the carrier from liability for loss or damage of cargo in transportation for the purposes of the present case are these: (1) Whether the owners show that they exercised due diligence to make the vessel seaworthy, and properly manned, equipped, and supplied; (2) if the loss arose through fault, whether it was fault or error in navigation, or in the management of the vessel. It remains to ascertain from the evidence the answer to these questions, and, further, (3) whether the respondent was negligent in respect to the saving and care of the cargo after the stranding. The conclusions of fact I have reached upon these inquiries will be briefly stated.

1. In fitting out and manning the steamer for performance of the contract, I find that every provision appears to have been made, and every precaution taken, which good seamanship would dictate for this service. The only suggestions against the seaworthiness in fact are that her compasses were defective; that the mate who was navigating the steamer and the men on his watch were either grossly incompetent, or the mate had been overworked, or was under the influence of liquor, and neglected to take the necessary observations. There were two compasses, and all of the direct testimony tends to show their substantial accuracy. Slight deviation is rather the rule than the exception, arising from causes which exist locally about the vessel, and which cannot be exactly defined. It is for this reason that two or more compasses are employed. Constant watchfulness is necessary to note deviations.

Allowance must be made in a course until adjustment can be had, and, after adjustment, neither certainty nor constancy is assured. The circumstances which are charged here as proving substantial error in the compasses are, in my judgment, insufficient, and not borne out by the course actually made. Capt. Davis, produced on behalf of the libelants, testifies that deviation of an eighth of a point (not unusual) would deflect the compass course about three miles in the distance shown here, while the actual deflection in this course is apparently about one mile. Assuming that this slight deviation existed, it cannot be regarded as ground to condemn the vessel as unseaworthy, especially in the absence of any showing of its continuance for sufficient time to require notice. The selection of this mate, and intrusting to him the navigation of the steamer on his watch, were fully warranted by his excellent reputation, long experience as master, and acquaintance with the course taken. In fact, all the men appear to have been peculiarly well qualified, owing to the opportunity afforded for their selection for the special service before the regular opening of navigation. The suggestion that the mate was overworked or under the influence of liquor is unsupported by testimony, and is not entertained. So far as appears in this record, the vessel was seaworthy in fact up to the time of disaster.

2. There is nothing in the state of the weather or the sea which clearly accounts for the stranding, and the only cause which I find fairly presumable from the evidence is this: That the mate, in the absence of necessity therefor, placed too much reliance upon the accuracy of her compass course, and upon a showing of the red light bearing on the reef for warning of its proximity; that he either failed to take and keep accurate observations of the Wind Point flash light, or miscalculated its bearings, when it would have furnished clear and timely warning of the danger of his position had its bearings been noted. This well-known flash light was in clear view for an hour and more, and I am constrained to hold that there was fault in neglecting this warning, and in presuming upon entire accuracy of compass or course, deceptive appearances of distances, or upon the absence of the red light at that hour in the morning when there was, at least, some daylight to dim its appearance. But this was clearly a fault or error in navigation, and not chargeable against the claimants, under this application of the act of congress.

3. After the stranding, the efforts for saving vessel and cargo were adopted with promptness, were carried out with skill, and were successful, except as to a considerable portion of the cargo. In the light of the events, it is possible, and may be probable, that, by earlier resort to pumping and use of extemporized lighters, a larger saving of wheat could have been effected, although there is room for some doubt of these possibilities under the testimony as to wind, sea, and ice. But, as stated in *The Nevada*, 106 U. S. 154, 1 Sup. Ct. 234, "the event is always a great teacher," and these "possibilities are not the criteria by which they can be judged." The only matter in which it appears to me there was failure by the respondent to exercise the care for the cargo which was demanded under the circumstances as they appeared at the time was in the refusal to

deliver the wheat when demanded at Racine. Aside from this, I find no reasonable ground for complaint, and the question of liability for such refusal is left open for further hearing.

There can be no recovery for the causes set forth in the libel, unless it be for damages above mentioned, and for such allowance in general average as may be just.

NOTE. On March 2, 1896, the supreme court rendered decision in the case of *The Delaware*, 16 Sup. Ct. 516, in which construction of the Harter act was involved. The opinion is by Mr. Justice Brown, and I regret that it arrived too late for reference in the foregoing opinion, especially for its concise and instructive recital of the history and purposes of the enactment. The provisions of section 3 are held not applicable to liabilities arising out of collision with another vessel. It is stated as entirely clear "that the whole object of the act is to modify the relations previously existing between the vessel and the cargo"; that the general words of the third section, "detached from the context, and broadly construed as a separate provision, would be susceptible of the meaning claimed, but when read in connection with the other sections, and with the remainder of section 3, they show conclusively that the liability of a vessel to other vessels with which it may come in contact was not intended to be affected." This interpretation is entirely in accord with the prior rulings in the Second circuit. It does not determine or directly touch upon the question involved in the case of *The E. A. Shores, Jr.*; and, while it clearly denies a broad construction of the literal terms of the section, the decision, as a whole, supports the view taken in the above opinion,—that the act modifies the relations theretofore existing between the vessel and the cargo, and affects all contracts of affreightment therein, without reaching other existing liabilities of vessel owners.

THE UNADILLA.

GERMAN-AMERICAN BANK OF BUFFALO v. THE UNADILLA.

(District Court, N. D. Illinois. March 16, 1896.)

MARITIME LIENS—LIEN CREATED BY STATE STATUTE—PRIORITIES.

The holder of a lien on a vessel created by state statute, and not enforceable by admiralty process, is entitled to share in the proceeds of a vessel sold to enforce maritime liens only after the maritime liens have been paid.

In Admiralty. Petition by the German-American Bank of Buffalo against the remnants and surplus of the proceeds of the sale of the steamer Unadilla.

Brown & Cook and D. L. Cruice, for petitioner.
Schuyler & Kremer, for respondent.

GROSSCUP, District Judge. The Unadilla was sold at the instance of a lienholder, and its proceeds are now in the registry of this court. The German-American Bank appears as an intervening petitioner. The home port of the Unadilla was Tonawanda, near Buffalo, in the state of New York. The petitioning bank is situated in Buffalo. The petitioner's claim arises from advances made by the petitioner to the owner of the Unadilla at Buffalo for prospective supplies to and repairs upon the Unadilla. The advances were made in reliance upon an understanding between the owner and the bank that there should be a lien upon the vessel for the amount thereof.

The statutes of New York provide for a lien for "advances made for the purpose of procuring necessities for such ship or vessel." Admiralty Rule 12 provides a lien to material men "for supplies or repairs, or for necessities." This, plainly, does not extend to the petitioner's case. The bank was in no sense a material man. Rule 17 provides a lien on account of maritime hypothecation for supplies, repairs, or other necessities in a foreign port. The case of the petitioner does not fall under this rule. There is no other rule in admiralty except the forty-third, hereafter referred to, which even remotely touches the petitioner's case.

The question, then, arises whether, having a lien by virtue of the New York statute, for the enforcement of which, however, by a proceeding in rem, no provision is made by the admiralty rules, the petitioner is entitled to share in the proceeds in the registry, and, if so, in what order. I have examined with as much care as my time would permit the line of federal decisions from which light upon this question might be obtained, and, without attempting to summarize the principles therein separately developed, will state only the conclusions to which they have brought me. These conclusions seem to me to be especially apparent in the cases of *The Lottawanna*, 21 Wall. 558, *The General Smith*, 4 Wheat. 438, and *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498.

Maritime law is entirely distinct from the municipal law of the land. It is, and always has been, a separate and distinctive jurisprudence. But, though relating to the sea, and radically different, in some respects, from the conceptions of municipal law, it has always been an attribute of some sovereignty, and enforced in the courts of such sovereignty. The constitution of the United States transferred this jurisprudence from the sovereignty of the states to that of the nation. The maritime law proper finds its expression now only in the national will. The states can add nothing to it, nor take anything from it; and, in the field of strictly maritime law, state legislation is ineffectual except as such legislation may be adopted by the national will.

On maritime subjects the national will finds its expression through the national courts. But, though the states surrendered maritime jurisdiction to the nation, they still have within their own political divisions power to legislate respecting water craft and contracts and conduct relating thereto. Such legislation, however, does not *ex proprio vigore* become maritime law. Unless adopted by the nation, it remains outside the domain of maritime law. Liens, whether arising under maritime law, or under other competent legislation, are rules of property. But liens are not necessarily alike in point of priority or effect. Maritime liens proper are such as the maritime law has recognized as needful to the affairs of the sea. Their primary object, generally, is to give wings and legs to the ships. They constitute the first debt a ship owes, the debt arising from the necessity of self-existence. But the maritime law proper is not non-expandable. Transitions of time and circumstance bring forward considerations favorable to new classes of liens that did not exist before. These may be introduced primarily into the body of mar-

itime law by the national will, or adopted by the same power from the legislation of the state. Such new classes of liens, thus created or adopted, become a part of the maritime law, or of the law in the nature of maritime law. The class of liens not thus adopted, however, by the national will, have the force and effect only of state legislation. They are not a part of the body of maritime liens. Whether a lien is maritime, therefore, or of a maritime nature, so as to be enforced as such, depends not upon the legislation of the state, but upon whether such legislation has been adopted by the national will. But how shall it be ascertained whether state liens, otherwise alien to the maritime law, have been adopted into the class to which the remedies of the maritime law are extended? Plainly, only by the decisions of the United States supreme court and its rules of procedure. It is in that tribunal that the expression of the national will is to be found, and it is presumable that, for every lien newly adopted into the maritime class, the court will provide a process. The absence of process to give effect to a lien other than strictly maritime liens, clearly manifests the will of the court that such lien is not adopted into the national maritime jurisprudence. For the claim of the petitioner no process is provided, and there is therefore no authority for extending to him the rights of a maritime lienholder. But under the state law, and as against the owner of the vessel, the petitioner has a right superior to that of the owner to the proceeds of the vessel. The absence of rules of the supreme court covering his lien only excludes him from the class of maritime lien holders proper and those which have been adopted as such. His rights, under the laws of New York, remain intact. His interest, as against the owner, in the proceeds in the registry, is protected by the forty-third rule in admiralty.

A decree may be entered allowing petitioner the payment of his claim after the discharge of the claims of the lienholders proper.

THE DUNBRITTON.¹

DARRAGH et al. v. THE DUNBRITTON. CROOKS et al. v. SAME.
 KNUDSON et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. March 3, 1896.)

1. SHIPPING—DAMAGE TO CARGO.

In a suit to recover the amount of damage found by appraisers to have been done to certain bags of nux vomica and turmeric, by reason of stains upon the packages from oil cargo, it was shown at the trial that the goods were sold by the consignees for the full market price of sound goods, and that the purchasers never made any objection to them or claimed any allowance for damage. *Held* that, as they sustained no loss, the ship was not liable.

2. SAME—PERILS OF THE SEAS—CARRYING AWAY OF VENTILATORS—ADMISSION OF WATER.

Damage by sea water entering the ventilator holes, after the ventilators had been carried away by a heavy sea which came aboard in a gale off the Cape of Good Hope, smashing one of the lifeboats, and breaking frames

¹ Rehearing denied March 17, 1896.

and stanchions, *held* to be the result of a peril of the seas, for which the ship was not liable, where it appeared that the firmness of the ventilators had been thoroughly tested by shaking, and by examination of the flanges and the screws and bolts securing them to the deck, although the screws and bolts were not taken out for inspection. 61 Fed. 764, affirmed. The *Edwin I. Morrison*, 14 Sup. Ct. 823, 153 U. S. 199, distinguished.

3. SAME—CHARACTER OF PROOF.

Where the ship has shown a sea peril which left water aboard that might reasonably be expected to cause the damage found to exist, it will be presumed to have produced it, if there is satisfactory proof that any or all other suggested causes did not produce it. 61 Fed. 764, affirmed.

4. SAME—DAMAGE BY OIL.

Damage done by Ceylon cocoanut oil, which, though properly stowed, escaped by natural and usual leakage into the hold, and was afterwards carried up into contact with the cargo by water that entered the ship in consequence of a sea peril, *held* to be the result of a sea peril for which the ship was not liable. 61 Fed. 764, affirmed.

5. SAME—PROPER STOWAGE—CEYLON OIL.

Although Ceylon cocoanut oil, partly by reason of its inherent qualities and partly because of bad cooerage, always leaks greatly from the casks, yet *held*, on the preponderance of evidence, that it is not improper stowage to place it in the between-decks, over dry cargo in the hold, provided the decks are permanently laid, in thorough order, well caulked and tight, and provided with sufficient scuppers for the escape of leaking oil. 61 Fed. 764, affirmed.

6. SAME.

Where oil is stowed in the between-decks, near an open hatch, beneath which dry cargo is placed, and is found to be damaged at the end of the voyage, the burden is on the vessel to show, not merely that the damage could have been caused by a sea peril, but that it could not have been caused otherwise.

7. SAME—"BROKEN STOWAGE."

When packages susceptible to damage from oil are taken as "broken stowage," the ship is not entitled to use them as dunnage for casks of oil which are known to be so liable to leak as those which come from Ceylon, or to stow them in immediate physical contact with such casks, where it is almost inevitable that they will be soaked with oil before the end of the voyage.

8. SAME—PRESUMPTIONS—"OIL DHOLLS."

There being a cheap variety of coir yarn coming from Colombo, Cochin, and Alleppy, in the shape of dholls, which are known as "oil dholls," because not susceptible to damage by oil, *held* that, when dholls of coir are receipted for by the ship as "oil broken stowage," it may be assumed, in the absence of evidence to the contrary, that they are of that cheap kind, and may, according to the custom of the trade, be stowed with oil casks.

These are appeals from decrees of the district court, Southern district of New York, dismissing libels in rem, filed to recover from the ship *Dunbritton* for damages to cargo sustained on a voyage from Colombo, Cochin, and Alleppy to New York. The three cases were tried together, and the evidence is voluminous. The word "libelants" is used hereafter in this opinion, sometimes as referring to the libelants in some one of the suits, sometimes collectively to the libelants in all three suits, as the context may indicate. The decrees of the district court were entered April 25, 1894. See 61 Fed. 764.

Geo. A. Black, for appellants.

Wm. D. Guthrie, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.
v.73f.no.2—23

LACOMBE, Circuit Judge. The Dunbritton was built in 1874 or 1875. She is an iron vessel, with two decks, both wood, and three hatches in each deck. She is 237 feet long, 38 feet beam, 22 feet deep; 1,471 tons net, and 2,100 tons gross. On her deck she had two ventilators, one abaft the foremast, the other 6 feet aft of the mainmast. These ventilators were 5 feet high. Each was made up of three parts,—the flange, the funnel, and the cowl. The flange was a cast-iron ring inserted vertically downward into the deck the thickness of the plank, with a 3-inch horizontal rim projecting around it level with the surface of the deck, and screwed fast thereto with 6 screws and 6 bolts, inserted through holes either drilled or cast in the rim. This flange extended vertically above the deck some 6 or 8 inches, and was about 15 inches interior diameter. The funnel of the ventilator was made of galvanized sheet iron, and was screwed on the flange. It was provided on top with a cowl or hood, with a bell-mouth. The forward ventilator opened into the between-decks, but there was no opening below it from the between-decks into the lower hold. The main ventilator opened into the between-decks, and directly below it was an opening in the between-decks, 18 inches square, by which access was had to the water tanks in the lower hold. Around this opening was a shaft of open slat work 4 feet square, extending up to the main deck. This shaft was used as a means of access to the water tanks and pump well. To descend the shaft, it was, of course, necessary to remove the funnel of the ventilator.

On January 6, 1892, the Dunbritton was chartered by Darragh, Smail & Co., of Alleppy (the East Indian house of the libelants in the first suit), by a charter party which required her to proceed to Colombo and the Malabar coast, there to load "from charterers or their agents a full and complete cargo, consisting of lawful merchandise, including cocoanut oil," and thence to proceed to New York. She began loading at Colombo on March 3, 1892, took some cargo aboard at Cochin, and, having completed loading at Alleppy, sailed for New York on May 11th. Speaking generally, her cargo was stowed as follows: In the lower hold, fore and aft, plumbago, with dholls of coir; in the rest of the hold, cocoanut oil, with dholls, and upon the oil bales of fiber, ballots, and mats, and some bags of nux vomica; in the between-decks, a few barrels of plumbago aft against the bulkhead of the lazarette; in front of them, and extending forward to the after hatch, some 40 or 50 casks of cocoanut oil, with bags of turmeric on top of them; and from thence forward rolls of matting, bales of fiber, coir yarn, mats, some tea, et cetera. The vessel arrived in New York October 19th. Discharge of cargo commenced October 24th, and was completed November 28th. Upon discharge, portions of the cargo below were found in the condition hereinafter set forth: (a) There were taken out of the lower hold about 186 casks of oil (i. e. cocoanut oil, which will hereinafter be referred to as "oil" simply), consigned to Darragh & Smail. These were shipped at Cochin, and stowed in the lower hold, four or five tiers deep. Cochin oil, as a rule, is better coopered than Colombo oil, and is a superior article. It suffers much less from leakage.

This Cochin oil was found in good condition, and no claim has been made for any damage to it. (b) To the libelants Crooks & Co. was consigned the oil taken aboard at Colombo. The evidence shows that the oil was properly dunnaged. None of it had shifted, but there was an exceedingly heavy loss by leakage. Crooks & Co. made claim for this upon the Thames & Mersey Insurance Company, which had underwritten their oil, and collected \$3,671.06. Whether the company paid this claim because it thought the loss had resulted from sea perils, or because the policy covered leakage in excess of some named average, does not appear and is immaterial. No claim for damage to this oil was made against the ship. (c) The nux vomica and the turmeric consigned to Darragh & Smail appeared to be somewhat damaged by oil, and these libelants claimed to recover therefor such sums as the appraisers estimated the damage to amount to. Near the close of the trial, however, claimant's counsel elicited from one of the libelants' firm the fact that both the turmeric and the nux vomica were sold for the full market price of sound goods, despite the oil stains on the packages; that the purchasers never made any objection to them, nor claimed any allowance for damage; and that his firm really lost nothing on either. Further discussion as to the turmeric and the nux vomica is unnecessary. Since Darragh & Smail sustained no loss, there is no loss to be made good to them, either by ship or underwriter. (d) The plumbago, which consisted of 924 barrels of Knudson's and 435 of Crooks' (1,359 altogether), was stowed, without any separation by marks, fore and aft in the lower hold, except the 15 or 20 barrels in the between-decks next to the lazarette. Of these there were found to be 718 barrels damaged by oil, of which 386 belonged to Knudson, and 332 to Crooks, and these libelants seek to recover therefor. (e) A part of the bales of yarn, cocoa mats, and matting consigned to Darragh & Smail was found to be damaged by sea water. The amount of loss thereby was claimed from the Delaware Insurance Company, and has been adjusted. No claim therefor is made against the ship. (f) It appeared that other parts of Darragh & Smail's consignment, consisting of mats, matting, bales of coir yarn, bales and ballots (a ballot is a little bale) of coir fiber, were damaged by oil. Claim for loss is made in the libel. (g) Darragh & Smail had on board of the ship 16,721 dholls of coir. A "dholl" is a round skein of yarn, wound together and tied up, about 30 inches long and 5 in diameter, thick at one end and narrow at the other. Of these, about 9,000 were found to be damaged by oil, and claim for loss thereon is made in the libel.

Two theories are advanced to account for the damage to the plumbago. For the ship it is contended that during a severe storm a heavy sea carried away the ventilators; that the apertures thus left in the deck remained open for a considerable time, while seas were constantly breaking over the deck; that, in consequence, great quantities of water got into the ship, first into the between-decks, and thence into the lower hold, in part by the ventilator shaft, in part by the hatches, and principally by the scuppers; that there had been much leakage from the Colombo oil, due to inherent vice in the oil and packages, and, as the pumps sucked at $3\frac{1}{2}$ inches, there was

considerable oil already in the bottom of the ship when the irruption of water came through the ventilators, and that much additional oil leaked out into the hold before the ship was cleared of this water; that after discerning that the ventilators were carried away, and covering up the apertures, it was found that there were 3 feet of water in the well; that in two days this was reduced to $5\frac{1}{2}$ inches, but so much water was distributed through the cargo, whence it drained gradually into the bottom of the hold, that it was two weeks and more before the ship was freed from it; that the large quantity of water shipped during the storm rose above the level of the ceiling, bearing the oil on its surface; and that, during the rolling and tossing consequent upon the conditions of wind and sea, the oil was thus washed up onto the cargo stowed in the bottom and wings of the ship. It is the theory of libelants that the oil leaked through the deck of the between-decks, aft of the after hatch, where 40 or 50 barrels of the oil were stowed, onto the plumbago in the after lower hold.

The ship having delivered the plumbago in bad order, it is for her to show that the damage was the result of a sea peril. It is necessary, therefore, to examine more carefully the evidence upon which she relies to establish this proposition. The first part of the voyage was prosperous, but in the latter part of June the ship ran into heavy weather and storms. Iron ships rarely leak, and during this period the pumps, although regularly attended to, seem to have disclosed the presence neither of water nor of oil in the hold. As before stated, the pumps sucked at $3\frac{1}{2}$ inches; and in view of the superabundant and uncontradicted testimony that Ceylon oil packages are peculiarly susceptible to leakage, and of the further fact that during the bad weather prior to July 10th the ship was a good deal knocked about, it is reasonable to assume that there was considerable oil in the bottom, although not enough to be reached by the pumps. July 10th opened with the wind gradually increasing and a heavy southwest swell. In the afternoon it was blowing a fresh gale, with a very high confused sea running. About 7 p. m. (it was dark at the time, which was winter off the Cape of Good Hope), a very heavy sea came aboard. It carried away the starboard lifeboat, and also the port one, smashing the latter in the port rigging. The donkey-room and galley-room doors were torn off. The pigsty and the steam winch cover, a large teak-wood box, were carried away. The sea, as the mate testified, also "broke three frames, one inside the fo'castle, and two outside, and two stanchions also, the bulwark stanchions. Also, the rail and the bulwark was cut about six feet just by the sea, and also the bulwark plate it stove in; also, the top-gallant rail and the pin rail." The chief surveyor for Lloyds Register, who examined the ship upon arrival at New York, testified that there was damage "mainly on the starboard side of the forecastle, the after end of the forecastle, where the plates were bent inward, and three frames broken. The after end of the forecastle or wing was completely carried away, excepting just a piece on the deck. There were damages also to the main rail, and there were iron stanchions broken. There was a lifeboat smashed or badly broken,

and second boat injured." He added that "this breaking of frames on an iron ship is very unusual and excessive damage for an iron ship to suffer. Have never seen more than two or three similar cases since I have been a surveyor, and that is a good many years now." The same sea tore away the funnel and cowl of the forward ventilator from the flange, and carried away the main ventilator, flange, bolts, and all. In consequence, two apertures, 15 inches in diameter, were left open in the deck, over which repeated seas, though none so heavy as the first, were breaking; and, by reason of the darkness, no one perceived that the ventilators had been carried away, for a period of time variously estimated at from three-quarters of an hour to an hour and a half. When the loss of the ventilators was discovered, the holes were covered temporarily with canvas and battens. Subsequently, the forward ventilator was replaced on its flange, and the flange of the main ventilator again bolted in place. The mate who saw the carpenter sound the pumps next morning testified that they found 3 feet of water in her. No entry to this effect appears in the log; the mate who kept it explaining that, for some days after the damage was done, he was so busy repairing the ship that he wrote nothing in the log at all. By July 12th the water was reduced to 5½ inches, but it was nearly two weeks before it was all out, presumably by reason of gradual drainage out of saturated cargo. When they pumped after July 10th, oil for the first time came from the pumps, and thereafter in considerable quantities. That large quantities of water poured down through the ventilator holes is proved by other witnesses from the ship, and that this is just what would happen under the circumstances is surely self-evident.

Necessarily, the narrative of these events of July 10th comes from the mouths of the officers and crew, and from them alone; and it is proper that, in weighing all such evidence, a court should have due regard to the bias which may be supposed to operate on the minds of men whose carefulness and fidelity to duty are issues in the case. But it does not follow that they are to be held perjured whenever some of their statements of fact run counter to the claim of a libellant. A careful study and comparison of the ship's evidence as to the storm and its results has satisfied us that, in all substantial particulars, the narrative above given is accurate. There is nothing marvelous about it. Ships have in the past suffered like ill usage from wind and sea, and other ships will undoubtedly have similar experiences in the future. Moreover, the evidences of damage which were found to exist when the Dunbritton finally reached port confirm the story of those who sailed in her.

The regular periodical survey of the Dunbritton was held in August, 1891, and she was classed A1 at Lloyds. At about the same time, Capt. Auld, the "overlooker" for claimants, also made a special examination, preliminary to her purchase by claimants. He testifies that he examined carefully around the ventilators, for fear of any rot being about them. The screws or bolts were not removed. He found the ventilators in first-class order, with regard to soundness and repair. The ship's carpenter testified that the ventilators prior to July 10th were in perfect order; that he had to overhaul

them every Saturday, and see that everything was right, and that nothing was leaking; that he found them in sound and good repair every time he examined them; that at Alleppy, before the cargo was finished, in the course of his examination, he took them off the collars or flanges, and went below when the decks were washed down, to see that the screws and bolts were tight. Then he put the elevator on, screwed it to the collar, and shook it to test its firmness. He did not unscrew the flange from the deck. A seaman testified that, when he went down to the fresh-water tanks, he had to lift the main ventilator off, and put it on, and was also engaged scraping, cleaning, and painting it; that he saw it two or three times a week, and it was all right up to July 10th. Similar testimony was given by another of the crew. One of the partners in the firm of shipwrights who furnished a new flange for the main ventilator when the ship was repaired in New York testified that he saw the old flange before removal, and afterwards the place on deck from which it had been removed. No one asked him as to the condition of the wood, but the new flange seems to have been put in the old place.

We are clearly of the opinion that the carrying away of the ventilator, and the consequent taking in of water, was a sea peril, for the results of which the ship is not responsible. The case of *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, is relied upon as controlling to a different conclusion. It is, however, clearly distinguishable from the case at bar. The mishap to the *Morrison* was the loss of a plate and cap covering the orifice of a bilge pump. The plate, which was of brass, was let into the port waterway, and fastened in place with screws. The removable cap projected about three-eighths of an inch above the surface of the plate. During a heavy storm, when there was much water on the deck, both cap and plate were found to be missing; the screws having been torn out of the wood, part of the wood going with them, leaving white splinters hanging around the holes, which thus presented a ragged appearance. The holes were not smooth nor black nor rusty. From the small amount of projecting surface upon which a blow could be delivered, and from the condition of the screw holes, the circuit court (40 Fed. 501) reached the conclusion that the plate had been torn out by a blow of extraordinary violence, and inferred that some floating article, probably one of several planks which the evidence showed had been carried away from the bulwarks on the starboard side, had been hurled violently end-on against the cap, and, tearing out cap, plate, and screws, had gone overboard with them, through an open port in the bulwarks, about a foot square, immediately opposite the plate, leaving no other marks of violence in the vicinity. This, of course, was only an inference. No one testified to seeing a plank or anything else strike the cap. The supreme court, however, was not satisfied with the soundness of this inference, as is evident from the following excerpt:

"There was no direct evidence that the plate was knocked out, or, if this were so, that it was by some extraordinary collision; and while the fourteenth finding [as to the splintered appearance of the holes] tends to support the inference of the sixteenth [that the plate was knocked out by something striking violently against it] it will be observed that the tendency of the fifteenth [that no other marks of violence were found in the vicinity] is to rebut it. If it appeared

that the wood was solid, and the screw holes splintered, the drawing out of the screws might be imputed to a blow or blows; but, on the other hand, if there were no marks of violence in the vicinity, since such blow or blows, to effect the result, if the cap, plate, and waterway were in good condition, must necessarily have been of great violence, it seems almost incredible that no marks thereof appeared on the stanchions and bulwarks on the port side, and that nothing but the cap and plate were carried away." 153 U. S. 214, 14 Sup. Ct. 823.

It seems to be the conclusion of the court that the cap and plate "were so made or so fastened as to be * * * knocked off by some ordinary blow from objects washed by the sea across the decks." In the case of the *Dunbritton*, however, there is direct evidence of a blow delivered by the sea upon those parts of the deck where the ventilators projected five feet above the surface, and that the same blow was of such violence as to tear off deck-house doors, smash lifeboats, cut away the rail, stove in bulwark plates, and break three iron frames and two iron stanchions,—“very unusual and excessive damage for an iron ship to suffer.” Certainly, there is convincing proof here of an extraordinary blow, to the effects of which the ventilators were exposed, and which left abundant other marks of its violence in the vicinity.

The supreme court, in the *Morrison Case*, further says:

“If, however, the vessel had been so inspected as to establish her seaworthiness when she entered upon her voyage, then, upon the presumption that seaworthiness continued, the conclusion reached by the circuit court might follow.”

The proof showed that the bilge-pump hole had not been used for four or five years, if at all, and that the cap and plate were painted over whenever the waterway was painted. The only inspection of them which was proved consisted of such an examination of them as could be given by the eye, without testing either by unscrewing the cap or the plate, or by tapping the plate with a hammer. Such inspection was held sufficient by the circuit court, which, from the strong indications afforded by the splintered condition of the holes, and certain direct proof that upon arrival at the port of destination the timber of the waterway where the plate had been inserted was found to be solid, reached the conclusion that there was no defect, patent or latent, and therefore nothing unseaworthy which a more rigid inspection would have disclosed. The supreme court, however, held the inspection to have been insufficient, manifestly because it did not concur with the circuit court as to the cause of the disappearance of the cap and plate, as appears from the following excerpt:

“The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. * * * In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement. We are unwilling, by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate, to relax the important and salutary rule in respect to seaworthiness.”

In the case at bar, however, there is not only general testimony as to the apparent condition of the ventilators, almost from day to day, but proof of a special inspection and testing of their security according to known tests. The carpenter's evidence on this point is

direct, positive, and sufficient. The proposition that, although shaking or tapping gives no indication of insecurity, nevertheless everything which is fitted into a ship with screws or bolts must be unscrewed or unbolted before each voyage, so that the condition of the interior of all screw and bolt holes may be thus inspected, has not, in our opinion, been declared to be the law in the Morrison Case, nor in any other to which our attention has been directed.

Having proved a sea peril for the results of which she is not responsible, the ship must next show that it is that sea peril which caused the damage to the cargo. This may be done by negative as conclusively as by positive proof. The sea peril having left water aboard the ship, which might reasonably be expected to cause the damage found to exist, it will be presumed to have produced it, if there is satisfactory and sufficient proof that any or all other suggested causes did not produce it. In the case at bar the proof is both positive and negative. As before stated, the theory of the ship is that the water taken aboard, bearing the oil upon its surface, rose in the hold to such a height that the rolling, pitching, and tossing of the ship caused oil and water to be dashed upon the lower tiers of barrels and those stowed in the wings. It is manifest that the condition of the barrels when discharged would have a most important bearing on the question whether the damage was thus produced, especially since the only other suggested cause—a leakage through the after between-decks—would expose the plumbago barrels to the action of oil alone, unaccompanied by water. On this branch of the case, very many witnesses have been examined, and the testimony is extremely conflicting. The witnesses called by the ship (and among these are many who certainly must be considered as indifferent to the result of the case) testified that the plumbago barrels damaged by oil were also more or less stained with sea water. On the other hand, the witnesses called by libelants, some of whom were interested either for shippers or for insurance companies, and others of whom were apparently disinterested, testify that the damage was caused by oil, and that there was no evidence of salt-water damage. It is not, however, difficult to reach a conclusion upon the whole body of proof bearing upon this part of the case, if certain important circumstances are borne in mind. The examination into the condition of the plumbago was had at the conclusion of a long voyage. One witness, indeed, testified that it might be expected that the contents of barrels damaged by salt water in July would still be moist when opened in September; but the weight of the testimony is overwhelmingly to the contrary. Whatever salt water had attacked the plumbago had long since dried up, and its presence was to be detected, if at all, by the stains and rust it left behind it. Most of the witnesses on both sides agree that such traces will remain on the outside of a plumbago barrel which has been damaged by salt water, though one or more of libelants' witnesses are of a different opinion. Many of the libelants' witnesses, and notably those most disinterested, went to examine plumbago which they had been informed was oil-damaged, with the object of deciding if it was so damaged, and to what extent. When they found undoubted evidence of oil damage,

they had done all they undertook to do. If any of the packages were also water-damaged, it would not be surprising if they gave no particular attention to that fact. Some of them declined to swear positively that there was no sea damage. Moreover, to sustain the theory of the ship, it is not necessary to show that the packages of plumbago were "damaged" by salt water in the sense in which that word is used by insurance appraisers and trade experts. If cocoanut oil is as penetrating as the testimony tends to show, it may well be supposed that, when the composite liquid was splashed upward on the lower tiers of barrels, it was the oil that forced its way into the package or clung to its exterior, the water receding with but little injurious result. In consequence, it is easy to see how a package might in that way be damaged either inside or outside wholly by oil; while the traces of the presence of any salt water could be detected only upon a careful examination, directed particularly to determine such presence. It does not appear that any of libelants' witnesses were informed, at the time they examined the plumbago, in what way the ship accounted for the presence of the oil on the barrels. Presumably, they supposed it was a case of improper stowage. The testimony of Swallow, the weigher, called by libelants, is most suggestive. He was an independent witness, employed by libelants to weigh their oil and plumbago. He personally weighed 969 barrels, and marked on his book, according to his practice, the number of barrels which were oil stained. He thus noted the greater part of the 718 damaged barrels. It is equally his custom to examine for stains from salt water, and to note them when found. Out of the 969 barrels thus examined, he only marked one with a "w," indicating it was water-stained. But he further testified that if barrels had had salt water on them two or three months previous to his examination, and had completely dried, he would not mark them in this way on his book, unless they were badly discolored. For that reason he refused to swear that there was only one of the 969 barrels which showed evidence of water stains, stating that there was only one thus noted in his book, because there was not enough water damage on the other barrels to injure the lead inside.

Taking all things into consideration, it must be held to be established by a fair preponderance of proof that the condition of the plumbago barrels when discharged in New York was such as tended to show that the damage was caused by oil brought into contact with the barrels through the action of the sea water shipped during the storm. There is no suggestion of any other way in which this oil damage could have been caused, except by leakage through the between-decks. It will be remembered that some 40 or 50 casks of oil were stowed in the between-decks aft of the after hatch, with plumbago in the after hold immediately below. The libelants contend that this was improper stowage under any conditions; that not only was Ceylon oil always liable to leak out of the casks to a considerable extent, but that, as one or two of their witnesses testified, it was so penetrating that it would flow through a permanently laid three-inch deck, planks and seams alike, apparently like Cathode rays through a pine box. The other witnesses for the libelants, however, do not

sustain this proposition. Undoubtedly, Ceylon oil, partly by reason of its inherent qualities, partly because of bad cooperage, always leaks greatly from the casks; but the clear preponderance of proof is to the effect that it is not improper stowage to place it in the between-decks over dry cargo in the hold below, provided the between-decks are permanently laid, in thorough order, well caulked and tight, and provided with sufficient scuppers for the escape of such oil as may leak out of the casks, which, by reason of the continuing heat of the interior of the ship, will remain liquid even after she has reached an outside temperature sufficient to congeal it. The Dunbritton's between-decks was provided with waterways along the sides of the ship, and scuppers, four on each side, about 25 feet apart, one pair about abreast of the after part of the after hatch. The scuppers were $2\frac{1}{2}$ to 3 inches in diameter, and ran into the bilges or limbers. The inspector of the insurance company, called by libelants, testified that oil will clog the scuppers; but since there is direct and positive testimony that the Dunbritton's scuppers were free and clear when she sailed, and free and clear when she arrived, and there is not a scintilla of evidence to indicate any clogging on the voyage, his testimony hardly rises to the dignity of proof. The testimony of the captain that the oil pumped up was "in regular balls, as large as your head," on which libelants lay some stress, manifestly indicates the condition of the oil when it was ejected from the discharge orifice of the pump into the colder air of the main deck.

The condition of the between-decks as to tightness is therefore the only question of importance in this branch of the case. The between-decks was caulked in San Francisco in 1891, by the ship's carpenter, under the supervision of the then captain, who testified that the work was thoroughly well done, the between-decks watertight and in perfectly safe condition for carrying liquid cargo. After the periodical inspection, and the special one of Capt. Auld, in August, 1891, which he says was thorough, and showed the between-decks to be well caulked and tight, the Dunbritton sailed from Cardiff to Mahé, in the Seychelles Islands, with a cargo of coal, and thence in ballast to Colombo. On the voyage from Mahé to Colombo, the vessel was carefully prepared for taking in the new cargo. The inside of the ship was thoroughly washed and painted, and particular care was taken to see that the between-decks was tight. A thorough examination was made of this deck, and the carpenter went carefully over it at the time the deck was wet down in washing the ship, and caulked every place which showed any signs of leaking or wearing away of the pitch and oakum in the seams. In the between-decks there are several ballast hatches, four of them aft of the after hatch. They are apertures cut in the deck planking, two of them 2x3 feet, and the two others 4x8 feet. The portions of plank thus cut out of each hatch are edge-bolted together, and provided with a ring for lifting. They fit back as a hatch cover into the place from which they were removed, resting on the deck beams. These hatches have no coamings. It is not usual to have them around ballast hatches. They were off when the plumbago was being stowed, were replaced before the oil was stowed, and,

under the captain's express instructions, the ship's carpenter caulked them tight. After she was entirely discharged in New York, and the between-decks cleaned up, Capt. Auld testifies that the seams of the between-decks all looked very good, and showed no evidence of leakage; and the stevedore who loaded her for her next voyage confirms this statement.

In the nature of things, all this testimony as to inspection and caulking comes from the ship, but it is inherently probable. It is to be supposed that ship's officers who are about to load liquid cargo over dry make some effort to ascertain if the deck between is tight or not, and that subordinates who are ordered to caulk seams obey orders. The assumption may not be strong enough to take the place of proof; but, when officers and crew testify directly and positively to the facts, their evidence is not to be rejected as of no weight merely because the witnesses come from the ship. Before their uncontradicted evidence will be thus disregarded, there must be satisfactory proof of some other fact or facts inconsistent with their story. Such proof, the libelants contend, is furnished by their witnesses, who describe the condition of affairs in the between-decks and below it when the Dunbritton arrived in New York. The question, however, does not lie simply between those on the ship testifying that the decks were tight, and uncontradicted independent witnesses testifying that they had leaked. The claimants produced many witnesses, quite as independent of personal bias or interest as were the libelants', who testified positively that no oil had leaked through the between-decks. Of the libelants' witnesses on this branch of the case, Keegan, a clerk for libelants Darragh & Smail, testified quite freely to oil running through holes in the deck and dripping from the ballast hatches; but he locates the place between the main and after hatches (where, indeed, no oil was stowed), says that the cargo beneath was bags and bales of coir, and admits that he did not go aft of the after hatch, but stood on bales in the after hatch, and sounded from that position the casks of oil, not then removed from their place of stowage. As proof of any leak in the seams of the after between-decks, his testimony is of no value. Knapp, a clerk for libelants Knudson, Paterson & Co., testified that he saw not only the dirty between-decks where the packages of oil had been leaking, but also plumbago, 200 barrels of it, lying underneath the between-decks, all covered by cocoanut oil. The weight to be given to this statement becomes apparent when the witness goes on to say that he was only twice below the main deck, the first time before any of the after lower hold had been discharged, the second time after it had all been discharged; that on the first occasion he did not go below the between-decks at all, but looked at the plumbago stowed below from the after hatch. It is difficult to see, if the cargo in the lower hold had not been touched at that time, and came, as he says, within two feet of the under part of the between-decks, how he could see the condition of affairs under the between-decks except in the immediate vicinity of the hatch itself. He says there was plenty of light to see there, and speaks of two ballast hatches being off, but subsequently confines his positive statement

to the ballast hatches between main and after hatch, and only says he thinks there were others which let light down. That oil poured down through the after hatch upon the cargo below is abundantly proved, and the ship's liability therefor will be discussed later on. That condition of affairs undoubtedly impressed this witness (and, indeed, all the others called by libelants); but his evidence to there being any leak through the seams of the after between-decks has no weight. He was not in a situation to form an intelligent judgment upon that question. Wilbur, a salesman for libelants Darragh & Smail, went into the between-decks October 26th, and subsequently, on October 29th, in company with Getshow and Evald, into the between-decks and the lower hold. He only testified, however, to seeing three ballast hatches, "through which oil could run," and could not tell from any examination he made whether any oil had in fact leaked through. Dumont, a surveyor of marine damages for underwriters, testified to seeing oil on the between-decks, and to his "opinion" that it went down on the plumbago; but his recollection of his visit to the ship is extremely vague, and he admits that he has no recollection of going into the lower hold at all. Getshow, an experienced stevedore, not employed by the ship, who was aboard to investigate the condition of affairs, stowage, etc., at the request of Darragh & Smail, testified only to one leak, namely, through the seams where one of the ballast hatches fitted into the deck. He did not go into the hold, formed his opinion from looking at the surface of the between-decks, but was very positive that the seam was open, so that oil could go through; so wide open was it that, according to the record, the witness undertook to indicate the width of the seam with his hands; and the seam was full of oil, with which at the time the entire aft between-decks was covered. He admitted, however, that he could not tell whether the ballast hatch had been lifted and replaced; and from the evidence given by the ship's witnesses, the time when this examination was made, the amount of oil still on the between-decks, and the condition in which these ballast hatches were found by Getshow and by Evald, who thrust his pencil through the seams, we are satisfied that they had been already lifted, and temporarily replaced. If this be so, there is no evidence from Getshow sustaining the contention of libelants that there were leaks in the between-decks. In view of the discrepancies in the testimony of Beirne, the cooper called by libelants, and the contradiction of some of its most material parts by testimony to which we give greater credit, and the manner in which it was given, we find it unsatisfactory proof of the presence of oil beneath the between-decks, except in the square of the after hatch and its immediate vicinity. He did not at any time while below look up at the underside of the between-decks. Evald, an inspector for underwriters, went aboard the ship three times, and on the last occasion, the oil casks in the between-decks being then removed, and the ballast hatches visible, made a report to his employers that there was a large amount of loose oil in the between-decks where the oil packages had been stowed, and on the underneath side a heavy coat of oil, "showing that the oil had soaked through every seam of deck, but most of it

appears to have run through the four ballast hatches abaft the after hatch." His testimony on the trial indicates that the examination from which he reached the conclusion expressed in this report was made principally in the between-decks. He says that he "went down into the between-decks," and "then saw oil on the deck where it had soaked through the seams,"—"from the lazarette up to the after hatch." The location of the lazarette was defined by a bulkhead in the between-decks, but not in the lower hold. Subsequently he went down into the after hatch, where they had broken down the cargo. The ballast hatches were all in place at the time, and most of the plumbago in place; but the witness says he "could see the space abaft just as well,"—a statement we are not inclined to credit. His opportunities for a careful examination of the underside of the between-decks seem to have been limited. He was evidently much impressed by the fact that he could thrust his pencil through the seams around the ballast hatches (not knowing that they had been lifted), and, seeing much oil on the between-decks and about the after hatch, made an exaggerated report to his employers, which has operated to make his description of the condition of affairs given on the stand more highly colored than his original inspection would fairly warrant. Moreover, on the trial he no longer talks of oil which had "soaked through every seam," but confines the leakage almost entirely to the ballast hatches. And those hatches could hardly be lifted and replaced on a deck flushed with oil without some of it being smeared over, and making its appearance on the underside of the seams.

When all this evidence is compared with that produced on the other side, notably the testimony of Nelson, the stevedore, who himself removed the upper tiers of the plumbago stowed in the after hold (a job which required him to work so close to the between-decks that his head came frequently into contact with its underside),—testimony supported by that of others whose opportunities for examination were better and more frequent than those of libelants' witnesses,—and when the positive evidence from the ship as to inspection and caulking of the between-decks is thrown into the scales, we are satisfied that the clear preponderance of proof is against the proposition that the oil which damaged the plumbago leaked through the between-decks, and, that being so, have reached the conclusion that the damage was the result of the irruption of sea water through the broken ventilators, a sea peril for which the ship is not responsible.

Some portion of the plumbago, however, sustained oil damage under circumstances which lead to a different conclusion. The between-deck hatches were not on during the voyage, being left off for purposes of ventilation. From the bottom of the ship, plumbago was stowed in the square of the after hatch up to the coamings in the between-decks; and on top of the plumbago in the after hatch were bales of fiber extending upward to the after hatch of the spar deck. The between-deck packages of oil were stowed from near the lazarette up to the coaming of the after hatch amidships. On the port side they extended to within about two feet abaft the coaming,

and on the starboard side to about the forward end of the hatch. It is abundantly proved that oil and also water poured over the coamings of this after hatch, and damaged a number of barrels of plumbago, variously estimated at from 20 to 30 in number. Whether this oil was altogether such as was carried on the surface of the water which came aboard at the time of the storm, and no doubt washed around the between-decks while it was seeking an exit through the scuppers, the open hatches, and the shaft to the water tanks, or whether part of this oil poured over the coamings without the assistance of any water, no one can tell. In view of the great quantity of oil that leaked from the casks (a leakage which the condition of the between-decks shows to have continued almost, if not quite, down to the day of arrival in New York), it is by no means improbable that some of this oil washed over the coamings of the after hatch on other occasions than during the storm of July 10th. The deck was built with a crown adapted to induce whatever oil leaked out to flow to the scuppers; but the *Dunbritton* was a sailing ship, and there were undoubtedly during the voyage long periods of time when she was heeled over so that the windward waterway and the crown of the deck were in the same plane. Moreover, the wood dunnage would cut this plane surface up into a great number of little reservoirs, with outlets more or less obstructed. A comparatively shallow accumulation of liquid oil between the coamings and the nearest casks might readily be swept over the coamings, which were only $3\frac{1}{2}$ inches high, by some sudden roll or pitch of the ship. Having undertaken to carry oil over dry cargo, the ship can justify such stowage only by showing that the deck between was tight. Certainly, so far as the after hatch was concerned, it was not tight. Cargo stowed below in the square of that hatch has been damaged; and unless the ship can show that this damage was caused by a sea peril, and not by improper stowage, she must be held responsible. In this case she only shows that it could have been caused by a sea peril, and does not negative the possibility of its being caused otherwise. For the damages to these 20 or 30 barrels of plumbago, the libelants Crooks & Co. and Knudson, Paterson & Co. are entitled to a decree, as interest therein may be made to appear.

The libelants Darragh & Smail claim for oil damage to mats and matting, coir yarn, and coir fiber. Of their consignment, 1,000 rolls of matting, 1,923 bales of coir yarn, and 314 bundles of mats were stowed in the between-decks forward of the after hatch. Manifestly, since there was no oil stowed in the between-decks except aft of the after hatch, this damage could be caused only in one or other of two ways. Either portions of this dry cargo were stowed next to the oil barrels, or on top of them, with insufficient dunnage to protect them from contact with any oil which might leak or spurt out, or else oil reached the dry cargo by flowing over the deck. It is unnecessary to discuss the evidence as to dunnage. The turmeric and nux which were stowed on top of the oil packages are out of the case; and, as to all the rest of the between-deck cargo, there is a clear preponderance of proof that the dunnage was proper and sufficient to protect it, not only against contact with the oil packages,

but against whatever oil might be expected to flow upon the deck. The dunnage wood raised the dry cargo $2\frac{1}{2}$ to 3 inches above the deck, and there would, in our opinion, have been no damage to it had not the great volume of water shipped during the storm floated the oil on its surface, and thus raised it above the dunnage where it could injure the dry cargo. As to all the rest of Darragh & Smail's dry cargo (except the dholls) stowed in the lower hold, none of it was placed below oil; and we are satisfied from the proof that such as was stowed on oil was properly dunnaged; that no oil leaked upon any of it from the between-decks, except on one bale, through a seam near the mainmast, and possibly on a few bales of fiber stowed in the square of the after hatch; and that the oil damage was caused in the way already described in discussing the plumbago claims. In our opinion, therefore, the ship is not liable, except for the bale near the mainmast, and those, if any, in the after hatch.

As to the dholls of coir a different question arises. The charter party provides that the ship shall "load for the charterers a full and complete cargo of lawful merchandise, including cocoanut oil in casks ('broken stowage,' at charterers' option, to the extent of 10 per cent., to consist of coir dholls, of from four to six English pounds weight each)," etc. Darragh & Smail shipped 16,721 dholls, which were stowed promiscuously with other cargo in all parts of the ship. Some 9,000 dholls were found to be damaged by oil, and a part of these by sea water as well. Undoubtedly, the damage to many of these was caused in the same way as was the damage to the plumbago, and, for damage thus caused, the ship is not responsible. But the proof indicates quite clearly that all of the dholls which were found to be oil-damaged were not thus affected only because of the presence of the water taken in through the ventilator holes; some of the dholls were exposed directly to leakage. This technical phrase "broken stowage" is not defined in any authorities to which we are referred, but the evidence of the experts, although not in all particulars in full accord, is sufficiently explicit to enable us to construe that phrase for the purposes of this case. All agree that packages taken as broken stowage may be stowed anywhere where there is a vacancy for them. Small packages thus taken are put into places where there are vacant spaces left in stowing casks and bales and bags, and may be put between clean cases of anything. There is some conflict in the expert testimony as to the amount of risk which the shipper takes of damage to cargo thus shipped. It is reasonable to assume that, as he pays but half rates, he takes some risk; but to what extent the ship should protect broken stowage from contact with other cargo is not entirely clear upon the proof. Inasmuch, however, as there is no claim made against the Dunbritton for any other damage to the dholls than that from oil, it is not necessary to determine any general measure of obligation. We are of the opinion that, when packages susceptible to damage from oil are taken simply as broken stowage, the ship is not entitled to use them as dunnage for casks of oil, which are known to be so liable to leak as are those which come from Ceylon, nor to stow them in immediate physical contact with such casks where it is almost in-

evitable that they would be soaked with oil before the voyage was ended. The libelants' witnesses, however, testify that there is : kind of broken stowage, especially from Colombo or Cochin or Alleppy, which is stowed all over the ship, even among the oil casks. It is known as "oil dholls," a cheap variety of coir, that oil does not injure. There were three lots of dholls taken aboard the Dunbritton,—one from Alleppy, described in the bill of lading as "8,086 dholls coir yarn"; another from Colombo, described in the bill of lading as "3,991 dholls coir yarn, shipped as broken stowage"; and the third from Cochin, described in the bill of lading as "4,650 dholls coir yarn, shipped as oil broken stowage." Undoubtedly, bills of lading are not independent contracts, but merely receipts for cargo shipped in accordance with the original agreement contained in the charter,—a proposition to which both parties assent, citing *Steamship Co. v. Theband*, 35 Fed. 620, and *Crenshaw v. Pearce*, 37 Fed. 432. But when it appears that this particular lot of dholls was receipted for by the ship as "oil broken stowage," with no objection on the part of the charterer who shipped them, it may be assumed, in the absence of any proof to the contrary, that those particular dholls were of the cheap quality of coir which oil does not injure, and which, according to the custom of the trade, may, if shipped as broken stowage, be stowed with the oil. It would appear, then, that for some of the damaged dholls the ship is responsible; for others, not. Claimants contend that it is to be assumed that the broken stowage dholls, 3,991 in number, were stowed with the plum-bago, and therefore injured only by the oil which was brought into contact with them as a consequence of the sea peril; and that the oil broken stowage dholls only, 4,650 in number, were stowed with the oil, and damaged directly by leakage from the casks. The aggregate of these two lots is, 8,641, which tallies closely with the estimated (9,000) of the number of dholls found to be damaged by oil. Having delivered this large number of dholls in bad condition, however, it is for the ship to show that they, or some part of them, were damaged by sea peril or by some other cause for which the ship is not responsible. There should be some affirmative proof that the different lots were stowed as is suggested. The court cannot assume that they were so stowed, in the absence of any proof at all upon that point. And, in the absence of such proof, the utmost that can be said for the ship is that she has shown that some portion of the 9,000 (what proportion we do not undertake to say) has been injured solely by causes for which she is not responsible. For the part not thus injured she should respond.

The expert evidence introduced by libelants in support of their contention that the Dunbritton was improperly loaded, and for that reason unstable, has not been overlooked. It is sufficient to say that on that point the preponderance of evidence is with the ship.

The decree of the district court is reversed, and the cause remitted to that court, with instructions to decree for the libelants for the damage to those packages for which the above opinion indicates that the ship is responsible, with costs of this court only.

UNITED STATES v. TINSLEY, Chief Supervisor of Elections.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 94.

APPEAL AND WRITS OF ERROR—ACTIONS AGAINST UNITED STATES.

An action brought by a supervisor of elections against the United States, under authority of the act of March 3, 1887, to recover items for services disallowed by the treasury department, is an action at law on a legal demand; and the judgment can be reviewed only on a writ of error, and not by appeal. *U. S. v. Fletcher*, 8 C. C. A. 453, 60 Fed. 53, and *Chase v. U. S.*, 15 Sup. Ct. 174, applied.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

A. J. Montague, U. S. Atty.

William B. Tinsley, in pro. per.

Before GOFF and SIMONTON, Circuit Judges, and SEYMOUR, District Judge.

SIMONTON, Circuit Judge. This is an appeal from the circuit court of the United States for the Western district of Virginia. The plaintiff below, appellee here, supervisor of elections, brought his action at law against the United States for certain items of services claimed by him and disallowed by the first comptroller of the treasury. The cause was heard by the court, and the greater part of his claim allowed the petitioner. The United States filed its petition for an appeal, which was allowed, and the cause thus comes here. This being an action on a legal demand, and properly an action at law, errors in the court below cannot be reviewed in this court except by writ of error. Act March 3, 1887, c. 359, § 9 (1 Supp. Rev. St. 561); *U. S. v. Fletcher*, 8 C. C. A. 453, 60 Fed. 53. The cause coming here by way of appeal, this court has no jurisdiction over it. *Chase v. U. S.*, 15 Sup. Ct. 174. It is therefore dismissed.

LONG v. LONG et al.

(Circuit Court, N. D. Iowa, C. D. April 13, 1896.)

1. REMOVAL OF CAUSES—JURISDICTION—DISTRICT OF RESIDENCE OF PARTIES.

If a case brought in a state court is such that it might have been brought originally in a court of the United States, then it may be removed to the federal court of the district wherein it is pending in the state court, when the facts bring it within the second section of the act of August 13, 1888, though neither of the parties resides in such district.

2. SAME—APPEARANCE—PETITION FOR REMOVAL.

An action was commenced in a state court against nonresident defendants, by attachment of their property. The defendants filed a petition for the removal of the cause to the federal court, not limiting in any way the effect of such petition, and alleging therein the pendency of a controversy between them and plaintiff. The cause was removed, and plaintiff moved to remand, on the ground that neither state nor federal court had obtained jurisdiction of the defendants. *Held*, that both through the

attachment and through the defendants' appearance the state court had jurisdiction of the case to which the federal court succeeded, and that the motion to remand should be denied.

Submitted on Motion to Remand to State Court.

H. E. Long and Funson & Gifford, for plaintiff.

Botsford, Healy & Healy, for defendants.

SHIRAS, District Judge. The plaintiff herein, who is a citizen of the state of Iowa, and a resident of Des Moines, in the Southern district, brought this action in the district court of Calhoun county, Iowa, against Isabella M. Long, Ella M. Long, Frederick M. Long, Christian L. Long, and Flora R. Long, who are all citizens of the state of Pennsylvania, and residents of that state, and H. J. Griswold, a citizen of Iowa, to recover the sum of \$4,000, claimed to be due plaintiff for the use and occupancy of certain realty situated in Calhoun county, Iowa, it being averred in the petition that H. J. Griswold was the agent of his co-defendants, and in that capacity had received the rentals accruing from said realty. A writ of attachment was sued out by the plaintiff and levied on certain realty, and notice of the pendency of the action was given by publication, under the provisions of the Code of Iowa, no personal service of the original notice being had, except upon the defendant Griswold. Upon the return day in the state court the defendant Griswold appeared by counsel, and moved the court to strike his name from the case, for the reason that it appeared on the face of plaintiff's petition that he had acted only as the agent for his co-defendants, and had no interest in the subject of the action. At the same time the non-resident defendants filed a petition for the removal of the case into the federal court, averring therein that they were the defendants to the suit, which involved over \$4,000; that the controversy existed between themselves, they all being, when the suit was brought, citizens of the state of Pennsylvania, and the plaintiff a citizen of Iowa, residing at Des Moines. The state court sustained the motion of the defendant Griswold, dismissing the action as to him, and granted the petition of removal to the federal court. The transcript having been duly filed in this court, the plaintiff now appears, and moves that the case be remanded to the state court for want of jurisdiction in this court, basing such motion upon two general grounds; the first being that, as it appears that neither the plaintiff nor any of the present defendants are residents in the Northern district of Iowa, jurisdiction cannot be taken by removal, because the action could not have been brought in this court originally.

In cases brought in the state courts, wherein a removal to the federal court is sought, the first question to be determined is whether the given action, either by reason of the subject-matter or by reason of the diversity of citizenship between the adversary parties, is one coming within the federal jurisdiction under the provisions of the existing statutes, and the second question is, if it be found that the case is one within the federal jurisdiction, whether the statutory requisites to the right of removal exist in the particular case.

In the case now before the court, it appears that the controversy therein set forth exists between a citizen of the state of Iowa (the plaintiff) and five citizens and residents of the state of Pennsylvania (the defendants), and the amount involved exceeds the sum of \$2,000, exclusive of interest and costs. It thus appears that the controversy is one of federal cognizance and jurisdiction under the provisions of the first section of the amendatory act of 1888 (25 Stat. 433), and under the express provisions of that section the plaintiff might have sued originally in the district wherein the defendants reside, in the state of Pennsylvania, or in the Southern district of Iowa, wherein the plaintiff resides; and, further, if the plaintiff had brought the action in any other federal district,—as, for instance, the Northern district of Iowa,—and the defendants had appeared generally in the action for the purpose of contesting it on the merits, the jurisdiction would have been undoubted. *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982; *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563. The contention of the plaintiff that a case cannot be removed into this court, under the acts now in force, unless the action could have been properly brought in this court originally, is based upon a misconception of the true meaning of the second section of the act of 1888. It is now the settled construction of this section that, if a given case, brought in the state court, is such that it might have been brought originally in a court of the United States, then it may be removed to the federal court of the district wherein it is pending in the state court, when the facts bring it within the provisions of the second section. *Fales v. Railway Co.*, 32 Fed. 673; *Short v. Railway Co.*, 33 Fed. 114; *Wilson v. Telegraph Co.*, 34 Fed. 565; *Machine Co. v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485.

The second ground upon which plaintiff relies in support of the motion to remand is based upon the assumption that the state court did not have jurisdiction over the persons of the nonresident defendants, they being served by publication only, and that their act in filing a petition to remove the case must be deemed to be a special appearance only, both as to the state court and as to this court, and therefore neither court had or has jurisdiction over the defendants. Under the provisions of the Code of Iowa, actions aided by attachment may be brought against nonresident defendants, and service of the notice of the action may be made by publication, and upon such service the court has jurisdiction over the property attached, and can subject it to the payment of the debt found due the plaintiff. Therefore, in this case, the state court without an appearance, special or general, on part of the defendants, could have proceeded to judgment against the attached property, and it therefore had jurisdiction over the case. When the defendants appeared therein, and filed the petition for removal to this court, it was not sought to restrict in any way the effect of the appearance thus made. On the contrary, in the petition for removal the defendants averred that there was pending between them and the plaintiff a controversy exceeding in amount the sum of \$2,000, exclusive of interest and costs, and it was this controversy which they prayed might be removed

into this court. By their own affirmative action they have invoked the jurisdiction of this court, and, having brought the action into this court, they would not be permitted to aver that they are not here for want of personal service. *Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36; *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982. If the defendants had not appeared in the state court, the jurisdiction of that court would not have been defeated as to the attached property; but by the appearance of defendants in that court it obtained jurisdiction over them personally, and it does not now lie with defendants to question the jurisdiction of this court. *Cowley v. Railroad Co.*, 159 U. S. 569, 16 Sup. Ct. 127. The defendants, however, do not seek to avoid the jurisdiction of this court on the questions of service or appearance, and there is, therefore, no substantial ground for the contention of the plaintiff to the effect that this court is without jurisdiction. If the state court had jurisdiction over the case, this court has succeeded thereto. If this court has no jurisdiction, it must be because the state court had none, —a position which the plaintiff does not assume. The facts now appearing of record show that the state court had jurisdiction over the case, that it was one removable to this court under the provisions of the act of 1888, and that the proper showing for removal was made and filed in the state court; whence it follows that this court has jurisdiction, and that the motion to remand is not well taken. Motion overruled.

THOMAS et al. v. HURST et al.

(Circuit Court, W. D. Missouri, W. D. February 28, 1896.)

1. LIMITATIONS—ACCRUING OF CAUSE OF ACTION—PARTNERSHIP.

In fixing the date at which the statute of limitations begins to run against a cause of action for an accounting of the affairs of a partnership, and especially of a so-called mining partnership, a court of equity will not always take the date of the actual dissolution of the partnership by the death of a partner or otherwise, but in a case where, of necessity or by consent, the surviving partner continues the management of the partnership affairs for the winding up of the business, will sometimes postpone the running of the statute until such management or winding up has been completed, or until such surviving partner has openly asserted an adverse claim to the partnership assets.

2. SAME.

Prior to 1875 defendant, C., and A. were partners in mining operations; defendant being the active managing partner, and C. and A. residing in a state distant from the mines, and A. being ignorant of mining. The mines produced no profit, but defendant reported encouragingly to A. from time to time, and A. placed entire confidence in him. A. died in 1875, and defendant, shortly after, wrote to his widow that his interest in the mines was then of no value, but might become valuable, and defendant pledged his honor to account fully to the widow for anything that might be realized. Thereafter he never communicated with her, but continued to hold onto the firm property, to run and traffic in the same, and, at various times, admitted to other persons that A.'s widow had an interest therein. Prior to and in 1883, defendant sold out mining properties of the firm for large sums of money, for which he did not account to A.'s widow, who was ignorant of the sales until she learned of them

through a third party. Shortly after learning of such sales, and within the statutory period of limitation after the last one, A.'s widow brought suit against defendant for an accounting of the partnership affairs. *Held*, that the suit was not barred by laches, nor by the statute of limitations.

Geo. M. Wright and R. O. Boggess, for complainants.
C. O. Tichenor, for defendants.

PHILIPS, District Judge. This is a bill in equity for discovery and accounting between partners. On preliminary hearing on pleadings and proofs, the court found that one Charles H. Gage and the defendant Hurst in 1872 were partners in equal interest in all mines, mining operations, purchases, and sales had, owned, and engaged in by them jointly and severally, and likewise in any quartz mills owned by them, or in which they or either of them were interested, in the territory of Montana; that in 1872, or shortly thereafter, Alden Gage, the brother of said Charles, was, by mutual consent, evidenced by written correspondence between the parties, admitted into an equal share in the partnership; that this partnership extended to all such property rights and interests as pertained to the said Charles Gage and the defendant, existing in 1872, or subsequently acquired by them or either of them, and that said partnership affairs had never been settled or adjusted; and that the defendant Hurst, the survivor of the said Charles and Alden Gage, was in default, in failing and refusing, after demand, to render to complainant Isabella Thomas, the surviving wife of said Alden Gage, an accounting. A reference was thereupon made by the court to the master in chancery to take an accounting. The master having filed his report, finding in favor of the complainant in a given sum, she has filed various exceptions thereto, complaining principally of the inadequacy of the sum found in her favor by the master.

The defendant, without filing any exceptions to the report, resists on this hearing the rendition of any decree against him, on the principal ground that the cause of action stated in the bill is barred by the statute of limitation, and because the complainant has been guilty of laches in demanding an accounting. As this objection, if valid, is fatal, it must be disposed of, as of prime importance. On the first consideration of this case the court expressed the opinion that the defendant was clothed with an express, continuing trust, and therefore the statute of limitation did not apply. I am satisfied, on further consideration, that this statement is too broad. As applied to an ordinary business co-partnership, commonly known as a "mercantile or trading partnership," each partner is impressed with an implied trust, in dealing with the joint property and business of the concern; and, in case of dissolution of the partnership by the voluntary retirement or death of one or more of the co-partners, the cause of action for an accounting against the remaining partner is subject, in this state, to the five-years statute of limitation. But, even as to such a partnership, it does not necessarily follow that the statute of limitation begins to run from the instant of the retirement or death of one of the parties. It depends upon the peculiar facts and circumstances of each particular case. Such a partner-

ship is of so peculiar a character that its affairs, devolving upon the surviving partner for adjustment and settlement, may be in such condition at the time of the retirement of one of the partners that its practical continuance for a greater or lesser period may be a necessity acted on and recognized by all the parties in interest. So where, from the necessities of the situation, or the consensus, expressed or implied, of such persons in interest, the surviving partner continues to conduct the business, manage and administer its affairs, courts of equity, *ex æquo et bono*, hold that a cause of action may not, in the particular circumstances, arise, within the meaning of the statute, for an accounting, until the purpose of such recognized continued management and administration by the survivor has been accomplished, and equity will postpone the beginning of the running of the statute until that consummation. *Massey v. Tingle*, 29 Mo. 437; *Coudrey v. Gilliam*, 60 Mo. 86; *Causler v. Wharton*, 62 Ala. 358. So it is held in *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. 924, that where the affairs of a partnership are being wound up in due course, without antagonism between the parties, and assets are being realized and debts extinguished, and no settlement has been made between the partners, the statute of limitation has not begun to run, and that when the right of action accrues for an accounting, so as to put the statute of limitation in motion, "depends upon the circumstances of each case, and cannot be held, as matter of law, to arise at the date of the dissolution, or to be carried back by relation to that date." But the partnership under review is what is known in our Western mining states and territories as a "mining partnership." Its purpose and business were the acquisition, by purchase or exploration, of mineral lands, their development and operation. The defendant was a practical and actual miner, who undertook, especially for Alden Gage, the former husband of the complainant, who resided in the state of Ohio, to manage and conduct in person the mines in Montana. Such associations are, in many important respects, *sui generis*. The *delectus personæ* incident to an ordinary partnership has no place in mining associations. Hence such partnerships are not necessarily dissolved by the retirement of one of the partners, and a sale of his interest to a third party, even without the consent of the remaining partner. Nor is such partnership dissolved by the bankruptcy or death of one of the partners. *Kahn v. Smelting Co.*, 102 U. S. 641; *Bissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. 851; *Skillman v. Lachman*, 23 Cal. 198; *Taylor v. Castle*, 42 Cal. 367; *Jones v. Clark*, *Id.* 180; *Blanch. & W. Lead. Cas.* 129, 130. Mr. Justice Field, in *Kahn v. Smelting Co.*, *supra*, said:

"Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities. Indeed, without them, successful mining would be attended with difficulties and embarrassments much greater than at present. * * * They form what is termed a 'mining partnership,' which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership. * * * Associations for working mines

are generally composed of a greater number of persons than ordinary trading partnerships, and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members, or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was therefore recognized as applicable to the relations to each other of members of a mining association. The *delectus personæ* which is essential to constitute an ordinary partnership has no place in these mining associations."

Courts of equity are never more efficacious nor zealous in the exercise of their preservative and protective powers than when they intervene to enforce the obligations springing from fiduciary relations, and in denying to the trustee any shelter for withholding trust property to the injury of the *cestui que trust*; and, when he undertakes to escape accountability by taking refuge behind the statute of limitation, these courts will not only construe such statutes most strongly against him, but where, by his silence when he should speak, or his acts, he has lulled into repose his unsuspecting beneficiary, or the circumstances of the particular case induce special reliance on the part of the beneficiary upon his fidelity, so as to impose upon him the honorable obligation of keeping his beneficiary informed of the true condition of the estate and his dealings therewith, his derelictions will, in the interest of exact justice, be held to amount to a fraudulent concealment. And to this end the courts will postpone the inception of the limitation period until he has, by some overt act, thrown off his allegiance, and the knowledge of his infidelity is conveyed to his *cestui que trust*. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594; authorities, *supra*. A striking illustration of the application of this rule is presented in the case of *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3. The defendant had been furnished by the plaintiff, during the late Civil War, in 1863, with a large sum of Confederate money, to be invested by the defendant, in the state of Texas, in lands, or other supposed profitable ventures. Defendant's character inspired the utmost confidence in his integrity and fidelity. No report was had from him until 1865, when he reported simply large investments in cotton. After that he persistently remained silent. No tidings were had of his whereabouts. In 1875 it was discovered that he had long prior thereto returned to the state of Virginia, where he had invested probably a part of the proceeds of his speculations in real estate. Thereupon plaintiff filed against him a bill in equity of discovery and for an accounting. To this the defendant interposed the plea of statute of limitation, which, under the *lex loci contractus*, was two years on a verbal contract, and four years under written contract, and, under the *lex fori*, was five years. The court said:

"We are not satisfied that the cause of action, as set out in the bill, was, at the commencement of this suit, barred by limitation, as prescribed in either Texas or Virginia. The case, as now presented, discloses, not, perhaps, one of those technical trusts of which a court of equity has peculiar and exclusive jurisdiction, but yet a trust arising out of express agreement, under which the defendant received from complainant certain funds, which he undertook to invest in particular kinds of property, in conformity with specific instruc-

tions given by those whom he represented. His duty, under the law, although the agreement did not, in terms, so declare, was, from time to time, as the circumstances required, to inform those whom he represented of his acts, and, upon completion of the trust, to render an account of all he had done in the premises, or, if he elected not to execute the trust, to surrender the property or its proceeds. He received the funds in 1863 or 1864. * * * He gave no information whatever of his acts until the spring of 1865, when, in response to a letter from his principals, he wrote that he had invested the funds in the transportation of cotton, under articles of co-partnership to continue during the war, and that the business was under the management of an active partner, who gave his whole time and attention to it. * * * But he withheld the name of that partner, and did not inform his principals of the result of that investment. From that time forward the defendant failed to communicate with complainants, or any of them, as to what, if anything, had been accomplished in the execution of his trust."

The court then proceeds to say that the existence of the trust was clearly established.

"It is still open, or not wholly executed. It has never been disclaimed by clear and unequivocal acts or words brought to the notice or knowledge of complainants, or either of them. There has been no adverse holding of the original fund, or of its proceeds. Consequently the possession by the defendant of the proceeds of the original funds, if invested at all, may be deemed the possession of those whom he undertook to represent."

Further on the court says:

"Unless otherwise distinctly declared by the statute prescribing fixed periods for the commencement of suits, the cause of action is not ordinarily deemed to have accrued against, nor limitation to commence running in favor of, the trustee of such a trust as in the bill described, until the trust is closed, or until the trustee, with the knowledge of the cestuis que trustent, disavows the trust, and holds adversely to their claims."

Applying these wholesome doctrines to this case, what are the facts? The defendant Hurst for many years prior to 1872 resided in the territory of Montana, engaged in buying, working, and operating gold and silver mines. Charles Gage, brother of Alden Gage, married the defendant's sister. Prior to 1872 he and the defendant had been intimately associated together in business and mining operations in Montana. In 1872 they were partners in all mining claims. Prior to that time, when one was marshal in one of the counties, the other was his deputy. When the term of one ceased, the former deputy would become marshal, and the former marshal would become his deputy; and they shared, *mutatis mutandis*, in equal portion, the income of the office. Shortly prior to 1872 Charles Gage took up his residence in the state of Iowa. By personal interviews and correspondence, he induced Alden Gage, who knew nothing of practical mining, and had never been in Montana, to become interested in said mining operations. He extolled in unmeasured terms the virtue, integrity, and trustworthiness of Hurst to his brother, Alden. The result was the admission of Alden into a full partnership in all their mines and mining operations. From time to time, Alden was called upon to make advancements to this concern, until he had advanced about \$2,000, under the supposition that Charles was advancing corresponding sums, but who in fact did not furnish but little over \$300, which he borrowed from Alden, and does not seem to have ever repaid. Defendant received and used this money.

Up to the time of Alden's death in 1875, defendant wrote him from time to time, respecting the condition of the business, which experienced the usual fluctuations, disappointments, and hopes characteristic of such adventures; but, under the letters of defendant, there was sufficient encouragement to keep up hope and remittances. In one of these letters, in 1874, Hurst said:

"Am happy, for can see how that within year or two, with good management, am going to make money out of quartz, I think. Am not sorry now that you are interested with us, only that it may take longer than you expected. * * * Our mill is running every day on gold rock, and is keeping up the expenses developing the mines. We have got plenty of gold quartz, as well as silver, that does not look so bad at present, but it will take us 18 months to get them in shape to make money."

In a postscript he speaks of Charley having written him suggesting that papers be drawn up showing that Alden was interested "with us."

"You will find that I will do just as I agreed, if not a little better with you. Although you are a stranger to me, you have placed confidence in me, and I hope I will never give you cause to regret it. I may make a failure, but I never will betray that confidence by any dishonest act, and I cannot think Charley would."

In the last letter he wrote Alden, in March, 1875, after apologizing for not writing to Alden, answering his inquiries, he said:

"Think this summer will tell the tale for us, as we have got men working on four different lodes. They look well. Would not sell one inch, unless could get plenty of money for it."

In 1877 Charles died childless, leaving his wife surviving. On May 7, 1877, after the death of Charles, Hurst wrote to Mrs. Alden Gage, in which he said, *inter alia*:

"In relation to your interest in Cherry Creek Mine, at present will say they are almost worthless; but at one time we could have made money by selling them, and the time may come again. Should it come, and there is any money realized out of it, I will give you my sacred word you shall have every dollar of your share, which is equal with Charley's and mine. As regards my integrity, outside of politics, I would refer you to Hon. W. F. Sanders, in Helena; Hon. Henry L. Blake, associate justice of Montana; P. A. Largey, C. L. Dahler, bankers; or any other business men in the territory."

From that time on to the institution of this suit, he gave her no information and made no report of his stewardship; but he held on to the property,—run and trafficked in the same. The master finds that among the partnership mines, under the partnership, were the Broadway, Ajax, and Red Bluff Mines and Mill; and Hurst admits in his letter that the Cherry Creek Mine was also among the partnership property. It is quite evident, from all the evidence in this case, that, at the time of the death of Alden and of Charles Gage, these mining properties were either in process of development, or that Hurst was preparing for their development and operation. He began active work on the Broadway Mine, developing the interest he and Charles had therein, in 1877. The property was in a condition in which it could not be abandoned, and it would have been destructive to the interests of all parties to have done so. He never denied the interest of his sister, as the widow of Charles Gage, in the Broadway Mine, for the evidence shows that he paid her large

dividends therefrom as late as 1880. Repeatedly, during the time he ran it, he admitted that Alden Gage was interested in the property; and the same Hon. W. F. Sanders mentioned by him in his letter to Mrs. Alden Gage testified in his deposition that as late as 1880, or perhaps 1881, the defendant proposed to send by him, to Mrs. Alden Gage, the sum of about \$3,000, on account of dividends in this Broadway Mine. This, however, the defendant denies, in a qualified way, by saying that it was only the sum of \$300 which he proposed to send her, as a mere charity. In 1881, meeting with an opportunity to sell out the partnership interest in this mine, he obtained from the widow of Charles a quitclaim deed for her interest, for which he paid her \$1,000, and in August of that year he sold the partnership interest, realizing therefrom \$15,000. In the following fall, or in 1882, he came to Kansas City, and bought a home with part of this money, and speculated with the balance, as he claims, and lost thereon. As late as November or December, 1883, he returned to Montana, and sold the Red Bluff property, which was the Red Bluff Mines and Mill, found by the master to belong to this partnership. So it appears that as late as November or December, 1883, within five years of the institution of this suit, he was engaged in looking after and closing out the partnership property. But he was as silent as the grave, so far as Alden's widow was concerned, as to these important sales. By his said letter to her in May, 1877, he gave her to understand, in effect, that the partnership interest was subsisting and continuing under his guardianship and watchful eye; and its effect was to persuade her to remain in hopeful inaction, relying upon the pledge of his "sacred honor" that in the end of his stewardship he would account for every dollar. But he concealed from her his sales of the Broadway and Red Bluff Mines and Mill, aggregating about \$20,000, and even the fact of his removal to Missouri. Not until a short time before the institution of this suit did Mrs. Gage learn, on a chance meeting with that same Hon. W. F. Sanders, of the sale of this property. And, when she did call him to account, he denied even the existence of the partnership in this property, and refused to render any account for a single dollar. Under such circumstances and facts, the plaintiff has not been guilty of inexcusable laches, and the defendant is not sheltered by the statute of limitation. Equity protests against such defense.

In respect of the suggestion of defendant's counsel that the master ought to have accepted, *nem. con.*, the testimony of the defendant to the effect that in a private interview had with Alden Gage, in Utah, shortly before his death, Alden gave him to understand that he abandoned to him (Hurst) his interest in said partnership, it is sufficient to say that defendant has filed no exceptions to the master's findings. And, even if this were an open question, the defendant is contradicted as to the probability of any such statement by his own letter to Mrs. Gage in May, 1877, in which he recognized her interest in certain partnership property, and promised her, if anything came therefrom, to account for it. If this were a suit between Alden Gage's administrator and the defendant, he would have been incompetent as a witness to such interview. And where he comes

to withhold the property of the dead man, from his widow, whose voice is hushed forever in the grave, the master is well justified, in view of all the facts and circumstances of this case, in discrediting that statement.

In respect of the exceptions taken by the complainant to the master's report, I am frank to say that he has dealt most liberally with the defendant, in allowing him credits for expenditures claimed by him to have been made in and about the partnership property,—especially in respect of certain credits allowed the defendant on account of purchases and work done prior to the admission of Alden Gage into the co-partnership. There is much reason in the contention of complainant's counsel that Alden was admitted into a one-third interest in the property as it stood at the time of his admission. But in view of the indefiniteness of much of the testimony, and the complications in the state of the accounts after so long a lapse of time, the master has, perhaps, on the whole, reached a conservative conclusion.

The master has not allowed any interest on the final sum found in favor of complainant. The justice of this conclusion is not apparent to the court. Interest is a compensation for the use of money wrongfully detained. It is customary for all courts to allow interest on the final sum found to be due on an accounting. And while it is to be conceded that a court of equity, in such case as this, would be justified in awarding interest on the balance found due to the complainant from the time when it should have been accounted for, certainly the complainant should be allowed interest on this sum from the date of demand of payment made of the defendant for an accounting. The statute of this state (Rev. St. § 5972) declares that creditors shall be allowed interest at the rate of 6 per centum per annum "for all moneys after they become due and payable on written contracts, and on accounts after they become due and demand of payment is made." As this is a demand on account not in writing, the interest should be computed from the date of demand. It appears that such demand was made some time before the institution of suit. In the absence of a more exact date furnished by the evidence, interest should be computed on the sum found by the master from the 9th day of July, 1888,—the date of filing the petition. Decree accordingly.

UNITED STATES v. NATIONAL BANK OF ASHEVILLE et al.

(Circuit Court, W. D. North Carolina. March 3, 1896.)

1. NATIONAL BANKS—LIABILITY FOR DEPOSITS OF POSTMASTER.

A national bank, not designated as a depository of public moneys, which receives, under the permissive authority of law and the regulations of the post-office department, deposits of money made by postmasters in their official capacity, thereby assumes a fiduciary relation to the government, and becomes a bailee of the government, so as to become directly responsible to it for any moneys which it knowingly or negligently allows the postmaster to withdraw by private check, or otherwise appropriate to his own use; and where, after the removal of the postmaster, he deposits a sum

to make good a shortage in his balance, the bank cannot apply it in discharge of a debt due it from him personally.

2. SAME—EQUITY JURISDICTION.

By reason of this trust relation, equity has jurisdiction of a bill by the government to require an account and settlement of the moneys so deposited with it; and this remedy is not affected by the fact of a cumulative remedy at law against the postmaster on his official bond.

This was a bill in equity by the United States against the National Bank of Asheville and others to require an accounting in respect to public moneys deposited with it by defendant George W. Cannon, as postmaster at Asheville. Defendants filed a general demurrer, which was duly set down for argument, and has been heard and considered on written arguments and briefs.

R. B. Glenn, U. S. Atty., and Moore & Moore, for the United States.

Davidson & Jones, for defendant national bank.

DICK, District Judge. The bill alleges in plain, positive, and specific terms, that defendant George W. Cannon was duly appointed postmaster at Asheville on the 27th day of March, 1889, and soon thereafter entered upon the duties of said office, and continued to discharge the same until 17th of April, 1893, when he was removed from office; that during his term of office, and between the 1st of April, 1892, and the 17th of April, 1893, he, in his official capacity, took into his possession the sum of \$40,594.04, moneys received from and in behalf of the United States, and deposited the same with the codefendant National Bank of Asheville, and received from said bank a "deposit book or pass book," showing a statement of the said deposits to the account of Cannon, as postmaster; that the defendant bank had full knowledge that the public moneys so deposited were the moneys and property of the United States. The bill further alleges that on the 13th of May, 1893, after his removal from office, the said Cannon deposited with the defendant bank the sum of \$600, to be applied as a credit to his said account as postmaster, in substitution of moneys which he had checked out of said bank, and appropriated to his own private use. The bill further alleges that the defendant had full knowledge of the removal of Cannon from his office on the 17th of April, 1893, and that the balance of \$4,764.82 on his deposit account as postmaster on the 13th of May, 1893, were the moneys of the United States, and not the funds of Cannon, as they were deposited in the fiduciary capacity of postmaster and financial agent of the United States.

In considering this case on demurrer, as I am of opinion that the facts clearly and specifically alleged in the bill are amply sufficient to authorize the equitable relief insisted on by complainants, I deem it unnecessary to refer to the force and effect of the allegations of the bill as to the claims and pretenses of the defendant bank in justification and defense, and the contrary charges and averments made in the bill. These are matters which can be fully set forth in subsequent pleadings, and be investigated, developed, and determined on the proofs.

It appears on the face of the bill that, before this suit was instituted, a regular demand was made on defendant bank for an account and settlement of the public moneys received by it on deposit by Cannon in his official capacity, and such demand was positively refused. As the defendant Cannon failed to appear on the proper rule day, and file plea, demurrer, or answer, an order was duly entered to take the bill *pro confesso*; and, 30 days having elapsed since such order was entered, this cause may be proceeded in *ex parte* against him, as provided in eighteenth equity rule.

The defendants' counsel properly insisted that the demurrer of defendant bank only admits the truth of the allegations of fact in the bill that are properly pleaded, and not matters of inference and argument or conclusions of law, however clearly they may be stated. A general demurrer presents objections to the equities of the case dependent upon the facts alleged in the bill, and must be determined upon the assumption of the truth of such allegations; and all legal inferences and conclusions of law are matters for the judicial notice of the court. A decretal order overruling a demurrer in equity does not determine the merits of a case, but only affords an expression of the opinion of the court that the allegation of the facts in the bill and the reasonable inferences deduced therefrom are sufficient to entitle the plaintiff to the relief sought. The defendant will have opportunity, by plea or answer, to disclose facts, and sustain them by evidence, and thus controvert the allegations in the bill; and he will not be estopped by the implied admissions of facts arising from his previous demurrer, as such admissions were only for the purposes of the argument.

Upon this hearing, on demurrer, the implied admissions of the defendant bank bring the case clearly within the ancient and fundamental principles of equity, well settled by text writers and numerous authorities, that all persons coming into the possession of trust property, with notice of the trust, shall be considered in equity as trustees, and bound with respect to that property to comply with the requirements and purposes of the trust; and when a party has dealings with a trustee, with actual or constructive notice of the trust, he will be required to repay to the trust fund any moneys which he may have received in consequence of the breach of trust. In such transactions a party is regarded in equity as conniving with the trustee in a violation of his duty, and will be declared by the court a constructive trustee, without any reference to the intentions of the parties concerned, either express or implied. In this case it is not necessary for the court to hold the defendant bank as a constructive trustee, as it voluntarily assumed the duties and obligations of an implied trust arising out of the conduct and manifest intention of the parties when the public moneys were deposited and received.

National banks are created and their franchises are defined by acts of congress; and in some degree they are under the visitatorial supervision of the government, but they are private corporations, and not parts of the government, although in some respects they are quasi public institutions, and designed to aid the government

when employed as financial agents in the public service. Their currency is secured by the deposit of bonds of the United States, and the government has a prior lien on their assets for the redemption of their currency. If designated as depositories of public moneys, they must give such satisfactory security by deposit of United States bonds as may be required by the secretary of the treasury for the safe-keeping and prompt payment of the public moneys deposited, and the faithful performance of their duties as financial agents. National banks not designated as depositories cannot lawfully receive public moneys on deposit, except in the case of postmasters making deposits under peculiar and specified circumstances. By positive law and the specific regulations of the post-office department (Postal Laws & Regulations, p. 72), all postmasters receiving public moneys in their official capacity are custodians of the funds collected by them or placed in their possession and custody, and are required to keep them safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, until ordered by the postmaster general to be transferred or paid out. Where there is no designated depository in the county where a post office is situated, the postmaster may at his own risk, and in his official capacity, make deposits in a national bank in his town or city; but he or any other person cannot demand or receive, directly or indirectly, interest on such deposits. A national bank that knowingly receives such funds from a postmaster under such permissive authority, and opens an account with him in his official capacity, assumes a fiduciary relation to the government by reason of the privilege conferred,—the confidence reposed, and the risk of possible loss. This implied authority of law to receive public moneys on deposit is, in effect, equivalent to an express delegation of authority to receive, and constitutes such national bank a bailee of the government, and it assumes the obligation of safely keeping the public moneys thus deposited and accepted; and any undue negligence or nonobservance of law on its part has the legal effect of fraud and breach of the trust and confidence expected and reposed under the sanction of positive law. Such funds are to be held and safely kept for the purposes intended, and can only lawfully be withdrawn by a postmaster under orders of the post-office department to meet the legitimate requirements of the public service. The bank, as a lawfully authorized bailee of such funds, is presumed to know the law regulating the care, custody, and disposition of the same,—and cannot, without incurring liability, knowingly allow the postmaster, by private check, to withdraw such funds for his personal use, and cannot under any circumstances retain and apply such funds in satisfaction of the personal indebtedness of the postmaster on private account. The fact that the public moneys deposited by the postmaster in his official capacity were mingled with the funds of the bank, so as to lose their identity, did not impair the legal and equitable rights of the government, which still remain as a charge upon the entire mass of the bank funds until the trust moneys are fully restored to the rightful owner. If the bank was insolvent, and was in process of

liquidation, the United States, by not taking the security required by law to guard against possible loss of public moneys deposited and received by permissive authority, would be in the position of other creditors in the distribution of the insufficient assets of the bank, who had no connection with the misapplication of the trust funds. *Cook Co. Nat. Bank v. U. S.*, 107 U. S. 445, 2 Sup. Ct. 561.

From the facts alleged in the bill, and impliedly admitted by the demurrer, it appears that the defendant Cannon, as postmaster, received large sums of money from the United States, and deposited the funds in his official character in the defendant bank, and opened an account as postmaster, and was furnished with a pass book, in which his official account was stated and entered by the officers of the bank. The bank was fully aware of the duties and obligations of the postmaster to the government, and it knowingly allowed him, to some extent, to withdraw these trust funds on private checks, for individual purposes, which caused a deficit in his official account, but there was still a large balance of the public funds deposited by him as postmaster; that to meet, in some degree, his deficit on official account, and shortly after his removal from office, he deposited in said bank \$600, and directed the same to be applied as a credit to his official account. By such direction of the depositor, this sum of \$600 became a part of the trust fund belonging to the United States, and could not be applied in payment of the debts which he owed the bank on private account. This question is not very material as to the result of this case as it appears on demurrer, as I regard the bank as under direct liability to complainants for any balance of the trust funds which it accepted as bailee after deducting the sums of money legitimately withdrawn by the postmaster, and applied to the purposes for which such public moneys were designed when deposited.

The counsel, in their written arguments and briefs, presented many questions of law they deemed involved, some of which I will briefly enumerate: The adequacy of a remedy at law that excludes equity jurisdiction; the principles of equity that authorize a bill for discovery and account even where there is some remedy at law; the exclusive jurisdiction in equity to adjust and enforce executory trusts; the contracts and relations between depositors and banks; the extent and nature of a banker's lien conferring the right to retain funds of depositors to meet their personal indebtedness; the nature of general deposits and special deposits; the duty and obligation of banks to honor and pay the checks of depositors; the liability of persons in possession of trust funds with notice of the trust; the rights of *cestuis que trustent* in a court of equity to follow misapplied trust funds so far as they can be clearly identified, or traced to other property into which converted; and as to how far trust moneys mingled and confounded in a general mass of same description can be ascertained and applied to the purposes of the trust. I have examined the authorities cited by counsel as far as they were conveniently accessible, but, with the views which I entertain, I deem it unnecessary to consider further many of the interesting questions of law presented in arguments and briefs.

With the facts before me on admissions of demurrer, I regard the defendant bank as responsible to the United States for any balance of public moneys under the directly assumed obligations of a lawfully authorized bailee for valuable consideration. The bank was, by law, accorded the permissive privilege of receiving public moneys from a postmaster without furnishing the security required of national banks that are expressly designated depositories. By this indulgence, the government incurred possible risk of loss if the bank should become insolvent; and the bank was relieved from the rigid penalties imposed upon private and unauthorized banks knowingly receiving deposits of public moneys by holding their receiving officers as guilty of embezzlement. A person dealing with officers of the government must take notice of the extent and nature of the authority conferred by law in their official capacity; and the United States are only bound by acts of officers which come within the just exercise of official powers. The defendant bank, by receiving public moneys deposited by postmaster in his official capacity, and by virtue of express authority conferred by law, assumed to some extent the obligations of a designated depository, and became, not a financial agent, but a bailee, bound to exercise the highest degree of care over the funds placed in its custody under the peculiar circumstances. Even if this legal proposition is too broad and stringent, under well-settled principles of equity the acceptance of public moneys by the bank, with full knowledge of their fiduciary character and the confidence reposed by the government, were sufficient to create a duty to devote such funds to the purposes intended by the deposit of such trust funds. *McKee v. Lamon*, 159 U. S. 317, 16 Sup. Ct. 11. If the bank assumed no higher obligations than those imposed upon a gratuitous bailee at common law, it was bound, in good faith and in law, to restore to the government on demand the public moneys deposited which had not been paid out by authority of law upon the official checks or orders of a rightful public officer. But the bank was more than an ordinary mandatary bailee, and its primary duty and obligation was to the United States, and not to the official agent who made the deposit. Its duties and obligations were imposed and defined by positive law, founded upon considerations of public policy. It must be presumed to know the law applicable to this peculiar kind of bailment. Such funds could not be used by bailee for the purpose of demanding and receiving interest. They were in the nature of special deposits for government purposes, and could only be withdrawn in the manner provided by law. If withdrawn on the official checks of the postmaster, and applied by him to his personal purposes, the bank would not be responsible, unless it had actual or constructive knowledge of the unlawful intention and purpose of the postmaster when the checks were drawn or presented and paid; for, as the checks were in proper form, the bank would have a right to presume that he was lawfully performing his official duty. The public moneys deposited by the postmaster in the bank did not come within the ordinary rules of law which establish the relation of creditor and debtor between depositors and

banks, and require the banks to honor and pay the checks of depositors when they have funds applicable to such purpose, and authorize the banks, by way of lien, to retain personal funds of depositors to satisfy individual indebtedness to the banks. The deposit of public moneys in this case in no way misled the bank, or was calculated to induce the bank to extend the personal credit of the official depositor. *National Bank v. Insurance Co.*, 104 U. S. 54. If the bank, as bailee, mingled these public moneys in the general mass of its own funds, it may be that the bank violated the law by directly or indirectly demanding and receiving interest; as it had no authority to loan such funds, and there was, by law, positive prohibition. The funds certainly did not lose the character they had when deposited, and all the funds of the bank became, in equity, trust funds of the United States, until the just claims of the government are adjusted and paid.

The counsel of the defendant bank insisted that the plaintiffs had a clear and adequate remedy at law against the postmaster and his sureties on official bond, and therefore could not resort to a court of equity for relief. The adequate, appropriate, and only remedy of the plaintiffs against the bank was in equity, and not at law. A court of equity has exclusive jurisdiction in administering and enforcing executory trusts, and a complaining cestui que trust has no remedy at law against a trustee for acts done in that capacity. The bank only occupied towards the plaintiffs the relationship of trust and confidence to keep the public moneys safely, and only allow them to be withdrawn in the manner provided by law. The adjustment and settlement of the affairs of such fiduciary relationship, when controverted questions of liability arose between them, gave rise to the necessity for discovery and account showing the condition and disposition of the funds of the executory trust, to enable a court of equity to determine the rights of parties by allowing all just credits and ascertaining any balance due from the bank. The fact that the plaintiffs have cumulative remedy at law against the postmaster on his official bond did not preclude the plaintiffs from the more convenient and effectual remedy in equity against the bank, as trustee of public moneys accepted by trustee. The plaintiffs had the right to seek the enforcement of the executory trust in equity, and proceed in same suit against all parties who have in possession any of the trust funds, or who knowingly participated in transactions affecting the subject-matter of the trust. As the public moneys were deposited by authority of law, and no security was required of the bank by the deposit of the United States bonds, the manifest object of the law in requiring the postmaster to deposit at his own risk was to reserve and continue the liability of him and sureties on official bond if the bank should become insolvent, and loss should be incurred by the creditors asserting equality of claim in the distribution of insufficient assets.

After careful consideration of all matters appearing in this case, the court directs a decretal order to be entered of record, overruling the demurrer, and requiring defendant bank to file plea or answer.

GENERAL ELECTRIC CO. v. WEST ASHEVILLE IMP. CO.

Ex parte CARRIER et al.

(Circuit Court, W. D. North Carolina. March 20, 1896.)

EQUITY PRACTICE — SUITS AGAINST CORPORATIONS — INTERVENTION BY STOCKHOLDERS.

The charter of the W. Co., a North Carolina corporation, was repealed by an act of the legislature, passed without the knowledge of the corporation or any of its members, and while it was solvent and a going concern. Pursuant to plans concerted at a meeting of the president and directors, a suit was instituted by a creditor for the winding up of the corporation, in which a receiver of the property of the corporation was appointed. Subsequently, several stockholders, including the president and secretary, petitioned for leave to intervene as parties, to protect their interests, alleging fraudulent dealing by the complainant, in derogation of the rights of the corporation and the petitioners, but not alleging that any request had been made to the directors of the corporation to raise the issues stated or protect the petitioners' rights. The Code of North Carolina (section 667) provides that corporations whose charters shall expire or be annulled shall, nevertheless, continue bodies corporate for three years, for the purpose of prosecuting and defending actions and winding up their affairs. *Held*, that the board of directors should have been applied to, to protect the stockholders' interests; and, in the absence of any allegation of the directors' neglect or refusal to do so, the individual stockholders should not be permitted to intervene.

C. M. Stedman, for General Electric Co.

Merrimon & Merrimon and John P. Arthur, for petitioners.

Before SIMONTON, Circuit Judge, and DICK, District Judge.

SIMONTON, Circuit Judge. This case comes up on a motion to vacate an order filed 14th January, 1896, permitting the petitioners and all other stockholders and creditors of the West Asheville Improvement Company to intervene pro interesse suo in the main cause, as defendants therein, with all the rights incidental thereto. It is proper to say that the motion is made by counsel with the permission granted to them by the judge who signed the order, and that without such permission it would not have been entertained.

The West Asheville Improvement Company was a corporation organized under the law of North Carolina. Some time about June or July of the past year, it was discovered that the legislature of North Carolina, at the session immediately preceding the discovery, had repealed the charter of the corporation. This discovery was a surprise to all parties interested in the corporation, and up to this time there seems to be a mystery connected with it. At the time of this repeal, the corporation was doing a large business, was in the enjoyment of a large and valuable property, owed a considerable debt, by way of mortgage securing outstanding bonds and a floating debt, but was by no means in an insolvent or even dangerous pecuniary condition. Called upon to meet this wholly unexpected emergency, a meeting of those who theretofore had been the president and directors of the corporation was called; and, after consultation with counsel, the proceedings in the main cause were instituted, the chief purpose and motive for which were the appointment

of a receiver to take charge of the assets and affairs of the late corporation. Receivers were appointed, and took charge, but no further steps were taken, the manifest desire being not to hasten progress until an opportunity was afforded of going before the legislature of North Carolina, and of obtaining a correction of an error if the repeal was the result of an error, or of a reconsideration of the action of the general assembly if the repeal was intentional. Pending this proceeding, the petition in question was filed. One of the petitioners, E. G. Carrier, was the president of the corporation before and up to the date of the repeal of its charter, and was present at and presided over the meeting called upon the discovery of the repeal above spoken of; and J. D. Carrier, another of the petitioners, was secretary of the corporation. The other petitioners are friends and relations of E. G. Carrier. The petition alleges acts of fraudulent dealing on the part of the complainant, in derogation of the rights and interests of the West Asheville Improvement Company and of the petitioners individually. It does not state that an approach has been made to the directors of the West Asheville Improvement Company, requesting that these issues be raised in the pending suit; nor does it allege any fraudulent conduct or partisan relation on the part of these directors; nor does it state any reason whatever for not applying to them for co-operation with the petitioners. It asks that they themselves be allowed to intervene and protect their own rights, in their own name. The order of the court now in question grants them this privilege, and extends it to all the other stockholders and creditors of the West Asheville Company.

As a general rule, the corporation represents all the shareholders in suits by a third party; and the directors control the action of the corporation. But if the directors are false to their duty, and there is danger that they will, from corrupt motives or blind obstinacy, abandon, neglect, or sacrifice the interests of the shareholders committed to their charge, then the courts of equity will permit stockholders to intervene for their own protection, and to seek and obtain the aid of the court. *Bronson v. Railroad Co.*, 2 Wall. 302. But, in the absence of such misconduct on the part of the controlling authorities of the corporation, they will not be permitted to intervene. And for obvious reasons. If such privilege be accorded to one, it must be allowed to all. And so a case will be burdened by a number of parties, and be exposed constantly to abatement by death, change of relation, or circumstance of individuals, and justice be greatly impeded. The questions in every case are: Is the complaining stockholder remediless unless he represent his own interest? Is there danger of the commission of a flagrant wrong? If these questions be answered in the affirmative, he will be allowed to intervene, notwithstanding that the remedy is an extreme one, and should not be permitted without hesitation and caution.

The board of directors of the Asheville Improvement Company consisted of persons the majority of whom are men of great business experience and judgment, of unexceptionable character, and possessing public confidence. There is no charge or suspicion of charge that they have acted or would act treacherously to the trusts con-

fided to them. The petitioner E. G. Carrier is himself one of this board, and coincided in all the action taken, consenting to the filing of the answer of his corporation in the main cause. The learned counsel who represents the petitioner, in a clear and very forcible argument, contended that no application could be made to the directors for relief, because, in point of fact, there are no directors of the West Asheville Improvement Company, as the repeal of the charter extinguished the life of the corporation and of all of its agencies. But the dissolution of a corporation from any cause does not destroy its property or pay its debts. The franchise of conducting itself as a legal entity, may be, is lost. But the rights of creditors, the obligation of debtors, and the property of the shareholders, remain. And in the absence of statutory regulations, without the necessity for statutory regulations, the courts of equity take hold of and protect these interests. In North Carolina the wisdom of her legislature has provided for such an emergency. In the Code of 1883, which is a single act, read and passed in accordance with the constitution, and therefore speaking as of the date of its passage, in words de præsentī, is this provision (section 667):

"All corporations whose charters shall expire by their own limitation or shall be annulled by forfeiture or otherwise shall nevertheless be continued bodies corporate for the term of three years after the time when they have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property and to divide their capital stock; but not for the purpose of continuing the business for which such corporation may have been established."

The provisions of this section are free from any ambiguity. The mischief to be remedied was the confusion possibly resulting from the abrupt dissolution of the corporation from any cause. The plan adopted was the continuation of the corporate character solely for the purpose of winding up its affairs. It is urged with great ingenuity that this section became and was by the operation of law a part of the charter of this corporation, the West Asheville Improvement Company, and that, when its charter was repealed quoad hoc, this provision was repealed also. But the proposition is as unsound as it is ingenious. It is not a provision of the charter of the West Asheville Improvement Company, but a general provision of law applying to all corporations. The repeal of this particular charter does not repeal it pro tanto. Indeed, the repeal makes it applicable actively to this particular corporation, as a sort of statutory letters of administration; whereas before the repeal it was a passive provision, if one may so speak. This being the case, the corporate character is continued by the statute, especially for the very purpose of a suit of this nature. And this is a corporate act, especially provided for. And as all corporate acts must be effected by agents, and as the directors are the general agents of the corporation, the petitioners could and should have applied to them to raise the issues they now present.

It is contended, however, that Code N. C. § 668, has provided a mode in which a receiver can be appointed for a defunct corporation; and that, under the decisions of the supreme court of North Caro-

lina, this mode is the only one which can be pursued. But, as has been seen, courts of equity, in the exercise of their appropriate jurisdiction, can take charge of and wind up the affairs of corporations whose charters have ceased from any cause to exist. The jurisdiction of courts of the United States in equity is derived from the constitution and laws of the United States. It cannot be enlarged. Nor can it be diminished by the legislature of any state. *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75; *Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936; *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342. In the case at bar, E. G. Carrier is the president of the corporation and the presiding officer of the board of directors. Surely, his representation would receive a respectful hearing, and his suggestions as to objections to the claim of the complainant will be listened to. At all events, until they are disregarded, the whole of the stockholders and creditors should not be made parties to this record. Under the circumstances in which the answer of the West Asheville Improvement Company was put in,—to meet but one emergency,—leave will be granted at any time to amend it so that complete justice can be done. If there be any cause of complaint against this complainant for its action towards the West Asheville Improvement Company, or a claim for affirmative relief because of this against it, a cross bill can be filed. If the amount due the complainant is in dispute, this can and will be examined into, and the correct sum ascertained in the necessary progress of the case. Before the affairs of this corporation can be wound up, each creditor and each stockholder must be called in to establish his claim. Coming in, they will have a right to dispute the conflicting claims. If the petitioners have any specific ground of complaint against the complainant for injury to their rights as individuals, each of them has a plain, adequate, and complete remedy at law. At all events, in the present stage the intervention is premature. If in the future development of the case, it should appear that there is danger that the rights of the petitioners, or any of them, are neglected or endangered, they may be allowed to become parties actively (compare *Williams v. Morgan*, 111 U. S., at pages 698, 699, 4 Sup. Ct. 638); or the pleadings can be so amended as to make them, or some one or more representatives of them, the parties to the record. The petition is dismissed, without prejudice.

DICK, District Judge. I have carefully read and considered the foregoing opinion, sent me by the circuit judge, and readily concur in the disposition made of the motion of petitioners.

RAINEY v. H. C. FRICK COKE CO.

(Circuit Court, W. D. Pennsylvania. April 7, 1896.)

PARTITION—COAL LANDS—INJUNCTION AGAINST MINING.

Complainant brought suit against defendant for the partition of certain coal lands owned by them in common, and defendant, in its answer, conceded the right to demand partition. Pending the suit, complainant ex-

tended the workings from certain mines owned by him on adjoining land, and began mining coal from the common land. Defendant then filed a cross bill to enjoin such mining, alleging that the same was causing irreparable injury to the defendant in its part ownership. *Held*, that the court had the power to enjoin such mining during the pendency of the suit, and in view of the complications which would result from it, in the adjustment of the respective interests of the parties, and the possible injury to the common property, such power should be exercised.

Sur cross bill praying for an injunction.

J. S. Ferguson, for complainant.

W. F. McCook and Knox & Reed, for defendant.

BUFFINGTON, District Judge. On March 15, 1895, W. J. Rainey, a citizen of the state of Ohio, and owner of an undivided one-third of a tract of land containing from six to seven hundred acres, situate in Fayette county, Penn., and known as the "Beeson Farm," filed a bill in equity, for partition, against the H. C. Frick Coke Company, a corporation of the state of Pennsylvania, owner of the remaining two-thirds. On May 6, 1895, the company filed its answer, conceding complainant's right to demand partition. The land is underlaid with Connelville coking coal. Adjoining the land on the south is a tract owned by Mr. Rainey, and on which are located his Mt. Braddock mine and coke ovens. Subsequent to the filing of the bill, Mr. Rainey, without asking leave of this court, extended flat heading No. 11 of his Mt. Braddock slope across the division line, and into the Beeson land, and has since mined coal from the same, taking it to the surface through the said slope. On March 11, 1896, the company filed a cross bill praying an injunction to restrain said mining. The bill alleged Mr. Rainey had in February, 1893, begun a proceeding for partition of the same land in the court of common pleas of Fayette county, and, after much testimony taken on both sides, had discontinued the same, by leave of court; and this is alleged to have been done in bad faith; and the same day he filed the present bill. The cross bill also alleged the coal constituted the principal value of the land; that the mining of it was causing irreparable injury to the company, in its part ownership, and tended to reduce the value of the balance of the coal in the tract; that the dip of the vein was such that the water from the Mt. Braddock mine would drain into the Beeson coal; that, owing to the presence of gas in the old and abandoned portions of the Mt. Braddock mine, there would be great danger in subsequently mining the Beeson coal from an opening made on that farm, unless protecting pillars of an otherwise needlessly large size, and of an irregular contour, to correspond to the operations of Mr. Rainey, were left as a protection against water and gas. It also alleged Mr. Rainey's plan of mining was made with sole reference to taking out the coal through the Mt. Braddock slope, and was inconsistent with a plan for taking it out through an opening made on the Beeson farm. The answer of Mr. Rainey denies bad faith in the former partition; asserts his right as a tenant in common to mine the coal; denies his operations will flood the Beeson coal, or endanger subsequent mining

thereof, through water or gas; and avers his operations are conducted on a proper plan, and in the usual method.

The issues formed bring us face to face with the question whether a court of equity which has assumed jurisdiction to partition land, the substantial value of which is in unopened coal, has power, pending its partition, to preserve the property by enjoining one tenant in common, on complaint of his fellow, from mining the coal through an entry from an adjoining tract owned by the latter. The right of the tenant to so mine, and the consequent lack of power in the court to prevent it, are broadly asserted in this case, and the question thus presented is of a novel and important character. In the absence of prior adjudications, its solution would seem clear, in the light of certain fundamental legal and equitable principles. When Mr. Rainey invoked the jurisdiction of this court by his bill, he stated:

"That the enjoyment of said tract of land by your orator and his cotenant, the defendant, is subject to great inconveniences and difficulties, and that they have been unable to procure a partition thereof between themselves, according to their respective rights and interests, whereupon your orator needs equitable relief, and prays * * * that your honors decree that partition be made of the above-described real estate between your orator and the defendants, according to their respective rights and interests."

To the right of Mr. Rainey to demand partition the company has assented by its answer, with the added averment that, the principal value of the land being its coal, "partition thereof, in proportion to the interests of the plaintiff and defendants, cannot be made without prejudice to or spoiling the whole," and praying "that said property be disposed of otherwise, as a whole, according to law." In addition to the court's jurisdiction of their persons, all parties have, by their voluntary acts, brought the land itself within the control or jurisdiction of the court, for valuation, partition, allotment, or sale, as the proofs and law may hereafter seem to warrant. The proceeding, then, is in the nature of one in rem, in that the court is asked to make a decree directed against, and acting upon, the land itself. Where a court of equity has rightfully assumed jurisdiction of a principal subject-matter, it has power to dispose of all questions incidental to and arising out of the principal subject of jurisdiction, and necessary to its proper settlement and disposition. See *Winton's Appeal*, 97 Pa. St. 395; *Allison's Appeal*, 77 Pa. St. 227; *McGowin v. Remington*, 12 Pa. St. 63; *Souder's Appeal*, 57 Pa. St. 498; *Socher's Appeal*, 104 Pa. St. 615. And, in proceedings in partition, its scope is not narrowly restricted; "for," as was said in 1 Story, *Eq. Jur.* § 656b, "in all cases of partition a court of equity does not act merely in a ministerial character, and in obedience to the call of the parties who have a right to partition, but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex æquo et bono*, according to its own notions of general justice and equity between the parties." Moreover, it is clear that a court of equity has the power, and in a proper case will restrain the exercise of a legal right, where it is improperly or inequitably used. *Rog. Mines*, 795; *Buckland v. Gibbins* (1863) 32 *Law*

J. Ch. 391. Assuming the legal right of Mr. Rainey, as a co-tenant, to mine the coal up to that time, when the court assumed jurisdiction to partition the land the prior legal rights of the parties to the suit to consume or diminish it by mining became subject to the equitable control of the chancellor. If the subject-matter of partition is consumed, obviously no partition of it can be made. It would therefore seem that, as between the parties to the suit, power in the court to preserve is a necessary incident to jurisdiction to partition. In *Hawley v. Clowes*, 2 Johns. Ch. 122, which was a bill to partition land, and for an injunction to restrain a tenant in common from cutting timber, Chancellor Kent granted the injunction, saying, "This remedy is peculiarly proper and appropriate pending a bill for partition of the very land." In *Obert v. Obert*, 5 N. J. Eq. 397, while it was held the facts did not justify the application of *Hawley v. Clowes*, yet Chancellor Halstid expressed his approval of it, and said the principle of Chancellor Kent in that case was a safe one. It would thus seem that this court has the power to enjoin, if the application in hand commends itself to the sound discretion of the chancellor. Upon that point we have no question. There are serious and well-founded objections to allowing the mining of this coal pending the partition. The mining thereof until final decree would result in an anomalous situation, and involve the proceedings in confusion and serious embarrassment. What period would be chosen as the one at which to estimate the value of the land? Would it be the tract as it was when the bill was filed, or as it is when the witness testifies, or as might be when this decree is to be made? If either of the first two is chosen, the testimony would not be applicable to the situation when the decree was made; and, if the last, the evidence would be wholly problematic and speculative. Indeed, in any aspect, if mining were allowed the court would be confronted by a shifting state of facts and values, which, in its confused and confusing nature, could afford no stable ground on which to base an intelligent, equitable, and just decree. If the tenant of the one-third cannot be restrained, the tenant of the two-thirds should not; and, if both mined, the confusion of facts and proofs would be such that no court could practically and intelligently value, allot, or partition the land. To say the powers of a court of equity are so plenary and plastic that from these intricacies it could work out the equities of both parties, and mold a decree to suit the requirements, is to beg the question. The prompt use of its plenary powers to prevent these mischiefs at the outset of the case, rather than to cure them at the close, is a course which better commends itself to the sound discretion of a court of chancery. By preserving the status in quo,—one of the most beneficial branches of equity jurisdiction,—we avoid confusion and all danger of injustice, and insure a speedy, plain, and practical method of arriving at a proper decree. These considerations alone are sufficient to move a chancellor, in the exercise of a sound discretion, to preserve the present status of the land. But there are other facts which strengthen him in that conclusion. The proposed mining is not through a shaft or slope upon the premises themselves, nor through one which will inure to the benefit of the

subsequent owner of the land. The coal at that part of the land is thus made servient to an opening on an adjoining tract; the plan of mining is based on operations through the land of another; and even entry to or inspection of the coal is, so far as the objecting tenant is concerned, at the will or license of the owner of the dominant adjoiner. As we have seen, the respondent company asserts the tract cannot be justly partitioned, but should be disposed of as a whole. Upon that question we express no opinion, but, if such be the case, it is obvious that the mining of the coal during the pendency of the bill may seriously impair the rights of the parties; for it is obvious to those conversant with the coal business that the successful and profitable mining of large blocks of coal requires a comprehensive and consistent plan of proposed operations. Hence plans that might be feasible and economical, and which would render the whole tract of great value, might have to give way to relatively more expensive ones, if only a third, a half, or two-thirds of the tract could be had. It is obvious, too, that a plan which would distribute the cost of general items of expense, such as shaft, pumps, ovens, and other necessary appliances, over a large block of coal, would render that acreage relatively more valuable than when applied to a much smaller quantity. Whatever may be the facts in this particular case, and whatever the proofs may hereafter disclose, certainly the court should see to so preserving the status of the land that, if the justice of the case requires such a decree, the suitor shall not be deprived of his right to it, and its enforcement. As regards the method of mining here sought to be enjoined, we have conflicting statements from equally experienced men that grave damages from gas and water will—and from others, equally experienced, that they will not—result to the Beeson coal. We will not attempt to pass on these differences. Whether these apprehensions are well or ill founded, it is sufficient to say the subtle character of the subterranean elements in question are always, in mining operations, elements of more or less uncertainty and possible danger, and we avoid all risk of doing harm to the land we have undertaken to partition by staying the hand of all parties until we have finished our duty in the premises. The temporary suspension of the co-tenant's right to mine in this case works no hardship, since it has been for months past, and is now, in his power to speed the proceeding to final decree. This he can do in much less time than he could do if mining were allowed, and caused confusion and consequent delay in procuring a final adjustment. In the exercise of what we believe to be a sound discretion, in furtherance of the orderly conduct of the cause, and with a view to an intelligent and prompt disposition of the same, we are of opinion an injunction should issue as prayed for, and it is so ordered.

ALLINGTON & CURTIS MANUF'G CO. et al. v. GLOBE CO.

(Circuit Court, S. D. Ohio, W. D. April 6, 1896.)

No. 4,490.

PRACTICE—TAKING DEPOSITIONS IN PATENT CASES—EXTENSION OF TIME.

On defendant's motion for further extension of time for taking testimony, it appeared that complainant's counsel, resident in Hartford, Conn., was in attendance at Cincinnati from February 28th to March 14th, to be present at the taking of defendant's evidence, but that defendant took no evidence except on the first two and last five of those days; four of the latter days being occupied by an expert in answering a single question, without assistance from counsel. *Held*, that defendant was not entitled to an extension of time for taking additional expert testimony.

Offield, Towle & Linthicum and Albert H. Walker, for complainants.

Parkinson & Parkinson, for respondent.

SAGE, District Judge. The defendant's motion for further extension of time to take testimony is overruled. It appears that counsel for the complainants, whose residence is at Hartford, Conn., was in attendance at Cincinnati all the time from the morning of February 28 to the evening of March 14, 1896, to be present at the taking of defendant's evidence, but that the defendant took no evidence except on the first two and the last five of those days, although his counsel was in his office during the seven intervening business days. The only testimony taken during the second week in March was the deposition of one of defendant's experts, who occupied four days of that time in answering one question, without any assistance from counsel for defendant. The proposition now is to open up the testimony, to allow the taking of the deposition of another expert with reference to the operation of the Stratton steam separator when experimentally used as a dust collector. I see no reason why counsel for the defense cannot, if they so desire, procure from the expert, for their own use, his views on that subject, and then incorporate the substance of them in their brief or in their oral arguments. Such testimony is, after all, argumentative, and in most cases would be quite as effective if presented to the court as a part of the arguments of counsel. It is forcible in proportion as it appeals to the judgment and conviction of the court, rather than on account of its being under oath. Or, as suggested by Judge Taft, when a similar application was made to him, the steam separator might be operated in open court on the hearing in the experimental way desired. The showing made is not sufficient to justify the extension requested. The application is refused.

RATHBONE v. BOARD OF COM'RS OF KIOWA COUNTY.

(Circuit Court, D. Kansas, Second Division. March 19, 1896.)

No. 467.

1. COUNTY RAILWAY-AID BONDS—VALIDITY—VOTING—EXCESSIVE AMOUNT.

The voting for an issue of bonds in excess of the amount allowed by the statute does not invalidate the vote, and bonds may be issued thereunder up to the lawful limit; but where, at the same election, bonds are voted for two railroads, in amounts which, taken singly, are in excess of the limit, and the subscription is first made by the county commissioners to one of the roads for the full amount voted for it, a subsequent subscription to the other is entirely void. *Chicago, K. & W. R. Co. v. Commissioners of Osage Co.*, 16 Pac. 828, 38 Kan. 597, followed and applied.

2. SAME—INNOCENT PURCHASERS—NOTICE—RECITALS.

Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and all its requirements; and if there is want of power to issue the bonds, they are void in the hands of innocent purchasers, regardless of other recitals contained therein.

3. SAME—CONSTRUCTION OF STATUTES.

Whenever the power to issue bonds is called in question, the authority must be clearly shown, and will not be deduced from uncertain inferences. It can only be conferred by language which leaves no reasonable doubt of an intention to grant it. *Brenham v. Bank*, 12 Sup. Ct. 559, 144 U. S. 173, and *Ashuelot Nat. Bank of Keene v. School Dist. No. 7, Valley Co.*, 5 C. C. A. 468, 56 Fed. 197, followed.

4. SAME.

In a general law providing for the organization of new counties, a proviso that "no bonds of any kind shall be issued by any county, township, or school district, within one year after the organization of such new county" (Act Kan. Feb. 18, 1886), prohibits, not only the issuance of the bonds within the year, but also the taking of any of the prescribed preliminary steps, such as the voting by the people of authority to issue them. *Coffin v. Commissioners of Kearney Co.*, 6 C. C. A. 288, 57 Fed. 137, applied.

5. SAME—CONSTITUTIONAL LAW—GENERAL AND SPECIAL ACTS.

The constitution of Kansas declares that "all laws, of a general nature, shall have a uniform operation throughout the state, and in all cases where a general law can be made applicable, no special law shall be enacted." The general law of February 18, 1886, providing for the organization of new counties, contained these two provisos: "Provided, that none of the provisions of this act shall prevent or prohibit the county of Kiowa * * * from voting bonds, at any time, after the organization of said county; and provided, further, that no bonds of any kind shall be issued by any county * * * within one year after the organization of such new county." Held, that the proper construction of these provisos was that no new counties, except Kiowa, could either vote or issue bonds during the first year, but that Kiowa county might vote bonds within the year; that the effect of the proviso in favor of Kiowa county was to prevent a general law from having a uniform operation, and that proviso was therefore void. *Darling v. Rodgers*, 7 Kan. 598, and *Robinson v. Perry*, 17 Kan. 248, applied.

6. SAME—INNOCENT PURCHASERS—RECITALS.

Dealers in municipal bonds are bound to know the law; and a county is not estopped by a recital in the bonds that the vote and subscription were had "in pursuance" of a certain statute, when, under its true construction, such statute was not applicable to the county, at the time the vote was taken, because it had been organized for less than a year. *Dixon Co. v. Field*, 4 Sup. Ct. 315, 111 U. S. 92, *National Bank of Commerce v. Town of Granada*, 4 C. C. A. 212, 54 Fed. 100, and *Coffin v. Commissioners of Kearney Co.*, 6 C. C. A. 288, 57 Fed. 137, applied.

This was an action by Charles D. Rathbone against the board of county commissioners of the county of Kiowa, Kan., upon coupons of county railway-aid bonds. Plaintiff has demurred to the answer filed by the defendant.

Gleed, Ware & Gleed, for plaintiff.

S. S. Ashbaugh and L. M. Day, for defendant.

WILLIAMS, District Judge. This suit is instituted upon past-due coupons, detached from 16 bonds, of \$1,000 each, issued by the defendant county to the Kingman, Pratt & Western Railroad Company, and upon past-due coupons, detached from 30 bonds issued by the defendant to the Chicago, Kansas & Nebraska Railway Company. In each instance, the bonds were issued in payment of stock subscribed for by the defendant, in the respective companies.

Without stating the matters alleged in the answer in detail, it will be sufficient to say that the defendant county avers the bonds were issued by persons who were not clothed with power to issue the same, in disregard of the law governing the issue of this class of bonds, and that the amount issued is in excess of that which could be issued under the law. To the answer a general demurrer has been filed. All the steps taken by the county officers, in relation to the election, the canvass of the vote, and making of the subscriptions, if done at a time when the law authorized them to be done, appear to be regular.

The laws of Kansas authorize counties to subscribe for stock in railroad companies, and pay for the same with bonds of the character of those from which the coupons in suit are detached. The amount of indebtedness which may thus be created is fixed by statute:

"No county shall issue, under the provisions of this act, more than one hundred thousand dollars, and an additional five per cent. indebtedness, of the assessed value of such county, and in no case shall the total amount issued to any railroad company exceed four thousand dollars per mile, for each mile of railroad constructed in said county." Comp. Laws 1885, p. 783, § 68.

The courts of Kansas, in the construction of this act, have held that, after a proper petition has been filed, the board of commissioners of the county can be compelled to make an order for the holding of an election and submit the proposition of voting bonds to the voters of the county. They have also held that, after a subscription has been made, the officers designated by the statute to sign the bonds can be compelled to sign the same. In addition to this, they have held that, after the subscription has been properly made and accepted, this creates a binding contract which can be enforced by law.

As will be seen, the amount of bonds which may be issued by any county, under the law, is \$100,000, and an additional 5 per cent. indebtedness of the assessed value of such county. The assessed value of the defendant county, on the 23d of March, 1886, was \$236,662. The greatest amount of bonds then which could be issued, under the act, was \$111,833.10. There were two propositions for bonds before the board of commissioners,—the one for \$115,000 to one com-

pany, and \$120,000 to another, the two amounts aggregating \$235,000; and the assessed value of the county was only \$236,662. Both propositions were submitted to the voters at the same election, and both were declared carried. Either of the sums so voted are greater than the limit prescribed by the act. But it was held, in *Chicago, K. & W. R. Co. v. Commissioners of Osage Co.*, 38 Kan. 597, 16 Pac. 828, that the voting for more bonds than could be lawfully issued did not invalidate the vote, and that bonds, under such a vote, might be issued to the lawful limit. Hence, the question of the amount voted passes out of the discussion.

On the 25th of June, 1886, the board of commissioners authorized the county clerk to make a subscription to the Chicago, Kansas & Nebraska Railway Company for 1,200 shares, of \$100 each. The order is as follows:

"And the said board of commissioners of said county, as provided for in said proposition, and by law in such case, do now and hereby order and direct that the county clerk of said county of Kiowa, state of Kansas, do and shall, for and in behalf and in the name of said county of Kiowa, at once, subscribe, and make due and proper subscription of, twelve hundred shares, of one hundred dollars each, of the capital stock of the said Chicago, Kansas & Nebraska Railway Company," etc.

In pursuance of this order, and on the same day, the county clerk executed the following instrument:

"Whereas, on the 25th day of June, 1886, the board of county commissioners of the county of Kiowa, in the state of Kansas, did make and enter of record, upon the journals of its proceedings, an order directing the county clerk of said county of Kiowa, for and in the name and on behalf of said county of Kiowa, to make due and proper subscription to twelve hundred shares, of one hundred dollars each, of the capital stock of the Chicago, Kansas & Nebraska Railway Company," etc.: "Now, therefore, I, J. M. Crawford, county clerk of the county of Kiowa, state of Kansas, in pursuance of the statute in such case made and provided, and in obedience to the said order of the board of county commissioners, do hereby subscribe to, and make subscription of, twelve hundred shares, of one hundred dollars each, of the capital stock of said Chicago, Kansas & Nebraska Railway Company, for and on behalf of and in the name of the county of Kiowa, state of Kansas, and I do hereby take twelve hundred shares of the capital stock of said railway company, in the name of said county, and for its behalf and benefit," etc.

"In testimony whereof, I have executed, and signed and executed, this instrument and subscription, by subscribing my name hereunto, as county clerk of said county, and attesting the same under the seal of the said county of Kiowa, state of Kansas, at my office in Greensburg, the county seat of said county, this 25th day of June, 1886.

"[Signed]

J. N. Crawford,

"County Clerk of the County of Kiowa, State of Kansas."

"Approved:

"J. W. Gibson,

"J. L. Hadley,

"Board of County Commissioners of Kiowa County, Kansas."

The action of the county clerk, in executing this instrument, on the day of its execution, was reported to the board of county commissioners, and it made the following order thereon:

"The clerk of said county thereupon informs the board of county commissioners of said county of Kiowa that, in obedience to the foregoing order, he has made the subscription of stock, as required by said order, and now submits the same for approval, which is done by said board, and the said board further orders that the subscription, so made by the county clerk, be copied and spread

upon the minutes and record of proceedings of said board, and that said subscription be delivered to said company, as provided in the foregoing order, and it is accordingly so done."

This action of the board of county commissioners, in connection with that of the county clerk, on the 25th day of June, 1886, under the adjudications of the courts of Kansas, constituted a concluded contract, if, at the time these acts were performed, the parties performing them had the power to act for and bind the county.

On the 2d of August, 1886, the board of commissioners of said county made the following order:

"Board ordered clerk to subscribe for eleven hundred and fifty shares of the Kingman, Pratt & Western Railroad Company, at the value of one hundred dollars each, for the benefit of said county of Kiowa."

On the same day the county clerk executed a similar instrument to that mentioned in the case of the subscription to the Chicago, Kansas & Nebraska Railway Company.

Waiving, for the time being, the question of whether the board of commissioners of Kiowa county had the power to order a vote on the proposition submitted, and whether they could make a binding subscription, upon which bonds might thereafter be issued, until after the expiration of one year, the question is, which of these subscriptions shall stand? The supreme court of Kansas has settled this precise question. In *Chicago, K. & W. R. Co. v. Commissioners of Osage Co.*, 38 Kan. 597, 16 Pac. 828, which was a proceeding by mandamus to compel the issue of bonds voted to that company, it appears there had been two votes, as in the case at bar, to different companies, and the amount of the two, when added together, or taken singly, exceeded the amount of bonds which might lawfully be issued. The defense was a subscription had been made to the Kansas, Nebraska & Dakota Railroad Company, and that a delivery of bonds had been made to that company in payment of such subscription, and that this had exhausted the full amount which might be lawfully issued by the respondent in aid of railroads. The court, in speaking in response to that contention, say:

"No county can, under any circumstances, issue more than \$100,000 and an additional 5 per cent. indebtedness of the assessed value of each county. This is the limit of their power to issue bonds, for railroad purposes, under the provisions of the act. * * * This issue may be to only one railroad company, or it may be divided between several; but, if the full amount is at first subscribed to some one railroad company, it [the county] has no power to subscribe to the capital stock of any other railroad company. * * * If it subscribes the full amount allowed to one company, its power is exhausted, and it cannot subscribe to others."

This being true, it follows that all the bonds issued to the Kingman, Pratt & Western Railroad Company are void, because the limit of bonds which might lawfully issue had been reached and exhausted when the subscription was made, on the 25th of June, 1886, to the Chicago, Kansas & Nebraska Railway Company. The bonds issued to the Kingman, Pratt & Western Railroad Company recite that they are issued under an act entitled "An act to enable counties * * * to aid in the construction of railroads and to repeal section eight of chapter thirty-nine of the Laws of 1874," approved February

25, 1876, and by acts of said legislature amendatory thereof and supplemental thereto. This act informed every dealer in bonds purporting to be issued under the provisions of that act that no more than \$100,000 and the 5 per cent. therein mentioned could be issued thereunder. An examination of the records of the county would have shown the power to issue bonds had been exhausted.

At this late day it is hardly worth while to indulge in an extended citation of authorities in support of the proposition that every dealer in municipal bonds which, upon their face, refer to the statute under which they were issued, is bound to take notice of the statute and all its requirements, and of an equally well-settled rule that, if there is a want of power to issue the bonds, they are invalid in the hands of innocent purchasers, regardless of other recitals therein contained. In *Nesbit v. Riverside Independent Dist.*, 144 U. S. 617, 12 Sup. Ct. 746, a statute was under consideration which declared that "no county shall become indebted, in any manner, or for any purpose, to any amount, in the aggregate exceeding five per centum on the value of the taxable property within such county"; and the court say: "She was bound to take notice of the value of taxable property within the district, as shown by the tax list." A like question arose in *Sutliff v. Lake Co. Com'rs*, 147 U. S. 234, 13 Sup. Ct. 318, under a similar provision; and the court held the purchaser of the bond was bound to take notice of the valuation of the taxable property of the county.

As against both classes of bonds from which the coupons in this suit are detached, the objection is made that Kiowa county could not vote for or issue bonds within one year after its organization. On the other hand, it is contended that there is nothing in the law which inhibited the defendant county from voting to issue bonds within one year after its organization, and that the inhibition in the statute in relation to new counties relates, solely, to the issuing of bonds. In that behalf it is urged that the proviso which contains the limitation against the issue of bonds by counties which have not been organized one year does not withhold the power to vote therefor. The most that can be said of a contention of this kind is that the power claimed on behalf of a new county to vote for bonds within a year after its organization is to be found in the silence of the statute. It is conceded that, in the matter of issuing bonds, counties which have been organized less than one year are not upon an equality with counties that have passed the year of probation. While this is conceded, it is denied that there is any inequality as to the power of voting to issue bonds. The rule of law in relation to the issue of negotiable bonds is that, whenever the power to issue is called in question, the authority to issue must be clearly shown, and will not be deduced from uncertain inferences, and can only be conferred by language which leaves no reasonable doubt of an intention to confer it. *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559; *Ashuelot Nat. Bank of Keene v. School Dist. No. 7, Valley Co.*, 5 C. C. A. 468, 56 Fed. 197. It seems to me that the power claimed for the issue of the bonds in question rests entirely upon uncertain inferences, rather than upon affirmative language, which leaves the

mind free from doubt, as to the exercise of the power claimed. In the year 1876, the legislature of Kansas passed an act, of a general nature, providing for the organization of new counties. In that act there was a provision which declared "that no bonds, of any kind, shall be issued by any county, township or school district, within one year after the organization of such new county." On the 18th of February, 1886, it passed another act, covering the same subject as the act of 1876. This new act was a revision of the old, required a greater population, and threw some safeguards around the organization of new counties which were not in the act of 1876. In addition to this, it placed two provisos in the act of 1886, which are as follows:

"Provided, that none of the provisions of this act shall prevent or prohibit the county of Kiowa * * * from voting bonds, at any time, after the organization of said county. And provided, further, that no bonds of any kind shall be issued by any county, township or school district, within one year after the organization of such new county."

While this act was in force, on the 22d of June, 1886, an election was held in Kiowa county, and a vote was taken on a proposition to subscribe \$115,000 to the Kingman, Pratt & Western Railroad Company and \$120,000 to the Chicago, Kansas & Nebraska Railway Company, and the vote was canvassed on the 25th of June, 1886, and the vote for both companies declared carried. On the 10th of February, 1886, the legislature passed an act, entitled "An act to restore or re-create the county of Kiowa," and on the 18th of February, 1886, another act was passed, making Kiowa county a part of the Thirty-Ninth senatorial district, and on the 19th another act, placing that county in the Twenty-Fourth judicial district. These acts have no material bearing on this case, and are referred to only to show, hereafter, that the legislature had knowledge and took cognizance of the fact that the people residing upon the territory out of which the county was created expected, at an early day, to have a county organization, and why the legislature attempted to permit Kiowa county to exercise a power which it did not grant to other new counties, which had not obtained a perfect county organization. Kiowa county, at the date of these acts, had not become an organized county, under the laws of the state. The census taker, appointed by the governor, on the 19th of March, 1886, filed his report, and on the 23d of March, 1886, the governor made proclamation, that there were 2,704 bona fide inhabitants in said county, that 549 of them were householders, and that the value of the taxable property in the county was \$236,662, and appointed three commissioners and a county clerk for said county. It is conceded that these officers qualified on the 27th of March, 1886, and, under the law, that from and after that date it was organized into what under the law of Kansas is called a "new county," and that it might do and perform whatever a new county might do.

Assuming, for the sake of argument, that the language of the proviso, found in the act of 1886, which declares that "none of the provisions of this act shall prevent or prohibit the county of Kiowa, or any township or school district therein, from voting bonds at any

time after the organization of said county," confers power on that county to have voted bonds before it had been organized one year, the question arises, as to whether the legislature could, in the manner it so attempted, effect that object?

Section 17 of article 2 of the constitution of the state declares:

"All laws, of a general nature, shall have uniform operation throughout the state, and in all cases where a general law can be made applicable, no special law shall be enacted."

The supreme court of Kansas, in *Darling v. Rodgers*, 7 Kan. 598, declared that this provision of the constitution of the state was mandatory, and not directory. That the act in relation to the organization of new counties is a general law, in the sense that word is used in the constitution, does not admit of doubt.

In *Robinson v. Perry*, 17 Kan. 248, an act declared:

"All persons owning or having sheep, shall keep the same from running at large, except in this act otherwise provided: provided, that the provisions of this act shall not apply to the county of Doniphan."

This act was amendatory of an act, passed in 1869, which inhibited sheep from running at large in certain counties, unless the legal voters of those counties should, by vote, otherwise declare. The court held that the act of 1869, which exempted the counties named, as well as the act in question, interfered with the uniform operation of the fence act, was void, and was obnoxious to the provision of the constitution quoted. Judge Brewer, in discussing this provision of the constitution, uses this language:

"The language is plain and positive that all acts of a general nature shall have uniform operation. No discretion is left to the legislature or the courts. * * * Now, the fence law of 1868 is, without question, a law of a general nature, and of uniform operation throughout the state. No part of its terms are repealed by the herd law. If the latter act be valid, the former no longer has a uniform operation throughout the state. That which was a general law, and had the required uniformity of operation, still remains the general law, but it is deprived of such uniformity. * * * Tested by this rule, the fence act of 1868 is valid, and the herd law of 1870 void. * * * But it is contended that the two clauses of this constitutional section must be construed together, and the positive requirements of the first clause considered as limited by the discretion given by the latter; * * * that power to pass special laws carries with it the power to limit the operation of the general law by special laws. * * * If the legislature can, by simply specifying the locality over which a law shall operate, change a law of a general nature, the obligations of this valuable constitutional provision are weaker than a rope of sand."

Now, what is the material difference between the acts referred to by Judge Brewer, and one that reads as follows:

"No bonds of any kind, shall be issued by any county, within one year after the organization of such new county: provided, that the provisions of this act shall not apply to the county of Kiowa."

The act of 1886 was evidently enacted as a general law, and intended to apply to the organization of all new counties throughout the state. To sustain such a proviso would limit its uniform operation, and give to one new county a power or privilege which the other new counties were not permitted to have. It may be urged that the power conferred on Kiowa county may be sustained by treating the act as special. To do this would render the act ob-

noxious to that provision of the constitution which requires that no act shall contain more than one subject, which shall be expressed in the title.

It is contended by the defendant that the provisos in the act of 1886 are repugnant to each other, and that the last one must prevail. That contention is not assented to. But for the fact that it destroys the uniform operation of the great body of the act of 1886, the proviso might well stand. Kiowa county, as has been stated, was what is termed "duly organized" on the 27th of March, 1886. Having arrived at the conclusion that the proviso in relation to that county is void, we are confronted with the other proviso, which reads:

"No bonds of any kind shall be issued, by any county, township or school district, within one year after the organization of such county."

All law writers agree that, in the construction of a statute, the intention of the legislature should prevail, if it can be ascertained. All agree that the intent may be gathered from the act itself, and the supreme court of the United States have examined the course of a bill in the legislative body, and previous statutes on the same subject, for the purpose of arriving at that intent.

The defendant insists that the proviso which declares that "no bonds of any kind shall be issued by any county, township or school district, within one year after the organization of such county," does not authorize or warrant a new county to take any of the preliminary steps towards the issuing of bonds until after the expiration of one year after the organization, and that, to give the power to issue bonds, three prerequisites must consecutively follow each other: (1) the resident taxpayers of the county must present the character of petition, described in the law, to the board of commissioners; (2) they must order an election, and that a majority of the votes cast thereat must be in favor of the issue of the bonds; (3) that the board of commissioners make a valid subscription to or for the stock of the company in whose favor the vote was had. These prerequisites are common knowledge, especially by dealers in bonds, and by the members of a legislature; for the courts of every state in the Union, as well as the courts of the United States, have from time to time announced these propositions, in cases where the authority to issue was predicated upon the conditions stated. That this general knowledge exists is evidenced by the proviso which the legislature of Kansas incorporated in the act of 1886 in relation to Kiowa county. It had under consideration a general act in relation to the organization of new counties. It had knowledge of the fact, as its legislation shows, that Kiowa county, or rather its people, were seeking to have a county organization at an early day. It was revising and amending an act in relation to the organization of new counties, in which there was a provision that no bonds should be issued by any new county within one year of its organization. It proposed to, and did, re-enact that proviso; but at the same time it desired to permit the then unorganized county of Kiowa to exercise a function which it was not willing should be exercised by any other new county to be

formed thereafter. That act or thing, which it intended to permit Kiowa county to do, was what? The answer is that it intended to give to that county the privilege, not of issuing bonds within a year of its organization, but to vote for the issue of bonds within that year. If the proviso, as it stood in the act of 1876, and as carried into that of 1886, conferred upon new counties the right or privilege of voting for bonds within the first year of its organization, why was an attempt made, by a separate proviso, to authorize it to do what it is now claimed it might have done without the proviso? The proviso in relation to Kiowa county evinces an intent. The other proviso shows another. The first intent was to allow Kiowa county to vote before the expiration of the probationary year. The other shows an intent that the new counties to be thereafter organized should not have that power. The question of allowing new counties to vote for bonds within the year of minority was presented by the case of Kiowa county, and it is plain, from what was done, that there was no intention of extending a like privilege to other new counties. If it intended to have extended the privilege of voting at an earlier period than one year, it could have made that intent plain by saying that "nothing herein contained shall prevent any county from voting for bonds within a year of its organization." No such language is found, and no such power was intended to be granted.

The view here stated is borne out by subsequent legislation on the same proviso. In 1887 the greed to vote bonds made its appearance before the legislature. The result was that the proviso was amended so as to read:

"No bonds, except for the erection and furnishing of school houses, shall be voted for and issued by any county or township, within one year after the organization of such county."

Here the question of voting for bonds within the year was again up for consideration, and the right was extended, not to counties or townships, but to school districts. If the school districts had the right to vote for bonds, under the act of 1886, within one year after the organization of the county, why is it that, in 1887, those who desired that power for the school districts desired the law amended? If a school district had the power to vote before the expiration of a year, under the act of 1886, the counties and townships had. It must be borne in mind that the new counties, under the law of Kansas, were not clothed with all the powers of the older counties.

The circuit court of appeals for this circuit, in the case of *Coffin v. Commissioners of Kearney Co.*, 6 C. C. A. 288, 57 Fed. 137, had occasion to speak of the powers of the new counties coming into being under the act of 1886, and say:

"The proviso [in the act of 1887] does not, as counsel suppose, impose a limitation upon the exercise of power which becomes vested in a newly-organized county, as soon as commissioners are appointed, but its effect is to prevent such power from being vested until a year after its organization."

If it be true that the power does not vest until a year after the organization, it follows, as night follows day, that there was no power in Kiowa county or its officers to order or hold an election; and, if this be true, the bonds are void.

The supreme court of Kansas, in speaking of the nature and powers possessed by counties during the first year of the organization, say:

"Now, it will be admitted that, when the temporary county officers appointed by the governor have qualified and entered upon the discharge of their duties, the county is organized. But such organization is not a completed organization; or, at least, it is not an organization sufficient for all purposes. At that time the county has no county attorney, no clerk of the district court, no county treasurer, no superintendent, no county surveyor, and no probate judge."

No presumptions can be indulged in favor of such an organization unless it is given in plain and unmistakable language. Having held that the proviso in the act of 1886, which attempted to authorize or permit Kiowa county to vote for bonds before it had been organized one year, is obnoxious to the constitution of the state, where is the power to be found which authorized a vote and subscription at the time these acts were performed? It is urged that the general law authorized counties to make such vote and subscription, and under that the power existed, because the inhibition in the proviso in the act of 1886 only prohibits the issuing, and not the voting, of bonds within the year. To say that such power vested, to the extent of allowing a vote to be taken, within the year, is to accept the theory that the proviso is a limitation, which the circuit court of appeals declares is not true.

It is urged by the plaintiff that the county is estopped, by certain recitals in the bonds, from setting up a defense to these bonds. Recitals as to matters of fact sometimes operate as an estoppel, in the case of innocent purchasers for value; but recitals as to the existence of a law and the power conferred by it, which are false, cannot create an estoppel. The bond recites that it was issued under a certain act, and that the vote and subscription was had under and in pursuance thereof. The circuit court of appeals have decided that that act did not go into effect, as to newly-organized counties, until one year after their organization. In *Anthony v. Jasper Co.*, 101 U. S. 697, the court say:

"Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market."

In *Dixon Co. v. Field*, 111 U. S. 92, 4 Sup. Ct. 315, the question of estoppel by reason of recitals in the bonds was under consideration, and the court say:

"This does not extend to or cover matters of law. All parties are equally bound to know the law, and a certificate reciting the actual facts, and that thereby the bonds were conformable to law, when, judicially speaking, they are not, will not make them so; nor can it work an estoppel upon the county to claim the protection of the law. Otherwise, it would always be in the power of a municipal corporation to which the power was denied to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself."

In *National Bank of Commerce v. Town of Granada*, 4 C. C. A. 212, 54 Fed. 100, the circuit court of appeals for this circuit say:

"It has never yet been held that a false recital in a bond can make that a law which never was law."

The same theory of estoppel now urged was insisted on in *Coffin v. Commissioners of Kearney Co.*, 6 C. C. A. 288, 57 Fed. 137, a case wherein the power of newly-organized counties, under the very act under consideration in this case, was passed upon, and the court say:

"Even if we were able to concede, according to the contention of counsel, that a newly-organized county, in the state of Kansas, is endowed with the power, during the first year of its existence, and by virtue of the appointment and qualification of commissioners, to issue funding bonds, and the proviso is a mere limitation as to time of the mode of exercising the power, still we would not be able to concede the further proposition of counsel that purchasers of bonds issued by such counties are not required to ascertain the age of the county, but may rely upon the recitals which such bonds happen to contain."

And, in the concluding portion of the opinion, this language is found:

"It was at least incumbent on the purchaser of the bonds to ascertain that Kearney county had become a recognized political subdivision of the state. That fact had to be ascertained to enable the bondholder to further ascertain if it had power, under any circumstances, to issue bonds. A casual examination of the record kept in the governor's office would have disclosed the fact that the commissioners were not appointed until April 3, 1888, which was less than four months previous to the day on which the bonds bear date."

Both series of bonds involved in this suit on their face recite that they were issued under and in pursuance of an act which, it has been seen, was not applicable to a new county, such as the defendant was, and in pursuance of a vote had on the 22d of June, 1886. If the holders of these bonds had examined the record in the executive office, they would have found the commissioners were appointed on the 23d of March, 1886, and that the vote for the issue of the bonds was had in three months thereafter. If they had examined the act regulating the creation of new counties, they would have found, as has the circuit court of appeals, that such counties did not become vested with the general powers conferred by the act recited in the bonds until one year after their organization, and that Kiowa county did not have power to contract for the issue of the bonds in suit.

The bonds issued to the Chicago, Kansas & Nebraska Railway Company contain, among other things, this provision:

"This is one of a series of one hundred and twenty bonds, of like tenor, date, and amount [\$1,000 each], numbered from one to one hundred and twenty, inclusive, issued to the Chicago, Kansas & Nebraska Railway Company."

An examination of the appraisal of the taxable property of Kiowa county would have shown that Kiowa county, at the time it contracted to issue the 120 bonds was without authority to issue more than \$111,000 of bonds. It appears, from the pleadings, however, that the whole number of bonds have not been issued. If the views expressed in this opinion are correct, it would serve no useful purpose to enter upon a discussion of the subject suggested. That a vote to issue bonds, not taken under the sanction of law authorizing the same, will not confer power to issue bonds, is well settled in *George v. Oxford Tp.*, 16 Kan. 72, and in *McClure v. Township of Oxford*, 94 U. S. 429.

In conclusion, it may be stated that the power of the defendant county to vote, on the 22d of June, 1886, for the issue of these bonds,

is not free from doubt. On the contrary, the power claimed can only be deduced from the silence of the statute and the absence of negative words. The power to issue the class of bonds in suit must rest on a more firm foundation. Entertaining these views, the demurrer is overruled.

HOWARD v. KIOWA COUNTY.

(Circuit Court, D. Kansas, Second Division. March 19, 1896.)

No. 502.

1. COUNTY BONDS—VALIDITY—POWERS OF COMMISSIONERS.

The fact that bonds issued by Kiowa county, Kan., under the refunding act of 1879, were issued by the county commissioners without a previous vote of the people, does not affect their validity, for by Gen. St. Kan. 1889, § 1613, it is provided that the "powers of a county as a body politic and corporate shall be exercised by the board of county commissioners"; and, as there is nothing in the funding act prescribing by whom its powers shall be exercised, that duty falls upon the commissioners.

2. SAME—REFUNDING BONDS—COUNTY WARRANTS.

A statute authorizing the funding by a county of "matured and maturing indebtedness of every kind and description" (Act Kan. March 8, 1879) includes indebtedness evidenced by county warrants.

3. SAME—NEGOTIABLE BONDS.

Statutory power to issue bonds includes power to make them negotiable, unless restricted by positive enactment. *West Plains Tp. v. Sage*, 16 C. C. A. 553, 69 Fed. 943, followed.

This was an action by George R. Howard against the county of Kiowa, Kan. Plaintiff demurs to the answer.

Hutchings & Keplinger, for plaintiff.

S. S. Ashbaugh and L. M. Day, for defendant.

WILLIAMS, District Judge. This is a suit upon coupons cut from 79 funding bonds of the defendant county, issued February 2, 1889, to take up \$44,000 in railroad aid bonds and \$35,000 in county warrants. The defendant has filed an elaborate answer, to which a demurrer has been interposed. Several defenses are set up.

1. It is said that the question of whether the bonds in suit should be issued was not submitted to a vote of the people of the county. To that it need only be replied that the act authorizing the issue of the bonds does not require a popular vote. By section 1613 of the General Statutes of Kansas of 1889, it is provided: "The powers of a county as a body politic and corporate shall be exercised by the board of county commissioners." And, there being nothing in the funding act prescribing by whom its powers shall be exercised, it is plain that the duty falls upon the county board. Counsel argue with great earnestness that, if such be the case, a corrupt board of commissioners could destroy the financial prosperity of the county. That is true. The power to issue commercial paper is the power to destroy him in whose name it is issued. It should be conferred with care, but, when it has been conferred, it is not for the courts to deny the grant. Nor is it by any means certain that the power would be

exercised more wisely by the people of the county than by the commissioners. The history of bond issues in this country has shown that the people are as prone to listen to the beguiling of artful emissaries of projected railroads as their commissioners could possibly be. Our government is representative, not democratic. It concedes the final sovereignty to the people, but they are expected in all ordinary contingencies to act not in person, but through their representatives. In that way they are ruled by those whom they select as wisest and most patriotic, not by the shifting tempests of popular excitement. The principle of direct government by the people, and of the referendum, has found little favor in this country. The fact that in numerous other acts for the issue of bonds a popular vote has been required can throw no light upon one where nothing of the sort is provided for. If anything, it shows that the legislature was aware of the necessity of making express provision for such a course, and lends significance to its omission in this instance.

2. It is said that the act gives no authority to fund warrants. The act of 1879 authorizes the funding of "matured and maturing indebtedness of every kind and description whatsoever." It is gravely argued that a warrant is not a debt; but it is apparent that it not only represents a debt, but one which has been audited and allowed, which is mature at the date of its allowance. And the funding of warrants is often essential to the prosperity of the county. They become so numerous that they are greatly depreciated in value. Everything furnished to the county is upon the basis of the actual value of the warrants, necessitating the creation of a large debt for the purchase of trifling commodities. Under these circumstances, the only salvation frequently lies in funding a portion of them, so that the remainder may regain something like their face value, and the business of the county may no longer be transacted on the basis of a ruinous discount.

3. It is said that no authority is granted to make the bonds negotiable. The character of municipal bonds is as well established as that of a bill of exchange or promissory note, and it is no more necessary to say "negotiable bonds" than to say "negotiable notes" or "negotiable bills." In few of the acts authorizing the issue of such bonds is it declared that they shall be negotiable. When the power to issue them is given, the officers authorized may, unless restricted by positive enactment, make them payable to order or to bearer, and such is the uniform practice. Thus, in *Ashley v. Supervisors*, 8 C. C. A. 455, 60 Fed. 55, the court of appeals for the Sixth circuit held: "Statutory authority to issue and market bonds, which are to run for a long period of time, and bear interest, held to authorize, by implication, bonds negotiable in form." So, in *City of Cadillac v. Woonsocket Inst.*, 7 C. C. A. 574, 58 Fed. 935, the same court held that "statutory power to issue 'bonds' for loans lawfully made includes power to make the bonds negotiable." In *West Plains Tp. v. Sage*, 16 C. C. A. 553, 69 Fed. 943, this particular statute was construed by the circuit court of appeals for this circuit, and held to authorize the issue of bonds negotiable in form.

4. It is said that the railroad aid bonds surrendered in exchange for the bonds in suit were void, because voted for within a year after the organization of the county, and because in excess of the constitutional limit. In the view which I take of the case, it is not necessary to decide that question.

The bonds were issued by the proper officers, and contained the following recital:

"This bond is one of a series of bonds of like amount, tenor, and effect executed and issued by the county commissioners of said Kiowa county, to refund its matured and maturing indebtedness heretofore legally created by said county, and in accordance with an act of the legislature of the state of Kansas entitled 'An act to enable counties * * * to refund their indebtedness,' approved March 8, 1879; and it is hereby certified that the total amount of this issue of bonds does not exceed the actual amount of the outstanding indebtedness of Kiowa county, and that all the requirements of the provisions of the foregoing act have been strictly complied with."

It is plain that, under the repeated decisions of the federal courts, the purchaser was entitled to rely upon this recital, and was not bound to inquire into the consideration for which the bonds were issued.

Thus, in *Hackett v. Ottawa*, 99 U. S. 96, Mr. Justice Harlan says:

"It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case the city, both upon principle and authority, is cut off from any such defense. What this court declared, through Mr. Justice Campbell, in *Zabriskie v. Railroad Co.*, 23 How. 381, as to a private corporation, and repeated, through Mr. Justice Clifford, in *Bissell v. City of Jeffersonville*, 24 How. 287, as to a municipal corporation, may be reiterated as peculiarly applicable to this case: 'A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.'"

So, in *Ottawa v. National Bank*, 105 U. S. 343, the same learned judge says:

"If the purchaser, under some circumstances, would have been bound to take notice of the provisions of the ordinances whose titles were recited in the bonds, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances provided for a loan for municipal purposes. Such a representation, by the constituted authorities of the city, would naturally avert suspicion of bad faith upon their part, and induce purchasers to omit an examination of the ordinances themselves; and, consequently, the city was estopped, as against a bona fide holder for value, to say that the bonds were not issued for legitimate or proper municipal or corporate purposes."

In *Town of Coloma v. Eaves*, 92 U. S. 484, it was held:

"Where, by legislative enactment, authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the enactment that the officers of the municipality were invested with power to decide whether that condition has been complied with, their recital that it has

been, made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal."

In *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, it was held:

"When there is an express recital upon the face of a municipal bond that the limit of issue prescribed by the state constitution has not been passed, and the bonds themselves do not show that it had, the holder is not bound to look further."

In *City of Cadillac v. Woonsocket Inst.*, 58 Fed. 935, 7 C. C. A. 574, it was held by the court of appeals of the Sixth circuit that:

"Recitals in bonds issued by a city council under statutory authority, that they are 'refunding' bonds, issued to take up 'old bonds falling due,' estop the city from showing, as against bona fide holders, that the old bonds were invalid, and therefore insufficient to support the issuance of the new ones."

Again, in *Ashley v. Supervisors*, 8 C. C. A. 455, 60 Fed. 55, it was held:

"Refunding bonds, payable to bearer, recited that they were issued by the board of supervisors in conformity with the provision of an act authorizing the county to issue such bonds, and provide for the retirement of outstanding bonds. Held, that the purchaser was not bound, in the face of the recitals borne by the bonds, to investigate the nature of the refunded indebtedness."

Many other cases might be cited, but, as the circuit court of appeals for this circuit has passed upon this very statute, it is not deemed necessary to pursue the inquiry further.

In *West Plains Tp. v. Sage*, 16 C. C. A. 553, 69 Fed. 943, bonds were issued under this act containing recitals similar to those contained in the bonds now before the court; but instead of being issued in exchange for warrants, as alleged, they were issued to secure the location of a sugar factory; and it was held that the township was estopped by the recitals to set up the fraud as against a bona fide purchaser. Even were I inclined to the contrary view (which is not the case), I should be bound by that decision. When we contemplate the calamitous consequences which have resulted from it, we may regret that the supreme court should have established the doctrine of estoppel by recitals in municipal bonds; but it is now too deeply imbedded in the law to be shaken, and is conclusive of this case.

The demurrer to the answer is therefore sustained.

INTERSTATE COMMERCE COMMISSION v. LOUISVILLE & N. R. CO.

(Circuit Court, M. D. Tennessee. April 17, 1896.)

1. JURISDICTION OF THE UNITED STATES CIRCUIT COURT OVER ORDERS MADE BY THE INTERSTATE COMMERCE COMMISSION.

The jurisdiction of the United States circuit court is limited to an approval or disapproval, and to an enforcement or refusal to enforce an order of the commission. The court has no authority to modify the order of the commission.

2. SAME.

The court may go fully into the proof to determine whether it will approve an order made by the commission, and may hear any additional proof.

3. SAME.

An order made by the commission is essentially an administrative order, and is not final or conclusive in the sense of a court judgment or decree. And an order of the United States circuit court, enforcing an order of the commission, does not change its character or make it a final judgment.

4. THE JURISDICTION OF THE COMMISSION.

The function of the commission is both quasi judicial and administrative in its nature. The commission is required to make reports in writing in respect to complaints made to it. Such reports must include the findings of fact upon which the conclusions of the commission are based, and such findings so made are to be deemed prima facie evidence as to each and every fact so found in any judicial proceeding thereafter had.

5. SAME.

It was the intention of congress that the procedure before the commission should substantially conform to that before a court charged with the duty of finding the facts and giving judgment thereon, or to the investigation and report of a referee or special master in chancery, passing on both facts and law.

6. SAME.

The fact that the commission is composed of men of ability and experience, selected with reference to their particular qualifications therefor, and whose entire time is devoted to questions arising under the act, gives to its findings and opinion great weight. But, in order that the finding and opinion of the commission shall have the value intended, it should conform to the purpose of congress in requiring such proceedings. Its opinion or report should show what the issues in the case are, and what facts it finds in regard to such issues.

7. SAME.

It is not sufficient for the report of the commission to be made up of mere conclusions with respect either to law or fact. It should make suitable reference to the evidence where there is a conflict in the proof, and show how the commission settles the disputed fact; or, if the evidence in regard to any fact is undisputed, it should be so stated by the commission.

8. SAME.

Where, in a given case, it is the duty of the commission to receive and take into account evidence of certain facts, its failure to do so is error of law. And so, where an issue of fact is raised before the commission, its failure to dispose of it is an error of law.

9. SAME.

The commission has no power to make rates, and especially has the commission no power to order that rates from a given point to one city shall bear a certain relation to the rates from the same point to another city.

10. REASONABLE RATES.

Under the first section of the act to regulate commerce, the question may be made as to whether a given rate is, in and of itself, unreasonable and unjust. In the consideration of such a question rates to other places or points of shipment are unimportant, except as evidentiary circumstances; but where the conditions are similar, proof of rates charged by other roads is of great value.

11. UNJUST DISCRIMINATION—UNDUE PREFERENCE.

Under the second section of the act the question of unjust discrimination may arise, and under the third section the question of undue preference may arise. And in determining a question under either or both of those sections it may often, if not always, become necessary to contrast the rates to other places and persons, because those sections involve the question of relative rates, with all their elements.

12. SAME.

The burden of proving undue preference or undue prejudice rests upon the complaining party.

13. SAME.

The carrier's business of transporting goods involves the rights of, and the necessity of doing justice to, three parties. The interest of the seller at the point of departure, the interest of the carrier, and the interest of the trader or consumer at the point of delivery are all concerned in a given transaction, and must be duly considered by a tribunal or court in the decision of any case involving the carrier's freight tariff.

14. SAME.

Questions of unjust discrimination or undue preference must be treated broadly and practically. The carrier's business is one which involves so many considerations, and the necessity of taking into account so many conditions, that questions of this kind do not admit of any rigidly theoretical rules in their solution.

15. SAME.

It is impossible to exercise a jurisdiction, such as is conferred by the act to regulate commerce, by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances differing in the two cases, you cannot say that such a difference of circumstances represents or is equivalent to such a fraction of a penny difference of charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless to seek to decide a case by any attempted calculation.

16. SAME—COMPETITION.

In passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere difference in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers, with reference to each other, as competitive or otherwise.

17. SAME.

The public at large is greatly interested in competition, and the more favorable prices which it brings, and for that purpose the public is interested in keeping open the larger markets of the country to all points of production and supply. Where traffic from a distance can compete with traffic nearer the market, the public is interested in having the greater distance traffic carried at rates which will enable it to compete with the traffic which is nearer the market.

18. SAME.

The advantageous position of one trader in having his works so placed that he has two competing routes is as much a circumstance to be taken into consideration as the geographical position of another trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market.

19. SAME.

The fact that a lower rate is charged from a more distant point by reason of a competing route, which exists thence, is one of the circumstances which may be taken into account, under the provision of the second and third sections of the act to regulate commerce.

20. SAME—MILEAGE RATES.

Mileage, while a circumstance to be considered with all the other facts and conditions, is by no means controlling, or the most important.

21. DISCRIMINATION BETWEEN SUMMER AND WINTER RATES ON COAL.

The act to regulate commerce is not to be construed so as to abridge or take away the common-law right of the carrier to make contracts, and adopt proper business methods, further than its terms and recognized purposes require. A railroad company may lawfully charge lower rates on coal in the summer months in order to keep its coal cars and coal crews employed during that season of the year, provided such rates be offered in good faith to all persons upon equal terms.¹

¹Headnotes approved by Judge Clark.

A. G. Safford, for plaintiff.
Ed. Baxter, for defendant.

CLARK, District Judge. This case had its origin in an informal complaint laid before the interstate commerce commission at the instance of certain citizens of Nashville, upon which, the commission having decided to investigate the matter, an order was made calling upon the defendant for an answer, which was in due time filed before the commission. The commission, under proper orders, directed proof taken in regard to the questions raised by this answer to the complaint. When the proof was in, the case was heard before the commission, and resulted in a report and order by the commission. The defendant was directed by this order to make certain changes in its rate of charges on coal traffic from certain mines in western Kentucky to Nashville, Tenn., and particularly the rates from Earlington, Ky., to Nashville; and, as the principle involved is the same, it will be convenient to refer to Earlington alone as the shipping point in question, it being the principal point of production and shipment. The defendant, denying that this order was a legal and proper one to be made upon the facts, refused to obey the same, and thereupon the commission, pursuant to section 16 of the interstate commerce act, has filed this bill in the United States circuit court for the Middle district of Tennessee to enforce the order and mandate of the commission. The original complaint put before the commission alleged discrimination—First, in favor of Memphis and against Nashville, in the rates on coal from the Earlington mines; and, second, discrimination in the rates to consumers at Nashville, between persons engaged in certain manufacturing and in running steamboats and the public generally. The defendant had so readjusted its rates to Nashville pending the investigation, and before the decision of the case by the commission, that the established rate then was \$1 per ton to all persons on that kind of coal known as "run of the mines, nut and slack," and this rate was uniform the entire year round. On what is called "screened coal" the rate was \$1.15 per ton during the period from April 1st to September 1st; while for the remainder of the year, to wit, from September 1st to April 1st, the rate was \$1.40 per ton. The rate to Memphis remained just as it was; it being a uniform rate on all coal, and at all seasons, of \$1.40 per ton, from the same mines to Memphis. This change in the rate and in the company's method of doing business had eliminated from the case, when the commission came to act on it, every disputed question, except that of the alleged discrimination in favor of Memphis as against Nashville; and really all that was then complained of in this respect was the difference in the rate on "screened coal" from Earlington to Nashville of \$1.40 per ton from September 1st to April 1st of the year, which, as will appear, was the difference between a rate of \$1.15 per ton and \$1.40 per ton; and the only order which the commission made affecting the defendant was to reduce the rate from \$1.40 per ton to \$1.15 per ton, and to make that rate uniform the year round. It will become necessary, therefore, only to consider in this case the order of the commission

which directed the defendant company to make the change above indicated, and what is said in this opinion is to be understood as having reference only to the action of the commission in this particular. It is conceded by counsel for both sides of the case that the court, in its power and jurisdiction over the matter, is limited to an approval or disapproval, and to the enforcement or refusal to enforce the order of the commission as a whole or in part just as made by the commission, and that the court is without power or authority to treat the case as one originally instituted in this court, and make an order or decree of its own, or to modify the order of the commission for the purpose of making it conform to the opinion of the court in case the court should entertain a different opinion from that of the commission; and such would seem to be the proper construction of section 16 of the act. This relieves the case of any issue on that point. The court, of course, may go fully into the proof on its own examination to determine whether it will approve the order, and may hear any additional proof adduced. So much of sections 1-3 of the interstate commerce act as are material to the matter now under consideration will be given, and are as follows:

"Section 1. * * * All charges made for any service rendered, or to be rendered, in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The only complaint that could be made in regard to the rate in question here would be that such rates violated either section 1, 2, or 3, as above set forth.

Under section 1 the question might be made that a given rate was in and of itself unreasonable and unjust, and in the consideration of such question as this, rates to other places or points of shipment would be unimportant, except as a circumstance or fact in the proof, and having no other than an evidentiary bearing. Under section 2 the question of undue discrimination, and under section 3 that of undue or unreasonable preference or advantage, would arise. In determining a question under either or both of these sections it would often, if not always, become necessary to contrast the rates

to other places and persons, for the objection under those sections would involve the question of relative rates, with all of their elements. A discrimination or unjust advantage might be complained of as made between persons at the same place and entitled to the same rates, or between traders at different places. The investigation conducted before the commission, and its order thereon, are quasi judicial, although it may be considered as settled that the proceeding is not a judicial one, as that term is used with reference to courts of general jurisdiction, and in the general administration of justice. The function of the commission is really both quasi judicial and administrative in its nature. By section 9 of the act persons claiming to be damaged by a violation of the provisions of the act are given an election to sue in the courts of the United States for such damage, or to make complaint to the commission. The procedure in a complaint before the commission is prescribed in section 13 of the act, and by section 14 the commission is required to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commission are based, and such findings so made are to be deemed prima facie evidence as to each and every fact found in any judicial proceeding thereafter had. The commission is authorized to provide for the publication of its reports and decisions, and for the distribution thereof. Other sections of the act, not necessary to be set out herein, make it evident, in my opinion, that while the investigation and report of the commission and its order thereon, as stated, do not constitute a judicial proceeding, still it was the intention of congress that the procedure should substantially conform to that before a court charged with the duty of finding the facts, and giving judgment thereon, or to the investigation and report of a referee or special master in chancery, passing on both facts and law. Congress having provided for such investigation and report in general terms only, it is not to be doubted that substantial conformity to a judicial proceeding was contemplated. And the importance of the commission's action, taking substantially the form of a judicial proceeding, is apparent when it is recognized that the commission is composed of men of ability and experience, selected for this position with reference to their particular qualifications therefor, and whose entire time is devoted to questions arising under this act. This gives to the commission's finding and opinion great weight, and entitles it to great consideration, both by the parties affected and by the courts, when called upon to enforce obedience to its mandates. For the commission's investigation and opinion to have this intended value, however, it should, in fact, conform to the purpose of congress in requiring such proceedings. It is not sufficient, therefore, in a report of its findings of fact and conclusions, to do so in such general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in the case. Stated in another form, it is not sufficient for the report to be made up of mere conclusions. Its opinion or report should show what the issues in the case are, and what facts it finds

in regard to such issues. The report should make suitable reference to the evidence adduced in regard to any particular question, where there is a conflict in the proof, showing how the commission settles the disputed fact; or, if the evidence in regard to any issue is undisputed, state that fact. In other words, the report should give the parties to be affected, as well as the court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts, and the commission's opinion thereon, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigation. Now, the report of the commission in this case does nothing of this kind. It was not intended to cast upon the courts the labor of an original and independent examination, as in a case instituted here in the first instance. If so, action by the commission would be idle. The report should on all issues make a distinct showing, so that on its face it would be *prima facie* good as required under the act. The main issue made in the answer to the original complaint, as well as now in the answer to the suit in this court, is and was that the difference in the rates from the Earlington mines to Nashville and those from the same point to Memphis was rendered necessary and was justified by competitive freight rates at that point, and particularly in regard to the rates on coal, by competition in coal coming from the Pittsburg mines by means of river transportation to Memphis. The report of the commission, notwithstanding this was the main issue, makes but a passing allusion to the fact of competition at Memphis. The report shows nothing as to the cost of coal at the Pittsburg mines, the rate per ton at which it was transported to Memphis, or the price at which such coal was sold; and the commission does not consider nor decide to what extent, if at all, this competition affects the rates which the Louisville & Nashville Railroad Company can make on coal shipped from the Earlington mines to Memphis, so that the rate, together with the price, will enable that coal to be handled on the Memphis market. If the facts in relation to this question of competition were at all important in this case, it is certain that the commission did not so consider it, as that entire subject was summarily dismissed without any finding of facts or the expression of any opinion in regard thereto. Indeed, much of the argument at the bar on both sides has been directed to the question of what the commission did or did not find or decide in this case. It is contended, for example, by the learned counsel for the commission, that it did investigate, and did decide that the rate from Earlington to Nashville was in and of itself unreasonable and unjustly high, without regard to the Memphis rate at all; while counsel for the defendant earnestly insists (and successfully, I think) that the commission decided no such question. It is to be regretted, of course, that a report so important as this, both in its effect on the parties and as a basis of suit in this court, should become the subject of construction in order to ascertain what was really decided. It becomes necessary, therefore, in the outset, for this court to decide for itself between the opposing views of counsel, whether the commission decided that the rate from Earlington to Nashville was un-

reasonable and unjust; and a careful examination of the original complaint and the report and order of the commission forces me to the conclusion that no such question was presented or decided. From what has been stated, it is clear that nothing in this respect was presented in the original complaint, and there is but a single paragraph in the report of the commission which furnishes support to the view that it considered any such question. I think it may be gathered from the complaint and report that the commission was only discussing the relative rates between Memphis and Nashville.

Next to the last paragraph in the opinion of the commission is exactly the order which it made in the case, and may be safely taken as a condensed statement of its ruling, and this I will give in full, as follows:

"The rate should be so arranged that, while Memphis is getting a rate as low as \$1.40, Nashville should have a rate from the same mines of not more than \$1.00 on 'run of mines, nut and slack,' and not more than \$1.15 'screened coal' at any season. It is therefore ordered that from and after this date, so long as the rate charged by the Louisville & Nashville Railroad Co. for the transportation of coal of any kind or class from the mines on its Henderson & Owensboro divisions in the state of Kentucky to Memphis shall not exceed the amount of \$1.40 per ton, the rate charged by the said company for the transportation from said mines to Nashville of coal classed as 'run of mines, nut and slack,' shall not at any time exceed the amount of \$1.00 per ton, and the rate charged by said company for the transportation from said mines to Nashville of coal classed as 'screen coal' shall not at any time exceed the amount of \$1.15 per ton. And any reduction made by the Louisville & Nashville Railroad Co. in the rate for the transportation of coal of any kind or class from said mines to Memphis shall be accompanied by a proportionate reduction in the rates charged for the transportation of 'run of mines, nut and slack coal,' and of 'screened coal,' respectively, from said mines to Nashville."

It appears from this that the commission fixed only a relative rate as reasonable for Nashville, having regard all the time to the rate at Memphis. The rate put in effect was clearly intended to be based on and in proportion to the Memphis rate, with the provision that, in the event there should be a reduction in the Memphis rate, there should be a proportionate reduction in the rates charged from the mines to Nashville. Upon what basis the proportionate rate was made between the two places the report again leaves undisclosed, except inferentially. As the case is, the rate established for Nashville depends upon the fortunes of the Memphis rate, and goes up or down with that. This order is wholly inconsistent with the proposition that any decision was made respecting the Nashville rate as being too high of itself and independently of the Memphis rate. If the rate to Nashville of itself had been under investigation the rates to Memphis were of little value as evidence compared with rates from Tracy City, from Coal Creek and other mines in East Tennessee, from Bon Air at Sparta, and from Alabama mines. Rates from these points, not only to Nashville, but to Chattanooga, Atlanta, and other cities, were readily obtainable from the Southern and other railways on application; and the conditions throughout are so similar that they would be of great value on that question.

If the commission had considered the Nashville rate, and ruled that this was unreasonably high, and made an order regular in form, and authorized by law, and upon proof of rates on other roads, where conditions are similar, it might be that defendant would have a serious issue on its hands. It remains then to treat the action of the commission in making the change which it did as based on either section 2 or 3 of the act. I think that the entire proceeding shows that the commission was of opinion that the Memphis rate worked a discrimination in favor of consumers of coal at that place against Nashville, under section 2, or that it effected an undue and unreasonable advantage under section 3 of the act, though the report does not distinctly state what view the commission entertained, or that it entertained either. Taking the case as it was, and the rates as put in effect at the time the commission decided the case, Memphis was left with an even or flat rate of \$1.40 per ton on all classes of coal the year round; and Nashville, with a rate of \$1 per ton on the cheaper class of coal, uniform for all seasons of the year, and with a rate of \$1.15 on "screened" coal during the summer, and \$1.40 during the winter. This was a difference of 40 cents per ton on the lower grade of coal (which was more largely consumed) in favor of Nashville the year round, and a difference of 25 cents per ton on "screened or grate" coal during the summer, with the same rate as Memphis on that class of coal during the winter. The average for the year on either class was much in favor of Nashville. It would hardly be contended that this absolute advantage in rates to Nashville as against Memphis would work such discrimination as to injuriously affect Nashville in commerce, industrial pursuits, or growth, and there is no proof in the record indicating any such condition of things as this. Under such rates every consumer and every trader at Memphis would pay a higher price for coal of the same quality than would be paid by the trader or consumer at Nashville. Just how this could injuriously affect Nashville has not been suggested, and it is certain, I think, that no process of reasoning could show how an injurious result to Nashville is brought about, unless upon the basis of a relative rate which consumers and traders at each place should have, taking into account the relative distance of the two cities from the Earlington mines, and by putting the rates between the two places on a mileage basis only. In this way the consumer at Nashville might plausibly say that, while getting a rate on coal which made it absolutely cheaper to him than the consumer at Memphis, the rate to him was still relatively higher than to Memphis. Stated in another form, the complaint from the Nashville trader would be that he did not obtain in the rates the full advantage to which his shorter distance from the mines entitled him as against the Memphis trader with the longer distance. And it may be concluded inferentially that the commission was controlled in its action by this view of a relative rate, such as would be established practically on a mileage basis.

For in the report it is observed:

"As between Memphis and Nashville, considering the respective distances of those two cities from the mines in western Kentucky, the rate of \$1.00

per ton to Nashville does not seem to be low compared with the \$1.40 rate to Memphis."

In the absence of a more definite finding and statement of conclusions by the commission, it must be assumed, as I think the result shows, that the commission contrasted the distance at which the two cities are situated from the mines, and also contrasted the difference in rates, and concluded that the Nashville rate was relatively too high, and that this mode of adjusting the rates gave an undue preference, and was a violation of section 3 of the act; and that the commission rested its decision in part, though not entirely, upon this proposition. The entire omission of any finding or conclusion in respect of competing rates at Memphis, and what effect, if any, this circumstance had on the case, leaves no choice but to infer—as I think may be safely done—that the commission excluded entirely from its consideration any question of competition, so far as it related to the only point actually ruled on by the commission, as the case was left when it was called upon to pass judgment. If, therefore, the defendant company had the right to put in issue the question whether or not it was controlled by competing rates at Memphis, and if it was the duty of the commission to take into consideration that element or condition in passing on the case, it becomes apparent that the action of the commission was erroneous in two particulars: (1) In its omission to make any finding at all in regard to the fact of competition; and (2) in its refusal or failure to take into account such competition, and to give the same due consideration, and without doing which it failed to dispose of the leading issue in the case. It is important, therefore, to determine whether the commission was under a legal duty to accept evidence of competition, and to investigate and decide thereon; for, if such evidence was competent, and was evidence which the commission was required to receive as other evidence, its report and order would be analogous to a court judgment, showing upon its face that the court had excluded from consideration material evidence in the case and had made no response whatever to one of the issues joined. And whether the commission treated the rate which the defendant company had in effect at Memphis as a violation of section 2 or 3 of the interstate commerce act, it seems not now open to doubt that the fact of competing rates was a condition which it must have taken into account, and must have duly considered as evidence in the case, and must have decided whether the company's defense, based upon that circumstance, was made out or not. In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. 51, it was pointed out by Judge Jackson that sections 2 and 3 of our interstate commerce act substantially embody section 2 of the English railway traffic act of 1854, and section 90 of the act of 1845. It was held, too, that the interstate commerce act having thus substantially adopted these provisions, the construction given to such provisions by the English courts must be received as incorporated in the act, and the supreme court of the United States announced the same proposition in *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 284, 12 Sup. Ct. 844, affirming the judgment below.

And, while the question in that case was one growing out of passenger traffic, it involved a construction of these sections of our act, and in the progress of the opinion Judge Jackson said:

"The English cases referred to above, and others that might be cited, establish the rule that, in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise. The English decisions cited, and the case of *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.*, 11 App. Cas. 97, 55 Law J. Q. B. 181, further establish that the burden of proving the undue preference or the undue prejudice rests upon the complaining party."

And the supreme court, in the same case just referred to, after reviewing the English decisions, stated the result as follows:

"In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."

It is to be borne in mind that when competition enters as an element in the determination of a case, this question—whether or not there is an undue preference or advantage—is a question not of law, but of fact. Whether or not the evidence is competent, and must be taken into account, is, of course, a question of law; but, with the evidence once admitted, the issue then becomes one of fact. And so, if the commission ought to have received and taken into account the evidence of competitive rates, its failure to do so was an error of law; as was also its failure to dispose of this issue at all. When the evidence was admitted, the question of undue preference, as stated, is one of fact which should have been found. It may therefore be accepted as the result of the cases in this country that the circumstance of competition is an element which must be considered, and the English cases are now full and clear upon the subject.

It must be stated, too, that questions of this kind must be treated broadly and practically. The carrier's business is one which involves so many considerations, and the necessity of taking into account so many conditions, that questions of this kind do not admit of any rigidly theoretical rules in their solution. It must be kept in mind, too, that the carrier's business of transporting goods involves the rights of, and the necessity of doing justice to, three parties. The interest of the seller at the point of departure, the rights of the carrier, and the rights or interest of the trader or consumer at the point of delivery are all concerned in a given transaction, and must be duly considered by a tribunal or court in the decision of any case involving the carrier's freight tariff. It is entirely conceivable that by taking into account the interest and advantage of the trader at the point of delivery alone, serious injury might be done to the trader at the point of departure as well as the carrier, without any substantial benefit to the trader at the point of delivery; or a loss might be inflicted on the trader at the point of de-

parture, as well as the carrier, out of all proportion to any benefit conferred on those whose interests are at the point of delivery. And in referring to "trader" in this connection, either at the one point or the other, it is intended to use the word in a representative sense, as including all persons interested in the production and sale of a commodity at the point of departure of the goods, and all persons interested as dealers or consumers at the point of delivery. It was at one time thought doubtful whether the interests of the railway could be taken into account at all, but it is now established that they can be. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. 52; *Ames v. Railway Co.*, 64 Fed. 176; *Reagan v. Trust Co.*, 154 U. S. 412, 14 Sup. Ct. 1047.

There is also, besides the parties named, the interest of the public concerned in a traffic question like this. The public at large are greatly interested in competition,—with the more favorable prices which it brings, and, for that purpose, in keeping open the larger markets of the country to all points of production and supply. It is obvious, therefore, that in judicial action upon the question of rates the effect of the ruling must be closely observed, as it thus falls in different directions, and upon different interests, and no one particular interest can properly be considered to the exclusion of others. As the trader at the point of delivery, and who generally pays the rates charged, is the one actively complaining, it generally happens that his interest and that of the carrier are represented before the court, and thus brought out into prominence, and attention directed too exclusively to the proximate, rather than the more distant, results, and in a given case it may be to interests of relatively small magnitude. I will now refer briefly to two recent English cases involving the construction of the clauses in the English traffic act substantially embodied in ours. In the case of *Phipps v. Railway Co.* [1892] 2 Q. B. 242, the English court of appeals was considering a case which had been appealed from the decision by the railway commissioners. The statement of the case, so far as is necessary to be now noticed, was as follows:

"The case made by the company was that the comparatively lower rates charged to Butlins and Islip were forced upon them by the competition of the Midland Railway Company; that the lower charge was made bona fide, and was, in the terms of section 27 of the act of 1888, 'necessary for the purpose of securing in the interest of the public the traffic in respect of which it was made'; that there was still a difference of 6d. a ton in favor of the plaintiffs, and that the plaintiffs had not been injured by the rates charged to Butlins and Islip; and they produced evidence to show that the competition in the South Staffordshire market was such that a difference of 6d. a ton, or even less, in the price of iron of the same quality, would often be enough to secure a contract. The railway commissioners (Wills, J., Sir Frederick Peel, and Viscount Cobham) held that the London & Northwestern Railway Company, in fixing the rates in question, were entitled to take into account the circumstance that Butlins and Islip had access to another line of railway which was in competition with their own, and that no sufficient case of undue preference had been made out against them. The plaintiffs appealed."

The court of appeals, in giving its opinion and referring to a previous case, said:

"Is not it a question of fact, and not of law, whether such a preference is due or undue? Unless you could point to some other law which defines what

shall be held to be reasonable or unreasonable, it must be and is a mere question, not of law, but of fact. The lord chancellor there points out that the mere circumstance that there is an advantage does not of itself show that it is an undue preference within the meaning of the act, and, further, that whether there be such an undue preference or advantage is a question of fact, and of fact alone. No rule is given to guide the court or the tribunal in the determination of cases or applications made under the second section of the act of 1854. The conclusion is one of fact, to be arrived at looking at the matter broadly and applying common sense to the facts that are proved. I quite agree with Wills, J., that it is impossible to exercise a jurisdiction, such as is conferred by this section, by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances differing in the two cases, you cannot say that such a difference of circumstances represents or is equivalent to such a fraction of a penny difference of charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless to seek to decide a case by any attempted calculation."

And, referring to the matter of mileage as a method of determining what a rate should be, the court said:

"Therefore, what they call attention to as their ground for alleging that there was no undue preference is this: that mileage rate is not, and cannot alone be, the test. That where a train is started or taken from one point to another, there are certain initial charges and certain charges at the other end. I will not call them 'terminal' charges, because that is a word used to describe different things, and the use of it often gives rise to misunderstanding and dispute, but certain initial charges, and certain terminating charges, which are constant whatever distance the train has traveled; and that, before comparing the mileage rate, you must in each case deduct those initial and terminating charges, and then, and then only, will the comparison be a fair one. Now, dealing with the matter in relation to Butlins alone for the moment, can it be said that the railway commissioners were not entitled to take that circumstance into consideration, and, looking at the distance, and looking at the difference of charge, to say that it was not established to their satisfaction that there was undue preference, inasmuch as the railway company had pointed to circumstances which led them to the conclusion that there was no reason for saying otherwise than that the Gd. fairly represented the difference of charge which might be made without constituting any undue preference or any undue disadvantage? It was on that ground distinctly, on that part of the case so far as the mere difference of charge to Butlins was concerned, that Wills, J., proceeded in his judgment. What he said may be shortly put thus: 'It is true that, if you try it merely as a matter of mileage, it is about a half penny as compared with one penny for the distance traveled, but when you eliminate from the charge those constant charges at both ends, which must always exist whatever the distance, when you consider the longer lead there is in the one case than the other, and when you consider the necessities of the case which are brought about by the active competition of the Midland, putting all those things together, the difference is not nearly large enough to render it either necessary or desirable that this court should interfere.'"

And, continuing, the court further said:

"Now, there is no doubt that in coming to that determination the court below did have regard to the competition between the Midland and the London and Northwestern, and the situation of these two furnaces which rendered such competition inevitable. If the appellants can make out that in point of law that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, that they are not circumstances legitimately to be considered, no doubt they establish that the court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because, once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the court has

given too much weight to it or too little, becomes a question of fact, and not of law."

And, discussing the question of the trader's proximity to the market, the court observed:

"Can we say that the local situation of one trader, as compared with another, which enables him, by having two competing routes, to enforce upon the carrier by either of those routes a certain amount of compliance with his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader. It is said that it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competing routes is not so much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation, in regard to its proximity to the market, is to be the only consideration to be taken into account in dealing with the question as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantage which he derives from that favorable position of his works. All that I have to say is that I cannot find anything in the act which indicates that when you are left at large (for you are left at large) as to whether, as between two traders, the company is showing an undue and unreasonable preference to the one as compared with the other, you are to leave that circumstance out of consideration any more than any other circumstance which would affect men's minds. I should have said so, and I do say so, upon the act of 1854, and I find nothing in the act of 1888 to exclude any such consideration, if it is not excluded by the act of 1854."

And, treating of the railway's right and motive in the attempt to secure traffic, the court said:

"Of course, a railway company endeavors to secure the traffic for its own advantage. That is the motive which operates upon the railway company. Naturally enough they want to secure all the traffic they can in order to do the best trade they can. But I think that the legislature has here pointed out that in considering a question of this sort you are not only to consider the legitimate desire of the railway company to secure traffic, but that you are to consider whether it is in the interest of the public that they should secure that traffic, rather than abandon it, or not attempt to secure it. Of course, many cases might be put where, although the object of the railway company is to secure the traffic for their own purposes upon their own line, yet, nevertheless, the very fact that they seek by the charges they make to secure it operates in the interest of the public. One class of cases unquestionably intended to be covered by the section is that in which traffic from a distance of a character which competes with the traffic nearer the market is charged low rates, because, unless such low rates were charged, it would not come into the market at all. It is certain that, unless some such principle as that were adopted, a large town would necessarily have its food supplies greatly raised in prices. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic, and allowing the carriage at a rate which will render that traffic possible, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance from the market to compete with those situated nearer to it. * * * I cannot but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence is one of the circumstances which may be taken into account

under those provisions, and which would fall within the terms of the enactment quite as much as the case to which I have called attention. Suppose that to insist upon absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that those members of the public who are in the neighborhood where they can have the benefit of this competition would be prejudiced by any such proceedings. And, further, inasmuch as competition undoubtedly tends to diminution of charge, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this act of parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices."

And Lindley, L. J., in a concurring opinion, expresses the same view in language as follows:

"Now, the appeal here is put, as it must be put, upon a question of law, viz. whether there is any rule which compels us to say that the commissioners had no right to take into their consideration the fact that Butlins and Islip had two routes of communication westward instead of one. It appears to me that there is no such rule, as I cannot help thinking it would be extremely unreasonable if there were. Upon what principle of good sense can any business man, or anybody else, exclude from his consideration the locality of either place? If there is a physical difference in favor of one or the other, or any artificial difference by reason of the facilities of traffic, whether by sea or by land, why is not everything which is material to be taken into account, and upon what principle can it be said that you are to exclude from consideration one of the main elements in the case? The observations which I have made have no reference to the equality clause. The equality clause imposes a rigid rule, and, putting it shortly, it is to the effect that for the same service the same sum is to be paid. One can understand that. Everything turns upon the words 'the same.' The moment the service is not the same, the rule does not apply; and it appears to me that, if the law were to the effect contended for, it would be extremely irrational."

So in the case of *Mansion House Ass'n Railway Traffic v. London & S. W. Ry. Co.* [1895] 1 Q. B. 932, before the railway and canal commission, the question was one of an unjust advantage or preference as between home and foreign goods, and Collins, J., giving the opinion, and referring to the argument of counsel, said:

"It is obvious that this argument, if accepted, would involve the most momentous consequences; consequences which Mr. Balfour Browne did not dispute. For instance, let us assume that some trader in Southampton made it his business to collect home merchandise of the same description named in the application, and to deliver it to the railway company there at fixed dates and in large quantities, just as the respondents now deliver foreign merchandise for delivery to London, and was charged by the company the same rate, namely, 6s. a ton. On a complaint by the present applicants impugning such charges as an undue preference, it would be open to the company to justify it by urging all these topics which have been recognized by many decisions, and are sanctioned by subsection 2, such as difference of conditions, reducing the cost, and increasing the profit of the company, the existence of competition by land or water from Southampton to London, and so forth; and if they prove their facts they might be entitled to have their complaint dismissed."

And another member of the commission, giving a separate concurring opinion, observed:

"The other alternative would be to raise the shipping rates to the level of the local rates. These shipping rates are charged upon traffic of a highly competitive character, and we may take it that they are fixed at the highest point that is consistent with securing a remunerative share of the traffic. I am not introducing competition to justify the preference, but only as a

factor in the result which it seems to me will inevitably follow upon the raising of the Southampton dock rates, namely, the loss of the whole shipping traffic to the railway. A slight increase would probably have this effect; any approximation to the level of the local rates most certainly so. It is not denied that the traffic would go to London by sea all the same, and at the same rates as before. The only difference would be that the railway company would be more or less impoverished, not to the advantage of the farmer, who would gain nothing, but solely to the advantage of the shipping interest, which is not, of course, wholly a British interest. * * * I am of opinion, therefore, that if not by the use of the words 'same or similar services,' then by the general sense of the proviso as interpreted by the learned judge, it is intended that in cases where undue preference of foreign goods is alleged, that we should take into consideration, as we have always been entitled to do in the case of home goods, the circumstances of the traffic as regards its quantity, its packing, its regularity, and all other matters affecting its cost to the company, except so far as they may be matters special to the foreign origin of the goods; that is, the limitation imposed by the proviso, the object of which is, in my opinion, not to give home traffic a preference over foreign traffic, but to place them in a position of strict equality."

It thus appears beyond question, without reference to further authorities, that, in every case where a difference in the rates between two points of shipment is the ground of complaint, a leading and important element in the determination of the question is that of competition or want of competition. It is entirely apparent, too, that other practical conditions are to be taken into account, and that the mileage, while a circumstance to be considered with all the other facts and conditions, is by no means controlling or the most important. As early as 1872 it had been fully demonstrated in England that equal mileage as a basis for settling the difficulty was entirely impracticable. In that year the committee upon the amalgamation of railways reported upon this subject, and the substance of this report is found in the note to the case of *Ransome v. Railway Co.*, 1 Nev. & McN. 63, which was one of the Coal Traffic Cases. In reporting against equal mileage, the committee said:

"(a) It would prevent railway companies from lowering their fares and rates so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition and the company of a legitimate source of profit.

"(b) It would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual goods brought in large and constant quantities, or for carrying for long distances at a lower rate than for short distances.

"(c) It would compel a company to carry for the same rate over a line which has been very expensive in construction, or which, from gradients or otherwise, is very expensive in working, at the same rate at which it carries over less expensive lines. In short, to impose equal mileage on the companies would be to deprive the public of the benefit of much of the competition which now exists or has existed, to raise the charges on the public in many cases where the companies now find it to their interest to lower them, and to perpetuate monopolies in carriage, trade, and manufacture in favor of those routes and places which are nearest and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, not that the rates they themselves pay are too high, but that the rates which others pay are too low."

As has already been seen in this case, the commission, so far as it rested its decision on the difference in rates to Nashville and Memphis, evidently worked out a result by contrasting the distance of

these places respectively from the Earlington mines, or upon a mileage basis. And the commission did not take into account, or make any finding or investigation in respect of, competitive rates at that point; and in this, I think, the commission was clearly in error. The commission based its ruling in part upon the ground that the defendant railway company was without right to make any difference between what may be called the summer and winter rates, and the commission required the company to reduce its winter rate so as to conform to the summer rate, and make that uniform the year round; and this brings up the question whether its opinion on that point was sound. Neither the commission in its report, nor its able counsel in the argument, have referred the court to any particular provision of the interstate commerce act with the terms or just implication of which this mode of doing business is in conflict. The commission, in its report, assigns no reason why such mode of business is not lawful, except the statement that it is not customary. Indeed, counsel for the commission took occasion to say expressly that he regarded this mode of adjusting its rates by the defendant so as to furnish a lower rate during the summer, or dull season, than was furnished during the winter, or active season, as a sound, perfectly just, and proper business method in and of itself, and apparently conceding that it might be well if the act of congress allowed the business to be transacted in this way. It is difficult to understand how the question of whether such a difference in rates had been customary or not was controlling in the decision of that point. It has not been suggested that there is any particular common-law principle which prohibited what was thus done, and it is certain that methods of business have been followed for almost time out of mind closely analogous to this. It is customary in manufacturing and other industrial establishments to lower the price of goods in order to keep business going during the summer, or dull season of the year. And so, too, it is a matter of common knowledge that coal in any market may be bought during the summer or heated season of the year at rates lower than it can be obtained during the winter, when the consumption is large, and the demand for this commodity active. It is well known, as the proof in this case abundantly shows, that it is very difficult for mining and manufacturing establishments to find market during the summer months for the product or output of such establishments. This is due to the fact that there is comparatively little demand for their products during those months. It has come to be well known, therefore, as the "surplus output" or product, and the question of a market for such surplus output during the dull season of the year is everywhere recognized as a difficult one, and concessions are made in prices and rates in order that this surplus output may be handled. This is necessary to enable those owning and operating such establishments to furnish employment to the common laborers of the country, whose subsistence depends upon continuous employment. It enables those operating such concerns to keep their working forces together, in order that a sufficient output may be furnished during the active season of the year to meet the increased demands of the trade. It is apparent,

therefore, that no sound public policy is affected by such mode of doing business, and counsel admits that it is in itself reasonable, just, and humane to those who need consideration most. It would be surprising, therefore, if it could be found that a mere business method, wholly without objection within itself, is repugnant to the spirit and purpose of the interstate commerce act. The injurious effect of a suspension of business during a dull season, with idle machinery, and with those dependent on wages thrown out of employment, is certainly entitled to some consideration in following out the possible results of such a rule as the commission here announces. And if those who own and operate mining establishments may properly attempt to keep the same going during the summer season, it would be singular if the railroad company may not also have the right of keeping such appliances and cars as it devotes to the coal traffic from becoming idle, and also avoid throwing the crews of men who operate such cars out of employment, by joining with the coal miners in a reduction of rates in order to find a market for the surplus output. The interstate commerce act is not to be construed so as to abridge or take away the common-law right of the carrier to make contracts and adopt proper business methods further than its terms and recognized purposes require, and upon this point I quote again from the opinion of Judge Jackson in the case referred to, in which he refers with approval to the language of Earle, C. J. Judge Jackson said:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage, or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation services? In *Nicholson v. Railway Co.* (1 Nev. & McN. 147), which involved the 'undue preference' clause of the act of 1854, Earle, C. J., said: 'I take the free power of making contracts to be essential for making commercial profit. Railway companies have that power as freely as any merchant, subject only (as to this court) to the duty of acting impartially without respect of persons; and this duty is performed when the offer of the contract is made to all who wish to adopt it. Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of those whose traffic is confined to a home district; but the power of the railway company to contract is not restricted by these considerations.'"

It is no objection to this method of doing business to say that certain persons—for example, large dealers and others whose position enables them to store away quantities of coal—take advantage of such low rates, and supply themselves during the summer months, while others not so situated, or who are engaged in such business as that they are without motive to do so, will not take advantage of the rates. This is no undue advantage or discrimination which is made by the company, or which results from its method of doing business at all. If such a difference as that suggested results, it

grows out of the difference between financial and business conditions, and results incidentally, and not from anything in the rates themselves. The act was not leveled at any such differences as these, but at arbitrary differences and inequalities in the rates and methods of doing business of the carrier. If the interstate commerce act should undertake to regulate so vast a business as that of the commerce of the country, so as to overcome social, business, and financial inequalities and conditions, the act would at once become nugatory in the difficulties which would attend its execution. All that could be reasonably required of the railroad would be to offer in good faith the reduced or summer rate to all persons on equal terms, so as to extend the advantages thereof to all persons who might choose to avail themselves thereof, and to require more than this would be absurd and unjust. And as bearing upon this point I can again express my view by referring to the opinion of Judge Jackson, in which he says:

"In *Baxendale v. Railway Co.* (Reading Case) 5 C. B. (N. S.) 336, 28 Law J. C. P. 81, Cockburn, C. J., after stating that, if it were made to appear that the disproportion [in rates] was not justified by the circumstances of the traffic, the court would interfere, proceeds as follows: 'So, again, if an arrangement was made by a railway company whereby persons bringing a large amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, although the court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantages were extended to all persons under the like circumstances, yet it would assuredly insist on the latter condition.' And, while recognizing the duty on the part of the court to redress any injustice or inequality prohibited by the law, he makes the further pertinent observation: 'At the same time we must carefully avoid interfering, except where absolutely necessary for the above purpose, with the ordinary right (subject to the above-named qualifications) which a railway company, in common with every other company or individual, possesses, of regulating and managing its own affairs, either with regard to charges or accommodation as to the agreements and bargains it may make in its particular business.' As regards the 'undue preference' branch of the English acts, the effect of the decision seems to be that a company is bound to give the same treatment to all persons equally under the same circumstances; but that there is nothing to prevent a company, if acting with a view to its own profit, from imposing such condition as may incidentally have the effect of favoring one class of traders, or one town, or one portion of their traffic, provided the conditions are the same to all persons, and are such as lead to the conclusion that they are really imposed for the benefit of the railway company."

I am, therefore, without further discussion, clearly of opinion that the defendant railroad company had the right to make a difference in its summer and winter rates on the coal traffic. It is to be observed that I am not now called upon to pronounce any opinion as to whether either the summer or winter rate is in and of itself just and reasonable, being restricted, as before stated, to an approval or disapproval of the action of the commission.

The commission refers to the fact that the defendant road has been buying coal at the Earlington mines and selling on the Memphis market, and states that, as the price of coal is very low at Memphis, it presumes no profit could be made on the sale, and assumes that there must be a profit in the rate of transportation. The presumption that there is no profit in handling coal on the Memphis market

would apply equally to any dealer in that market, and is a presumption contrary to the course of business. It was only necessary, in order to know certainly the facts in the case, to call on the defendant company for a statement of the prices at which coal was bought at the mines and sold on the market at Memphis, and given these with the rate of transportation the truth would be made to appear without recourse to doubtful presumption.

I have considered whether or not, if the result of the commission's action might be sustained on any ground, I could reopen the case in this court, and allow the plaintiff to introduce proof to show whether or not the rate to Nashville is of itself too high. This could apparently be easily done by procuring the schedule of rates on coal to and from the points suggested herein, where the conditions are similar to the traffic between Earlington and Nashville. Whether I could do so under section 16 of the act is doubtful. As, in any event, I would be without power to substantially change the order made by the commission, and as I do not think that order is a lawful and proper one, I have concluded that it is best to decide the case upon the record as now made up. An objection is made to the form of the order, in that it is made in terms to operate indefinitely in the future without any reservation of the power of change or modification such as changes in traffic conditions might make absolutely necessary. It is argued that, if the order of the commission were made the judgment of this court, it would become a bar to any change in the future. I cannot, however, concur in this view. The order of the commission is essentially an administrative one, and is not final or conclusive in the sense of a court judgment or decree, and the order of this court is one merely to give effect to the order made by the commission, and does not change its character or make it a final judgment. There are no private vested rights in the order of the commission, or that of this court, such as exist in a regular judgment or decree of this court. And, if necessity should arise for a change in the tariff of rates, no reason is perceived why the carrier might not make this on notice to the commission under the act of congress, just as such carrier is permitted to do in regard to the published rates filed with the commission. But there exists another objection to the form of this order which goes deeper. I pass by now the very serious question of the commission's power to make rates at all. It has been seen that the order of the commission does not put in effect a rate at Nashville complete in itself, but only a schedule measured by the Memphis rate, and depending for its continuance or discontinuance, and for any modification or change, on the Memphis rate. If a change should be made in the rate to Memphis, it would be open to the Nashville trader under this order to complain that such change was arbitrary and unreasonable, and this would devolve on the commission, and next on the court, the duty of an examination and decision of the Memphis rate upon its own merits. So, too, if the trader at another point or place in the state should complain that the rates to the trader at Nashville violate the act, or the trader at Nashville should complain of discrimination in rates to the trader at another place in the state, the question in

each case would give rise to an inquiry into the rates at two places instead of one. These and other difficulties which would spring up in an attempt to keep in force the form of order made by the commission in this case are obvious enough without further enumeration. The rate to Nashville should stand on its own basis, independently of rates to Memphis or other places, except so far as other rates might be regarded as evidence and for their probative force only. The order is without precedent or analogy in court judgments or decrees. Conceding the doubtful power to fix a rate, it is certainly irregular, and one which I do not think the commission was warranted, under the act of congress, in making. It will be perceived, therefore, that the errors which are thought to exist in the action of the commission are such as relate to the method of investigation and the order made thereon, and to the grounds on which the commission based its action. There is in the case, in my opinion, no discrimination under section 2, and no undue advantage under section 3, to the Memphis trader as against the Nashville trader; and the proposition that the railroad was without power to make a difference in the summer and winter rates was, I think, erroneous; and whether or not the Nashville rate, considered upon its own merits, is unjust and unreasonably high, was not inquired about nor decided by the commission. The bill is therefore dismissed, with costs.

After the foregoing opinion was written it was withheld until the opinion in *Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission* (known as the "Social Circle Case") 16 Sup. Ct. 700, could be seen, the decision of the case having just been announced. That opinion is now before me, and with it also the opinion in *Texas & P. Ry. Co. v. Interstate Commerce Commission*, Id. 666. I find nothing in these cases which seems to call for any change or modification of the opinion as already written. On the contrary, so far as the same points were considered, these cases furnish authoritative confirmation of the conclusions reached from a study of the issues in advance of the light thrown upon the subject by these instructive cases. The *Social Circle Case* denies power in the commission to fix rates, and puts that question at rest. And the opinion in *Texas & P. Ry. Co. v. Interstate Commerce Commission* fully supports the proposition that in the determination of a question arising under sections 2 or 3 of the interstate commerce act, as between different places, the condition of competitive rates is an element which the commission must take into consideration, and that it is a material issue in the case which the commission is not at liberty to disregard.

STROHEIM et al. v. DEIMEL et al.

(Circuit Court, N. D. Illinois. April 16, 1896.)

EXECUTION—IMPRISONMENT FOR DEBT—STATE RESTRICTIONS ON FEDERAL PROCESS.

Rev. St. Ill. 1895, c. 72, §§ 30, 31, which provide that creditors who have caused their debtors to be imprisoned upon writs of ca. resp. or ca. sa. must pay their board weekly in advance, or the debtors will be discharged, is a restriction on imprisonment for debt, within the meaning of Rev. St. U. S. § 990, which declares that "all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein."

At Law. On motion. Action on the case by Julius Stroheim and others against Joseph and Rudolph Deimel. Plaintiffs obtained judgment, and obtained an execution against defendants' bodies, under which the latter were arrested and imprisoned. Defendant Rudolph Deimel now moves to be discharged from imprisonment.

Moran, Kraus & Mayer, for plaintiffs.

Duncan & Gilbert, for petitioner.

SHOWALTER, Circuit Judge. This was an action on the case, for alleged false representations for the purpose of obtaining goods on credit. On July 23, 1894, judgment was rendered against defendants for \$8,500 and costs. On the 17th of November, 1894, a writ of *capias ad satisfaciendum* was sued out by the plaintiffs, on said judgment. The two defendants having been thereafter arrested by the marshal, pursuant to said writ, a motion was made on their behalf to quash the same, as having been illegally and improvidently issued. This motion was based on the following statute enacted in 1893 by the legislature of Illinois:

"No person shall be imprisoned for non-payment of a fine or judgment in any civil, criminal, quasi criminal or *qui tam* action, except upon conviction by a jury: provided, that the defendant or defendants in any such action may waive a jury trial by executing a formal waiver in writing: and provided further, that this provision shall not be construed to apply to fines inflicted for contempt of court; and provided further, that when such waiver of jury is made, imprisonment may follow judgment of the court without conviction by a jury." Laws 1893, p. 96.

There had been filed in the case a stipulation, in writing, waiving a jury. But this paper was subscribed by the counsel for the parties. It contained also a provision for trial before one of the district judges, whereas a trial was afterwards had, and the finding upon which final judgment went was made, by another of the district judges. Before the latter was also heard the motion to quash, as already mentioned. What manner of stipulation was in fact made, waiving the jury, on the trial actually had, has been a subject of controversy between the parties. Section 914 of the Revised Statutes of the United States is in words following:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and

modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

A judgment for plaintiff in a case like this is a recital, of record, that the plaintiff do recover from the defendant so much money, and that he have execution therefor. Under the state law an execution against the body is comprehended in this recital. The state statute in question narrows the scope of such a judgment, if it be rendered on the finding of the judge, instead of on the verdict of a jury, when the waiver of the jury is not "a formal waiver in writing" executed by "the defendant or defendants." In the one case the judgment means one thing; in the other, another. In the one case the plaintiff has the right to take in execution the body of the defendant; in the other, he has not that right. The state enactment, in other words,—assuming it to be a valid enactment,—has for its subject-matter the rights of the litigants as between each other, and not any form of practice, pleading, or procedure, within the sense of section 914 above quoted. From another point of view, the state statute is apparently a limitation upon the judicial power of the state judge. That is to say, the judgment rendered by him upon his finding is narrowed by the statute from what it would be if rendered on the verdict of a jury. And, still further, section 649 of the Revised Statutes of the United States provides that the finding of the judge, where a written stipulation waiving a jury is filed, shall have the same effect as the verdict of a jury. For these reasons the state statute above quoted could not apply to the federal courts, nor could said statute become effective by section 914 of the federal statutes.

Nor, again, is the state statute a modification, condition, or restriction on imprisonment for debt, within the sense of section 990 of the Revised Statutes, which section is in words following:

"No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state."

This section, so far as it concerns any restriction on imprisonment for debt, has reference to what may be done on "process issuing from a court of the United States." The state enactment already quoted is, indeed, a modification, condition, or restriction "upon imprisonment for debt," but not a modification, condition, or restriction which, in the nature of things, can be "applicable to the process issuing from the courts of the United States," or to the process issuing from any court. The right to have the process is one thing; a restriction on what may take place under it is another.

The learned district judge overruled the motion to quash, and, on writ of error from the court of appeals, that order was affirmed. I am not here necessarily concerned with the line of thought on the question which led to the judgment of either court. I make the foregoing suggestions as pertinent to the inquiry now in hand and to be developed in the course of this opinion.

On the 13th day of March, 1896, Rudolph Deimel, who had been at large on bail pending the proceeding in the court of appeals, surrendered himself to the marshal. On the 14th of March he was taken to the jail in Will county, where he has since been imprisoned, pursuant to the said *capias ad satisfaciendum*. After notice from the marshal the plaintiffs in execution caused to be paid to him, on said 13th day of March, the sum of \$3.50, for the board of said prisoner for the next succeeding week. From the 13th to the 26th of March, no further advance of money was made by plaintiffs, or any one in their behalf, either to the marshal or the jailer. Said Rudolph Deimel now comes, by his counsel, and moves that he be released from said imprisonment, grounding his application on sections 30 and 31 of chapter 72 of the Revised Statutes of Illinois. Said sections are in words following:

"Sec. 30. In all cases where any person is committed to the jail of any county upon any writ of *capias ad respondendum* or *capias ad satisfaciendum* issued in any suit, it shall be the duty of the creditor in such writ to pay the keeper of the jail or sheriff his fees for receiving such person, and his board for one week at the time the debtor is committed to jail and before the jailer shall be bound to receive the debtor, and in default of such payment, the debtor may be discharged: provided, the officer having such debtor in charge shall give reasonable notice to the creditor or his agent or attorney, if within the county, that such debtor is about to be committed to jail on such writ.

"Sec. 31. Should the debtor be detained in jail under such writ for more than one week, it shall be the duty of the creditor, at the commencement of each week, to advance to such jailer the board of the debtor for the succeeding week, and in default of such payment in advance, the debtor may be discharged by such jailer. In case the debtor shall not be detained in such jail for any week for which his board may have been paid in advance, the jailer shall return to the creditor, or his agent or attorney, the amount so advanced for and unexhausted in boarding."

These enactments, by their terms, seem to apply to a debtor held on a *capias ad satisfaciendum* issued as of course on a judgment for a tort, as well as to one held on the like writ ordered after the return of a *fieri facias*, and on a showing by affidavit that such debtor has concealed his property to prevent a levy. But *Lambert v. Wiltshire*, 144 Ill. 517, 33 N. E. 538, in which the opinion was by Judge Scholfeld, and *Hanchett v. Weber*, 17 Ill. App. 114, in which the opinion was by Judge McAllister, are clear upon the point.

It is urged that said sections are for the benefit, not of the debtor, but of the jailer. In *Manby v. Scott*, 1 Mod. 132, Justice Hyde said:

"If a person be taken in execution to lie in prison for debt, he is not to be provided with meat, drink, or clothes, but he must live on his own, or the charity of others; and, if no man will relieve him, let him die in the name of God, says the law, and so say I."

By section 16 of chapter 75 of the Revised Statutes of Illinois, it is provided that:

"The keeper of the jail shall furnish each prisoner daily with as much clean water as may be necessary for drink and personal cleanliness, and serve him three times a day with wholesome food, well cooked, and in sufficient quantity."

By section 24, "the cost * * * of maintaining the prisoners" in the jail, "except as otherwise provided by law," is to be paid by

the county. But, as to a prisoner for debt, it is provided by law that the plaintiff in execution—the person interested in the detention—shall pay his board on the first day of each week. Otherwise, the prisoner is to be discharged. The jailer is not, nor is the state or county, interested. Moreover, the requirement of payment on the first day of each week is needlessly specific, as a mere provision for the jailer. And, again, the two cases already cited imply that these enactments are in fact a limitation on the right of plaintiff in execution to hold the body of his debtor. Such is the understanding, also, among the judges who preside over the state court of original jurisdiction. See, for instance, the opinion of Collins, J., in the case of *People v. McHugh*, 19 Chi. Leg. News, 177.

Rudolph Deimel was taken under the writ on the 20th of November, 1894. How long his imprisonment continued does not appear, from the affidavits; but certainly for a portion of a week. It is said that \$3.50 was then paid for a week's board, and that the balance thereof has not been returned. It further appears that on the 26th of March, 1896, a sum was either tendered or paid to the marshal, sufficient in amount to cover the board for the then current week. It is certain, however, that nothing was paid on the first day of the second week of the present imprisonment, and that, if the old balance could be so applied, it was less than \$3.50, which is the amount exacted by the jailer for a week's board for an imprisoned debtor. Upon the construction given by the state judges in the courts of original jurisdiction (see the opinion of Judge Collins, already referred to), this petitioner would be discharged, if this proceeding had been in the circuit or superior court of Cook county. It is said that the supreme court of Illinois has not passed on the question, and that, upon such facts as are shown here, an imprisoned debtor is not, under the state law, entitled to his discharge. But the ruling in the state courts is nothing more than a strict construction in a case where personal liberty is involved. It is grounded on English precedents under the lords' act, such as *Anon.*, *Sayer*, at page 102; *Fisher v. Bull*, 5 Term R. 36; *Rex v. Wilkinson*, 7 Term R. 156,—and on the rules as laid down in 1 Tidd, Prac. at page 382.

It is again contended that under the state law a judgment debtor taken on a *capias ad satisfaciendum*, issued as of course on a judgment for a tort, cannot be discharged without having first scheduled his property as provided in chapter 72 of the Illinois Statutes. Sections 62 and 65 of chapter 77, being the chapter on "Judgments," are in words following:

"Sec. 62. If, upon the return of an execution unsatisfied, in whole or in part, the judgment creditor, or his agent or attorney, shall make an affidavit stating that demand has been made upon the debtor for the surrender of his estate, goods, chattels, land and tenements, for the satisfaction of such execution, and that he verily believes such debtor has estate, goods, chattels, lands or tenements, not exempt from execution, which he unjustly refuses to surrender, or that since the debt was contracted, or the cause of action accrued, the debtor has fraudulently conveyed, concealed or otherwise disposed of some part of his estate, with the design to secure the same to his own use, or defraud his creditors; and also setting forth upon his knowledge, information and belief, in either case, the facts tending to show that such belief is well founded, and shall procure the order of the judge of the court from

which the execution issued, or of any judge or master in chancery in the same county, certifying that probable cause is shown in such affidavit to authorize the issuing of an execution against the body of the debtor, and ordering that such writ be issued; upon the filing of such affidavit and order with the clerk, he shall issue an execution against the body of such judgment debtor."

"Sec. 65. When a debtor shall be arrested by virtue of an execution against his body, he shall be conveyed to the county jail of the county of the officer who made the arrest, and kept in safe custody until he shall satisfy the execution or be discharged according to law. Immediately upon the arrest of the defendant the officer making the same shall give notice thereof to the plaintiff, his agent or attorney, if in the county: provided, that no person heretofore or hereafter imprisoned under the provisions of this act, shall be imprisoned for a longer period than six months from the date of arrest. And all persons imprisoned under the provisions of this act, for the period of one or more years at the time this act takes effect shall thereupon be immediately discharged: provided, however, that no person shall be released from imprisonment under this act who neglects or refuses to schedule in manner and form as provided by 'an act concerning insolvent debtors,' approved April 10, 1872, in force July 1, 1872. As amended by act approved June 17, 1887. In force July 1, 1887."

Section 34 of chapter 72, being the insolvent debtor act referred to, is in words following:

"In any case where the defendant arrested upon final process shall not be entitled to relief under the provisions of this act, if the plaintiff will advance the jail fees and board in manner hereinbefore provided, the defendant may be imprisoned at \$1.50 per day until the judgment shall be satisfied, and the officer making the arrest shall endorse the execution 'Satisfied in full by imprisonment'; provided, that no person heretofore or hereafter imprisoned under the provisions of this act, shall be imprisoned for a longer period than six months from the date of arrest; and all persons imprisoned under the provisions of this act, for the period of six months or more, at the time this act takes effect, shall thereupon be immediately discharged: provided, however, that no person shall be released from imprisonment under this act who neglects or refuses to schedule in manner and form as provided by this act."

If, after a return of a fieri facias unsatisfied, the debtor should be taken on a *capias ad satisfaciendum* ordered pursuant to section 62, above quoted, he may, if he so elects, pursuant to section 3 of chapter 72, have a hearing before the county judge upon the issue whether or not he has concealed his property. Upon a finding against him, he is remanded. But he may then, as an insolvent debtor, be required by the court to schedule and assign his property, or he may, doubtless, voluntarily avail himself of the divers provisions in the act concerning that class of persons. If, as an insolvent debtor, he makes a proper schedule of, and duly assigns, his property, pursuant to sections 6-11, he may still be discharged from imprisonment, notwithstanding the previous adverse finding already spoken of. But it cannot be said that an imprisoned debtor "neglects and refuses to schedule in manner and form, as provided by" chapter 72, unless he has been ordered to schedule, or unless there be some provision of that act which requires or authorizes him so to do. Sections 2-11 of chapter 72 have no application to a prisoner taken on a *capias ad satisfaciendum* issued as of course on a judgment for a tort. Such a prisoner cannot be released by scheduling. There is no law authorizing him to schedule, in the county court or elsewhere, as a means of being discharged from

imprisonment,—no law authorizing any judicial officer to entertain or pass on any schedule tendered by him. While he remains in prison the debt is abated at the rate of \$1.50 a day. If he be discharged, the balance of the debt remains. A fieri facias may issue, and if, upon the return of such a writ unsatisfied, the proper showing be made, under section 62, above quoted, I see no reason why a capias ad satisfaciendum may not again issue; and in that case, I take it, the provisions of chapter 72 would be applicable. But, however this may be, in no event, under the state law, can a schedule be a condition precedent to the release of an imprisoned debtor held by a capias issued as of course on a judgment like the one in the case at bar.

It is insisted, with much apparent confidence, that the state enactments upon which this application is grounded have no force in a court of the United States. Sections 4–6 of chapter 75 of the Revised Statutes of Illinois are in words following:

“Sec. 4. The keeper of the jail shall receive and confine in such jail, until discharged by due course of law, all persons who shall be committed to such jail by any competent authority.

“Sec. 5. The provisions of the preceding section shall extend to persons detained or committed by authority of the United States, as well as of this state.

“Sec. 6. The keeper of the jail shall be liable, for failing to receive and safely keep all persons delivered under the authority of the United States, to like pains and penalties as for similar failures in the case of persons committed under the authority of this state: provided, always, the marshal or person delivering such prisoner shall pay, or cause to be paid, for the use and keeping of such jail, at the rate of 50 cents per month, for each person that shall, under their authority, be committed therein, and also to the jailer such fees as he would be entitled to for like services rendered, in virtue of the existing laws of this state, during the time such prisoner shall be therein confined, and moreover shall support such of the said prisoners as shall be committed for offenses.”

It is by virtue of these enactments—made, it is said, in the brief for plaintiffs in execution, in response to the resolution of 1798 of the congress of the United States—that this petitioner was confined in the Will county jail. No law or regulation is pointed out whereby the United States or the marshal has undertaken to pay the board of a prisoner for debt. If the provision of the state law that the plaintiff shall pay the board of the prisoner taken by him in execution be not the law of the United States, then such prisoner, it would seem, must depend on himself, or on charity, to avoid starvation. Section 990 has already been quoted in full. It declares that “all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein.” Shall I say that, within these terms, sections 30 and 31 of chapter 72 of the Revised Statutes of Illinois, in form and effect, and as construed by the courts of Illinois, are a restriction upon imprisonment for debt, and that such restriction is applicable to the imprisonment of this prisoner? By these enactments a capias ad satisfaciendum, issued as of course on a judgment in an action ex delicto in a state court, can hold the prisoner no longer than

the plaintiff makes the payments called for. Said state laws are, in such a case, a restriction "upon imprisonment for debt"; and, as such restriction, they have application "to the process issuing from the courts of the" state. Such a restriction would seem, *prima facie*, and by the express terms of section 990, applicable "to the [like] process issuing from the courts of the United States."

But it is contended that section 990 does not apply to the imprisonment of a defendant on a *capias ad satisfaciendum* issued as of course on a judgment in an action *ex delicto*. Is not such a defendant taken on execution for a debt? Is not such a judgment a debt? How is the imprisonment to be characterized, in such a case, if it be not imprisonment for debt? Section 1042 of the Revised Statutes of the United States is in words following:

"When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment has been confined in prison thirty days, solely for the non-payment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him, that such convict is unable to pay such fine or fine and cost, and that he has not any property exceeding \$20 in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of \$20, except such as is by law exempt from being taken on civil precept for debt by the laws of (state where oath is administered); and that I have no property in any way conveyed or concealed; or in any way disposed of for my future use or benefit. So help me God.' And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts."

Shall I disregard the plain and ordinary meaning of the words of section 990, and hold that the imprisonment of a defendant on execution for a judgment in tort is not imprisonment for debt, within the meaning and intent of that section; and this in order to reach the conclusion that while, by the law of the United States, a convict or offender against the government, imprisoned for nonpayment of a fine, cannot be held longer than 30 days, yet a judgment debtor may, at the pleasure of his creditor, be held a prisoner for life, and be dependent on charity for subsistence while he does live?

It is said that the opinion of the court of appeals on the motion to quash contains a dictum to the effect that section 990 does not refer to imprisonment on judgments *ex delicto*. For reasons given in this opinion, I doubt if the point were material to the decision in the court of appeals. The question there was whether the writ itself was authorized by law. The dictum was not, and was evidently not intended to be, anything more than a reiteration of the rule that, in a constitutional provision abolishing imprisonment for debt, the word "debt" does not necessarily comprehend, and ought not to be construed as comprehending, a judgment in tort. But where a defendant has been taken in execution on such a judgment, and the question arises on the application to his case of section 990, as comprehending such statutory provisions as sections 30 and 31 of chapter

72 of the Revised Statutes of Illinois, the construction favorable to personal liberty must be applied to the words "imprisonment for debt." He is in fact "imprisoned for debt," within the fair scope of these words. Moreover, in Illinois his imprisonment satisfies the debt at the rate of \$1.50 a day. For the purposes of the question here presented, I must read section 990 of the Revised Statutes of the United States in connection with section 1042, and in the light of the rule of construction last referred to. The right of a creditor to take on execution the body of his debtor is in the nature of a property right. This right a statute or constitutional enactment abolishing "imprisonment for debt," in effect, takes from the creditor. Such a statute therefore contains no more than is expressed by, and necessarily included in, its terms. So construed, it cannot take from a plaintiff in tort the right to seize the defendant on execution; for the claim sued on gives character to the case, and that claim is not a debt. The contrary rule of construction, namely, that the statute contains everything fairly within the language used, and not necessarily excluded therefrom, prevails when the legislative intent is obviously a relief or benefit to a debtor already imprisoned. The words in section 990, "all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to process issuing from the courts of the United States," especially when read in connection with section 1042, above quoted, imply relief or benefit to judgment debtors held on execution by writs from the federal courts. The words, "imprisonment for debt," as used in section 990, may, and therefore must, include the imprisonment of a judgment debtor on execution in an action *ex delicto*.

My holding is that the requirement for the payment by plaintiffs of the debtor's board on the first day of each week of his detention is not, in Illinois, a municipal regulation for the guidance of state officials, within the sense of *McNutt v. Bland*, 2 How. 1; that said requirement is a limitation on the plaintiffs' right to detain the debtor,—in other words, a restriction on imprisonment for debt; that such restriction is within the terms of section 990 of the Revised Statutes of the United States; and that, by reason of the failure to pay on the first day of the second week of petitioner's imprisonment, plaintiffs lost their right to further detain this petitioner pursuant to the *capias ad satisfaciendum* under which he is imprisoned.

At common law, I suppose the appropriate proceeding here would have been by *audita querela*. But since no objection is interposed to the form of this application, and since the plaintiffs in execution elected to present the showing of fact from their side by affidavit, and since no occasion for a jury has arisen, there being really no dispute of fact, an order discharging this petitioner may be properly made on this application.

PRESCOTT & A. C. R. CO. v. ATCHISON, T. & S. F. R. CO. et al.

(Circuit Court, S. D. New York January 8, 1896.)

1. PLEADING—INTERPRETATION OF COMPLAINT—DEMURRER.

A complaint is to be interpreted as a whole even on demurrer and on motion to dismiss.

2. RAILROAD COMPANIES—ARRANGEMENTS FOR THROUGH BILLING.

There is no principle of common law which forbids a single railroad corporation, or two or more of such corporations, from selecting, from two or more other corporations, one which they will employ as the agency by which they will send freight beyond their own lines, on through bills of lading, or as their agent to receive freight, and transmit it on through bills to their own lines, and without breaking bulk; and the right to make such selection is not taken away by the interstate commerce law. *New York & N. Ry. Co. v. New York & N. E. R. Co.*, 50 Fed. 867, explained.

3. CONTRACTS IN RESTRAINT OF TRADE—ACT JULY 2, 1890.

A contract by which a railroad company arranges with another, to the exclusion of still others, for the interchange of passengers and freight by through tickets and bills of lading, is not a contract in unlawful restraint of trade, within the meaning of the act of July 2, 1890.

This was an action by the Prescott & Arizona Central Railroad Company against the Atchison, Topeka & Santa Fé Railroad Company and other railroad corporations and individuals for alleged unlawful discrimination in refusing to accept freight from the plaintiff company, on through bills of lading, while such freight was accepted and carried on through bills, under a contract with other railroad companies. The case was heard upon a motion, by all of the defendants save one, to direct a verdict in their favor upon the pleadings and opening, the remaining defendant asking judgment in his favor on demurrer.

C. N. Sterry, for the motion.

Delos McCurdy, opposed.

LACOMBE, Circuit Judge (orally). In this case I have examined the authorities submitted yesterday by the parties on both sides, and have reached the conclusion that the motions to dismiss must be granted. I am unable, however, in so brief a time to formulate any elaborate opinion; and it will be sufficient to indicate that the lines of thought which lead to this conclusion may be ascertained by reference to the cases of *U. S. v. Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 58 Fed. 58, *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775, and the *Dueber Watch-Case Co. Case*, 14 C. C. A. 14, 66 Fed. 637; all three being opinions of circuit courts of appeals.

All legislation interfering with the right of the individual, whether he be a natural person or a corporation, to enter into contracts or to exercise his preferences as to the persons with whom he shall do business, should be cautiously construed. It is legislation of a novel character, and should not be extended beyond the plain import of the language used by the lawmakers. Stripped of the adjectives and of the averments as to conclusions of law, the gist of this complaint is the making of the particular contract known as "Exhibit A," and

the carrying out of that contract according to its terms, coupled with the further set of facts that, in carrying out that contract according to its terms, the parties thereto necessarily ceased to continue with the plaintiff corporation the relations which had existed before. That contract contemplates, and the acts of the parties defendant set forth in the complaint show, that what was done was to institute a system of interchange of freight and interchange of passengers by the new corporation to and with the other four defendant corporations, and to cease, from and after the execution of that contract or some subsequent date, the further interchange of freight and passengers on through bills, and by through tickets, with the plaintiff corporation. Now, it is true that the complaint contains a single clause, at the close of the sixty-ninth paragraph, which uses the words "by utterly refusing to receive or deliver freight or passengers to or from it." That language, taken in its full scope, imports a refusal to receive freight, that had its origin on the line of the Prescott & Arizona Central Railroad Company, wherever and under whatever circumstances it was tendered. But it is a fair rule of pleading that the complaint is to be interpreted, even upon demurrer and upon motion to dismiss, as a whole; and examining it a second time, after the arguments yesterday, with great care, I am constrained to the conclusion that the case which it makes out is the case stated in general terms in the sixty-ninth paragraph, but set forth specifically and distinctly in the seventy-eighth paragraph, namely, "that the defendants have refused to accept or deliver local and interstate freight at said Seligman [or Prescott Junction] upon through billing from or to the line of the plaintiff, in conjunction with the lines of said defendants, although the said defendants now accept and deliver freight upon through billing from or to the said defendant the Santa Fé, Prescott & Phoenix." And the illustrative cases which are given under another of the paragraphs, the seventy-first, indicate quite clearly that the ground of complaint and the case made by the bill is the refusal to deliver freight on through bills, and without breaking bulk, to the plaintiff corporation, or to receive freight from the plaintiff corporation without breaking bulk, and without rebilling, and the same with regard to passengers,—the refusal to send passengers on through tickets, or to accept through tickets with passengers.

Now, I know of no principle of common law which forbids an individual railroad corporation, or two or three or more corporations, from selecting as to which one of two or more corporations they will employ, as auxiliary to their own lines, as the agency by which they will send freight beyond their own lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills, and without breaking bulk. And I do not find in the interstate commerce law sufficient to warrant the conclusion that the law has been changed in that particular. This court, sitting in May, 1892, at a term where the present judge sat, reached a somewhat different conclusion in *New York & N. Ry. Co. v. New York & N. E. R. Co.*, 50 Fed. 867. Of that case it is to be said that the decision was to some extent induced by the way

in which the case came to the court, after action by the interstate commerce commission, already partially accepted by both sides; and, moreover, there had not been at that time so exhaustive a judicial examination and exposition of the terms of the interstate commerce law as we now find in the authorities, notably in the decisions of circuit courts of appeals. The conclusion is reached, therefore, that this was not a contract in unlawful restraint of trade, within the meaning of the act of July 2, 1890, for the reason that it was not so at common law, was not made so by the interstate commerce statute, and that the act of 1890, as indicated in the Dueber Watch-Case Co. Case and in the Trans-Missouri Case (which have been already cited), is directed solely against contracts which would have been unlawful before the passage of the act.

The further question as to whether the averments of the complaint are sufficient, assuming that the court be in error on this branch of the case, to make out a cause of action against the individual directors, need not be considered. The authorities cited by the defendants are very strongly in support of their motion; but the court prefers to put the decision in this case upon the broader ground.

The motions, therefore, to dismiss as to John J. McCook individually, as to the same as receiver of the Atchison, Topeka & Santa Fé, as to the same as receiver of the Atlantic & Pacific, as to the same as trustee of the Prescott & Arizona Central Railroad Company, as to Russell Sage, as to Cecil Baring, both individually, as to McCook and Crane, as executors of George C. Magoun, and as to John J. McCook, as director of one or more of the railroads named, are granted; and the demurrer of George J. Gould to the bill, on the ground that it does not set forth facts sufficient to constitute a cause of action, is sustained. Judgment is therefore directed in favor of the moving parties for dismissal of the complaint, and the ordinary form of order on demurrer will be signed when presented. An exception is granted as to the whole disposition of the case, and exceptions separately as to each one of the separate motions will be recorded. Stay of 30 days to plaintiff.

PRESS PUB. CO. v. McDONALD.

(Circuit Court of Appeals, Second Circuit. April 6, 1896.)

1. JURY—CHALLENGE TO THE FAVOR—REVIEW IN APPELLATE COURT.

The decision of a trial judge, upon a challenge to the favor, the question before him being in the main one of fact, upon which he has the benefit of seeing the bearing and appearance of the juror, should not be set aside by an appellate court except for manifest error.

2. SAME.

Upon the trial of an action for libel against the proprietor of a newspaper, one J., called as a juror, stated, on his examination, in reply to the defendant's counsel, that he had no prejudice against the particular newspaper, or newspapers of the city in general, though he thought such papers published articles which they should not; that his first impression would be against newspapers on a charge of libel, which it would require some effort to free himself from. To the judge, he said he had no doubt

of his ability to be impartial. To the defendant's counsel, again, he said that his feeling would affect his deliberation as to whether the defendant had exercised fair care in publishing the article in question, but to the judge, again, he said he did not mean that he would assume the newspaper had not exercised due care. The judge overruled a challenge to the favor. *Held* no error.

3. EVIDENCE—LIBEL—FALSITY OF DISPATCH.

On the trial of an action against the proprietor of a newspaper, for libel, in which the defendant attempts to reduce the damages by showing that the dispatch, containing the libel, was not wantonly or carelessly sent, evidence is admissible, on the part of the plaintiff, to show that the information on which the dispatch was based was untrue, and that investigation would have shown its falsity.

In Error to the Circuit Court of the United States for the Southern District of New York.

This writ of error was brought by the defendant in the circuit court, to review the alleged errors of the circuit judge upon the second trial to the jury of an action pending in the United States circuit court for the Southern district of New York, for an alleged libel which was published in the New York World.

John N. Bowers, for plaintiff in error.

Horace E. Deming, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The facts with respect to the alleged libel which is the subject of this suit—the publication itself, its actionable character, the law in regard to evidence of the plaintiff's social standing, and in regard to the subjects of express malice and punitive damages—were fully considered upon the first writ of error, and are stated in the opinion of this court. 11 C. C. A. 155, 63 Fed. 238. The questions which arise upon the present writ of error, which are both new and important, are the alleged errors in overruling a challenge to the favor, and in admitting the challenged person to become a juror, and in the admission of evidence in regard to the falsity of Gosdorfer's original dispatch.

Alonzo B. Jones, an architect, and apparently an intelligent and cautious person, who was called as a juror, was examined by the counsel for the defendant and by the judge. In reply to the defendant's counsel, he said, among other things, that he had no feeling or prejudice against the World, and no prejudice against the newspapers of the city of New York; that he thought the papers of the city published articles which they ought not to publish; that no publication in the World against any of his friends had been made; that the first impression would be against newspapers on a charge of libel; and that it was a feeling that would require some little effort for him to free himself from. To the judge he said that he had no doubt at all in regard to his ability to render an impartial verdict in any case against a newspaper, or of his ability to be impartial in a case against the World; that he would give the defendant corporation the benefit of the rules of law and of the evidence which was in its favor. The defendant's counsel then asked the following question: "If the case involved the precise point suggested by his

honor, as to whether or not the defendant has exercised fair care in the publication of an article affecting a private individual, would or would not the feeling that you hold affect your deliberation as a juror?" To which the witness replied, "I think it would." To the question of the judge, "Do you mean to say that you would assume that the newspaper had not exercised due care, irrespective of the character of the article, or the circumstances of the case?" he replied, "No; I do not."

Challenges in the federal courts to the favor are tried by the court (Rev. St. § 819), and an alleged error in the decision which is duly excepted to is the subject of review by the appellate court. But it must be remembered that the question before the trial judge, although one of mixed law and fact, is, in the main, a question of fact, and that, while he may be sometimes wrongly influenced by a desire to expedite the trial, or by impatience of delays, yet, if his mind is undisturbed, the impression which the juror makes of his intelligence, fairness, and evenness of mind, from a personal inspection of him, and the belief, in regard to his probable character, which is created by his appearance under examination, his bearing and willingness to disclose the nature and extent of his preconceived opinions, are valuable, and have deserved weight before an appellate court, and therefore the finding of fact by the trial court will not be set aside except for manifest error. Thus Chief Justice Waite, in *Reynolds v. U. S.*, 98 U. S. 145, says, in regard to the finding upon a challenge for cause in a criminal case, the alleged cause being a preconceived opinion, as follows:

"It is clear, therefore, that, upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that, upon the evidence, the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."

The tendency of the modern decisions by the New York court of appeals is also to regard the question arising under a challenge to the favor as one of fact in the majority of cases, and dependent upon the circumstances of the particular case, and therefore to give proper weight to the opinion of the trial judge, who had an opportunity to see the juror. *Thomas v. People*, 67 N. Y. 218; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363.

In this case, if the answer of Jones to the last question which was put by the defendant's counsel was the only, or was the main, answer in the examination, the challenge should have been sustained. He had said, abundantly, that he had no feeling or prejudice against the World, but that his first impression would be against newspapers who were charged with libel. In reply to the court, and to a certain

extent, also, from his previous answers, it became apparent that this impression was a general one that newspapers were not as careful as they should be in regard to their publications concerning the private transactions of individuals, but he had no doubt that he could render an impartial verdict in a case against the World or any other newspaper, and would give to the defendant the benefit of the evidence in its favor. At this point the court overruled the challenge. The counsel then put the question and answer which has already been quoted, and in reply to the court's question the witness said that there would be no assumption on his part that the newspaper had not exercised due care. The court again overruled the challenge, evidently upon the ground that the entire examination showed that, while there was an impression that newspapers as a class were not as careful as they ought to be in publications of a personal character, yet that the man not only intended to be impartial, but was actually so, and that his impression or "feeling" was not of that substantial character which would interfere with and put his judgment, or faculty for judging truly, out of equipoise. When the juror was asked about this vague impression or feeling, his answers gave it undue importance. When he investigated his own impartiality, he had no doubt of himself, and in that conclusion the trial judge, who saw and endeavored to scrutinize and weigh the juror, coincided. We concur in his conclusion that the impressions were of the character "which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of it," and which Chief Justice Marshall thought constituted no sufficient objection to a juror. 1 Burr's Trial, 416, Fed. Cas. No. 14,692g.

The defendant urges Jones' prejudice against newspapers as an objection to his competency, upon the ground that a juror who has a prejudice against a lawful business is incompetent. Assuming that the proposition is true, Jones' impression in regard to the methods of conducting newspapers was not of that character which could be considered a disqualifying prejudice.

The next exception relates to the admission of testimony in regard to the falsity of Gosdorfer's original dispatch. The case really turned upon the question of damages; the effort of the defendant being to reduce them to a nominal sum, and to that end to show that there was no wantonness or carelessness, but that it exercised a high degree of care in the selection of correspondents, and in the reliance upon them for truthful dispatches. It offered Gosdorfer as a witness, who proved that he wrote and sent the original dispatch, and also offered the dispatch itself. Upon the cross-examination of Gosdorfer, the plaintiff endeavored to show that he had, without investigation, incorrectly changed the language of the statement which he originally saw in regard to Evan Smith, and offered further evidence to show the untruthfulness of the dispatch as sent, and that investigation would have shown its incorrectness. This testimony was admissible for the purpose for which it was offered, to attempt to refute the theory of the defendant of adequate care in the collection and publication of news, by an examination of the truthfulness

of the dispatch which the defendant had put in evidence as the origin of the published dispatch.

The general subject of testimony in regard to the social status of a libeled plaintiff was so fully examined in the former opinion that the discussion needs no repetition. The amount of testimony of that character upon this trial was kept within proper bounds by the trial judge. After the plaintiff had stated the character and extent of the social and business positions which he occupied, a single witness replied most briefly to a very general inquiry in regard to the plaintiff's business and social standing.

The judgment of the circuit court is affirmed, with costs.

CONNECTICUT MUT. LIFE INS. CO. v. McWHIRTER.

(Circuit Court of Appeals, Ninth Circuit. April 6, 1896.)

No. 195.

1. PLEADING—LIFE INSURANCE POLICY.

It is not necessary that the complaint in an action on a policy of life insurance should set forth the application for such policy, or the answers to all the questions contained therein.

2. SAME—LAPSE OF TIME—DATE OF COMMENCEMENT OF ACTION.

A policy of life insurance provided that no action upon it should be brought until 30 days after the receipt by the insurer of proofs of the death of the insured. The complaint in an action upon the policy alleged that proofs of death were delivered to and received by the insurer on a certain date, which was more than 30 days before the filing of the complaint, upon which alone the summons by which the action was commenced could be issued. *Held*, that reference could be made to the date of filing the complaint, to determine whether the action was prematurely brought, and the omission of a distinct allegation that the 30 days had elapsed did not render the complaint demurrable.

3. EVIDENCE—LIFE INSURANCE—DECLARATION OF INSURED—SUICIDE.

In an action on a policy of life insurance, in which one of the defences is the alleged suicide of the insured, it is not error to exclude evidence of declarations of the insured, made four years before his death, that in a certain contingency, not shown to have occurred, he would commit suicide.

4. LIFE INSURANCE—SUICIDE—PRESUMPTION.

In an action upon a policy of life insurance, the presumption is that the insured did not kill himself.

5. SAME—APPLICATION—GENERAL QUESTION—THREATS OF BODILY HARM.

When an applicant for life insurance is asked, at the end of a long series of questions, whether there is any fact relating to his physical condition, personal or family history, with which the insurer ought to be made acquainted, all that can be required is an honest answer, as to which, in an action on the policy, the jury must decide; and the court is not bound, as a matter of law, to instruct them that a failure to disclose, in answer to such question, that the insured had enemies who were reported to have threatened his life, or that he was apprehensive of assassination, would avoid the policy.

6. PRACTICE—CHARGING JURY—IGNORING ISSUE—HARMLESS ERROR.

Where two issues are made by the pleadings in an action, but upon one of them the defendant's evidence wholly fails to support his contention, an instruction to the jury that the entire theory of the defense is based upon his contention as to the other issue does not constitute error which should reverse a judgment against the defendant.

In Error to the Circuit Court of the United States for the Northern District of California.

James H. Budd and J. C. Campbell, for plaintiff in error.
Crittenden Thornton, for defendant in error.

Before KNOWLES, MORROW, and BELLINGER, District Judges.

KNOWLES, District Judge. In this action, Nannie S. McWhirter recovered a judgment of \$16,137.50 against the Connecticut Mutual Life Insurance Company. The action was based upon two life insurance policies issued to Louis B. McWhirter, insuring his life. The first of these policies was for the sum of \$5,000, dated on the 18th day of December, 1891. The amount of the annual premium on this policy was \$186.50. This was to be paid for 20 years. The \$5,000 was to be paid, in case of the death of Louis B. McWhirter, to Nannie S. McWhirter, who was his wife, in the event that she survived him. The second policy was for the sum of \$10,000, dated on the 15th day of March, 1892. The amount of annual premium on this policy was \$289.50. This amount was to be paid each year for 20 years. The said \$10,000 was to be paid to the said Nannie S. McWhirter if she survived him at his death. On the 29th day of August, 1892, the said Louis B. McWhirter was found in the back yard to his house, shot. The wound was in the vicinity of his heart. From this wound he died in a few minutes. It is claimed by the complainant that he was murdered. The Connecticut Mutual Life Insurance Company claims that he committed suicide. It is also claimed by the said company that said Louis B. McWhirter did not correctly respond to a question propounded to him when he made his application to said company for insurance; that this wrong existed at the time each application was made; that his answer to said question was a part of his policy, and he warranted its correctness; hence the policy was void on account of this breach of warranty. The question which it is stated he did not correctly answer is as follows:

"Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answer to the foregoing question, and with which the company ought to be made acquainted?"

The answer to this was, "No."

The matter in which it is claimed this answer was false, and to the knowledge of said Louis B. McWhirter, is that at said times he knew that he had enemies, and that his life had been threatened, and he believed his life was in danger. The grounds urged for the setting aside of the judgment in this case, and the ordering a retrial thereof, are as follows:

First. The demurrer to the complaint interposed by the plaintiff in error should have been sustained.

Second. The rejection of the evidence of one E. F. Bernhard.

Third. Charging of the jury by the court that the presumption was that McWhirter did not kill himself, and that this presumption had to be overcome by evidence on the part of the defendant.

Fourth. That the court erred in not giving, as a part of his charge, the following instruction requested by defendant:

"The question and answer referred to in instruction eleven were a warranty upon the part of Louis B. McWhirter that there was no fact in his personal history that would increase the hazard, or increase the premium, of said insurance; and you are instructed that the only question for you to determine is as to whether or not said warranty was true. It makes no difference whether said representation was material or not. If you find from the evidence that the same was untrue, then it is your duty to find a verdict for defendant."

The failure of the court to give this instruction as requested was excepted to. The question and answer referred to is the one set forth above.

The fifth ground is that the court erred in giving the following instruction:

"You are further instructed that the entire theory of defense in this case is based upon the assumption that Louis B. McWhirter prepared the clubs and the mask found upon the premises shortly after the killing; that six shots were fired on that occasion; that five, and only five, were fired into the fences and outhouses upon the premises; and that McWhirter fired the sixth into his own body, and through his own heart, which caused his death. This theory of defense is founded upon the allegation that McWhirter prepared the surroundings to indicate a sham assassination or scene of murder, and then killed himself. If you should find that Louis B. McWhirter did not make such preparations, that he did not saw the clubs found upon his premises, that he did not prepare the mask, that he did not own or possess both pistols, and that he did not fire all the shots, the bullet holes of which are found in the fence and outhouses, and on his own body, your verdict should be for the plaintiff."

To the giving of this instruction, defendant excepted.

The sixth error complained of is the refusal of the court to give the following instruction:

"In the applications which have been introduced in evidence the following questions were asked the deceased, and the following answers given by the deceased: 'Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?' The answer to that question was, 'No.' And furthermore it was, by the terms of said policies and applications, agreed that the questions and answers to each and every question was true. If you believe from the evidence in this case that at the time of the application for insurance made by said Louis B. McWhirter, and at the time of the delivery of the policies of insurance which are the subject of this controversy, said Louis B. McWhirter had been threatened or was apprehensive of being assassinated, then I instruct you that such facts were a part of the personal history of said Louis B. McWhirter, and should have been communicated to the defendant insurance company, and the failure to so communicate them avoids the policy, and you should find a verdict for the defendant."

The seventh and last ground of error set forth is a refusal of the court to give the following instruction to the jury:

"Warranties are a part of the contract of insurance, upon which the insurer, as well as the insured, has a right to rely; and if you find from the evidence that the deceased, Louis B. McWhirter, in answer to the question asked him as to whether or not there was any fact in his personal history which said company ought to know, said, 'No,' then I instruct you that if it were a fact, and if you so find from the evidence, that prior to the time of said application and said answer the said Louis B. McWhirter had had difficulties with certain persons who threatened his life, and that he was then apprehensive of

assassination, that was such a fact as he should have communicated to said company, and his failure to communicate such fact to said company was a breach of warranty contained in said application, and you should find a verdict for the defendant."

In considering the first point presented, the question arises as to whether or not the plaintiff was required by the rules of pleading to set forth, as a part of the contract or policy of insurance, the application made by Louis B. McWhirter. It is true that the policy recites that "in consideration of the application for this insurance, which is the basis of, and a part of, this contract, and a copy whereof is hereunto annexed, and of the several answers, warranties, and agreements therein contained, and of the annual premium," etc., defendant does insure the life of said McWhirter. I see no object to be obtained by requiring all of the answers specified in the application to be set forth. It is not a part of the case plaintiff was required to make out, to prove that all of these answers were true. It is urged that the contract sued on, in *hæc verba*, or according to its legal effect, should be set forth. It may be said there is no legal effect of these answers that can be set forth. There is some conflict of authority upon the point here presented. In the following cases it is held that the application, with all its answers, should be set forth: *Gilmore v. Insurance Co.*, 55 Cal. 124; *Tischler v. Insurance Co.*, 66 Cal. 178, 4 Pac. 1169. In this last case the former is cited with approval. But it should be observed that it is stated that a portion of the contract that might prove material was omitted, and a demurrer was sustained to the complaint for that reason. *Bidwell v. Insurance Co.*, 3 Sawy. 261, Fed. Cas. No. 1,393. In the following cases it is held that the application need not be set forth in the complaint, namely: *Blasingame v. Insurance Co.*, 75 Cal. 633, 17 Pac. 925; *Insurance Co. v. P. J. Willis & Bro.*, 8 C. C. A. 594, 60 Fed. 236; *Herron v. Insurance Co.*, 28 Ill. 235; *Insurance Co. v. Pickel* (Ind. Sup.) 21 N. E. 546; *Jacobs v. Insurance Co.*, 1 MacArthur, 632; *May, Ins.* § 587. The Code of California requires that the complaint shall contain a statement of the facts constituting a cause of action, in ordinary and concise language. With this provision in view, it would appear that the plaintiff should not be required to state a large amount of facts which do not in any manner constitute any statement of facts constituting his cause of action, and facts which he is not required to prove. In *Ship. Com. Law Pl.* 12, it is stated of the declaration in *assumpsit*:

"The contract must be stated with certainty and precision, and it may be set forth in terms, or according to its legal effect, and only such parts need be set forth as show the entire act to be done in pursuance of the consideration stated."

In note 47 on said page it is said:

"But not facts as to which no breach is claimed."

In support of this, *Miles v. Sheward*, 8 East, 7, is cited.

In *Henry v. Cleland*, 14 Johns. 400, it is said:

"The plaintiff is not obliged to set out the whole agreement. It is enough for him to state so much as constitutes the agreement, the breach of which is relied on."

The same view is maintained in *Sandford v. Halsey*, 2 Denio, 235. The provisions of the California Code as to pleading do not, I think, abrogate these common-law rules as to pleading, and make it necessary for a plaintiff to set forth facts upon which no issue is sought. The contract, therefore, was sufficiently described in the complaint, and the demurrer properly overruled. If, however, we should be mistaken in this view, it appears that all of the application was made a part of the answer, and is fully presented to the court. When a plaintiff omits to state material facts in his complaint, and these facts are set forth in the answer, then the defect in the complaint is cured or waived. This point was considered in this court in the case of *Richardson v. Green*, 9 C. C. A. 565, 61 Fed. 423.

It is also urged that the complaint does not state that 30 days had elapsed after the date the proofs of the death of McWhirter were received at the office of the Connecticut Mutual Life Insurance Company, at Hartford, Conn., and is therefore defective. The view taken is that the complaint must itself show that the action is not premature; that is, commenced before it accrued. It is stated in the complaint that due notice and satisfactory evidence of the death of said assured Louis B. McWhirter were delivered to and received by the defendant at its office at Hartford, Conn., prior to the 1st day of December, 1892. In *Moak, Van Santv. Pl.* p. 171, it is stated:

"Nor, indeed, would a demurrer lie to a declaration, unless it appeared affirmatively, upon its face, that the cause of action had not accrued when the suit was commenced. The rule has been fully recognized under the Code."

The case of *Maynard v. Talcott*, 11 Barb. 570, supports this view.

We find that the complaint was filed on the 7th day of January, 1893. This was more than 30 days after the serving of the proofs of death upon the plaintiff in error. Under the Code of California, it seems that an action is commenced by filing a complaint, and the issuing of a summons thereon. Certainly no summons could issue until the complaint was filed. The question is here presented as to whether we can recur to the filing of the complaint to show that the action was not premature. At common law an action was commenced by the issuing of the writ of summons, and not at the time of filing the declaration. In determining whether or not an action was commenced before it accrued, there could be a reference made to the date of the issuing of the writ; and if it was found, from the allegations in the declaration, that the action had not accrued at the time of issuing the writ, a general demurrer would then lie to the declaration. *Waring v. Yates*, 10 Johns. 119; *Cheetham v. Lewis*, 3 Johns. 43; *Lowry v. Lawrence*, 1 Caines, 71; 1 Chit. Pl. 262-265. In these cases it will be seen that the records showing the date of the issuing of the writs were considered, in ruling upon the demurrer. There are many allegations in a complaint that must be considered with reference to the filing thereof in court. For instance, in the action to recover the possession of real property, the allegations that the defendant now withholds the possession thereof from plaintiff refers to the date of the filing of the complaint. In the case of the allegation in an action upon a contract or promissory

note, when it is alleged that the payment is to be made upon a certain date, and, in assigning the breach, it is alleged which time has now elapsed, this must refer to the date of filing of the complaint. In this case, after setting forth in the complaint the contract of insurance, the death of McWhirter, the date the proofs of his death were filed in the office of the insurance company, then there is this allegation: That said defendant, although often requested, has not paid said sum of five thousand dollars, in one cause of action, and ten thousand dollars, in the other, or any part thereof.

This allegation must be construed as having the effect of saying that neither of these sums has been paid up to the date of filing the complaint. The cases of *Cowan v. Insurance Co.*, 78 Cal. 188, 20 Pac. 408, and *Doyle v. Insurance Co.*, 44 Cal. 267, were not made when the same state of facts existed as are presented in this case. In these cases there is no date alleged as to when the proofs were made or filed in the proper office, and hence it could not be seen by reference to the filing of the complaint whether the proper time had elapsed after the proofs to show that the cause of action had accrued. In view of these considerations, I think it sufficiently appears that the cause of action accrued before the filing of the complaint; hence the demurrer was not well taken upon this point. It should also be noted that after the demurrer was overruled the insurance company filed its answer, in which there is no pretense that the cause of action had not accrued, and went to trial upon the merits of the case. Unless the complaint clearly failed to state a cause of action, such action waived the demurrer. *Stanton v. Embrey*, 93 U. S. 548.

I can see no error in rejecting the evidence of Bernhard. It was sought to show that McWhirter, some four years before his death, said to Bernhard that, if he ever did anything which would bring disgrace upon him or his family, he would kill himself. There was no attempt to show that McWhirter had, as a matter of fact, done anything that had brought disgrace upon himself or his family. It is true, he had been arrested upon a charge which he declared was without foundation. This does not show that he had done the act which would induce his suicide according to his own declaration. That he had ever, upon any conditions, thought of committing suicide, seems to have been regarded as pertinent in the case. I do not conceive this to be correct. Many a man has talked of suicide in the way McWhirter did upon that occasion without any intention of committing the deed. Then, the purpose expressed was so conditioned and so remote that I cannot conceive that any presumptions were raised upon the point at issue. If there are any presumptions to be raised by such a declaration, I would say that it would be that McWhirter was a man so sensitive as to his honor that he would not purpose the committing of suicide with the view of defrauding a life insurance company.

The third alleged error presented for consideration is as to the charge of the court to the jury that the presumption was that McWhirter did not kill himself. The decisions of the supreme court sustain this charge. *Home Ben. Ass'n v. Sargent*, 142 U. S. 691, 12

Sup. Ct. 332; *Insurance Co. v. Akens*, 150 U. S. 468, 14 Sup. Ct. 155; *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360. In this last case the supreme court said:

"In respect to the issue as to suicide, the court instructed the jury that self-destruction was not to be presumed. In *Mallory v. Insurance Co.*, 47 N. Y. 52, 54, which was a suit upon an accident policy, it appeared that the death was caused either by accidental injury, or by the suicidal act of the deceased. 'But the court properly said the presumption is against the latter.' 'It is contrary to the general conduct of mankind. It shows gross moral turpitude in a sane person.' Did the court err in saying to the jury, upon the issue as to suicide, the law was for the plaintiff, unless that presumption was overcome by competent evidence. This question must be answered in the negative."

What presumption was it that the court had reference to? The presumption that the deceased did not kill himself? There is nothing in the statement of the court in the balance of the opinion in this case that contradicts this view. The plaintiff in error, in the court below, assumed the burden of proof, and undertook to show that McWhirter did kill himself. This was upon the theory that the presumption was that McWhirter did not commit suicide. The contention of the plaintiff in error cannot be maintained upon this assignment.

In considering the fourth error alleged by plaintiff in error, the question is presented as to the nature of the question specified in the instruction asked. In construing this question, we are confronted by the rule that the policy must be given that meaning which would be most favorable to the insured. May, Ins. § 175. And when there is any doubt as to the character of a statement in the application for a policy, which is made a part thereof, "a court should lean against that construction which imposes upon the assured the obligations of a warranty." *National Bank v. Insurance Co.*, 95 U. S. 673. The language, "Is there any fact relating to your physical condition, personal or family history, * * * with which the company ought to be made acquainted?" with these rules in view, ought to be classed as calling for an opinion on the part of McWhirter. A great many questions had been asked him upon almost every conceivable question connected with his family history, his physical condition and habits, and he was required to answer many of them "Yes" or "No"; then, finally, this question. Certainly, in considering whether there was any matter connected with his personal history which the company ought to know, he must determine that it would not be required of him to state that he had played marbles when a boy, had been whipped at school, or had loved his wife when he married her. When an opinion is asked, all that could be required would be an honest answer. *National Bank v. Insurance Co.*, supra; *Moulou v. Insurance Co.*, 111 U. S. 335-345, 4 Sup. Ct. 466. Whether he made an honest answer was a matter for the jury to determine. But, if it were a matter for the court, it would hardly be thought that he would consider it an important matter to state that he had enemies,—political enemies,—and his life had been threatened by them. Would any one suppose that in an agricultural community in the state of California, where churches and schools abound, and the

public press has abundant circulation, that a threat to take a man's life on account of political differences would be considered of importance? Considering what we know of such communities, and the causes which have led to murders, could any cool and reasonable man say he thought such a threat would be carried into execution? How many cases of this kind can it be asserted have occurred in such a community, in the history of this country, or even in the state of California? The fact that the deceased may have placed some stress upon this amounts to nothing. The presentiments of death that are said to come now and then to the mind of a well person, and the prophecies of a fortune teller, are at times said to have made impressions upon strong men; but would an insurance company consider such matters important, when taking the application of a person seeking a life insurance? I cannot think it would. If so, then such companies had better enlarge their long list of exhausting questions, and not leave it to the judgment of applicants for insurance policies to make known such matters.

The fifth error complained of should be considered with reference to the balance of the charge to the jury. In one part of the charge the court said:

"You are further instructed that any threats, the suppression or concealment of which by the deceased would constitute a defense to this action, must be actual threats of bodily harm by third persons known to the deceased, and which would affect the fears and apprehensions of a reasonable man, and that mere rumors or apprehensions of the unlawful acts of personal or political enemies, not amounting to tangible or specific threats of bodily harm or injury, would not, even if concealed from the defendant, constitute a defense to this action."

I have been unable to find any evidence of any such threats as are here specified in the record. There is evidence of statements of political enemies, of apprehensions of bodily injury, but nowhere any evidence of threats of bodily harm by third persons known to the deceased. While in the pleadings there were the two issues,—one of failure to give a proper statement in regard to his personal history, and the other that of suicide,—and while these issues were sought to be presented in the evidence, this instruction, in effect, eliminates the first issue from the case. It was not sufficiently supported by the evidence. We have already stated that vague impressions or presentiments occurring to a man, that he will be killed, were not required to be stated in answer to any question asked McWhirter. Evidently the court felt that under the evidence the only real issue in the case was the suicide of the deceased, McWhirter. The statement of the court that there were two issues in the case must, in the light of the whole charge and the evidence, be confined to the issues made by the pleadings, and not as maintained by the evidence. Under these circumstances, there is no error presented upon this point which should reverse the judgment of the court below. Where the error complained of could not have prejudiced the rights of a party in the case, a judgment should not be reversed by an appellate court. *Lancaster v. Collins*, 115 U. S. 222, 6 Sup. Ct. 33; *Hornbuckle v. Stafford*, 111 U. S. 389, 4 Sup. Ct. 515. The statement that there

were two issues for trial, when there was in fact only one, could not have prejudiced plaintiff in error.

The sixth and seventh points made in the brief, in regard to the refusal of the court to give instructions 11 and 13 asked by plaintiff in error, may be considered together. In both of these instructions the position is taken that it was the absolute duty of McWhirter to inform plaintiff in error, in answer to the question touching his personal history, that he had been threatened or was apprehensive of being assassinated, and that a failure to so state was a breach of warranty which avoided the policies of insurance in this case. I have already stated that I think this question referred to called upon McWhirter to express an opinion as to whether there was anything in his personal history which he ought to communicate to the insurance company, and that all that was required of him was to act honestly and fairly in this matter. These instructions entirely ignore this view. It was therefore right and proper for the court to have refused them. With this view of the case as presented to the court, the judgment of the court below ought to be affirmed. And it is therefore hereby ordered that the judgment of the circuit court before which this case was tried be, and the same is hereby, affirmed, with costs.

THE VIGILANCIA.

THE ALLIANCA.

ATLANTIC TRUST CO. v. THE VIGILANCIA et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

1. CHATTEL MORTGAGES—VALIDITY—RIGHTS OF LIEN CREDITORS.

One having a lien upon a vessel, as by judgment and execution, is entitled to challenge the validity of previous mortgages; and, if they are void by force of any statute, such as the statute against usury, or that relating to chattel mortgages, his lien must prevail, even though, as between the parties, the mortgages may be sufficient to transfer the title.

2. CORPORATIONS—USURIOUS MORTGAGES—RIGHTS OF LIEN CREDITORS.

A lien creditor of a New York corporation cannot invalidate a prior mortgage, on the ground that the bonds secured thereby were sold at such a discount as to make the mortgages void for usury; for the state statute, which declares that no corporation shall hereafter interpose the defense of usury (Laws 1850, c. 172), as construed by the state courts, operated as a repeal of the statutes of usury as to all contracts by which corporations stipulate to pay interest.

3. SHIPPING—MORTGAGES—RIGHTS OF LIENORS—CHATTEL MORTGAGE LAWS.

A lienor of a vessel owned in New York cannot secure priority over previous mortgages thereon by showing that they were not filed and refiled, as required by the state laws relating to chattel mortgages, when it appears that they were recorded in the office of the collector of the port of New York before he acquired his lien; for state statutes are inoperative as to vessel mortgages which have been properly recorded, pursuant to the laws of the United States.

4. CORPORATIONS—MORTGAGES BY IRREGULARLY ELECTED DIRECTORS—ESTOPPEL.

A lien creditor of a corporation cannot secure priority over previous mortgages, on the ground that the directors who authorized the execution thereof were elected at a stockholders' meeting convened without the notice required by the by-laws, when it appears that the bonds secured by

such mortgages were sold, and the proceeds received and used by the corporation, without any stockholder ever questioning the transaction.

5. SAME.

If the stockholders of a corporation permit persons irregularly elected, or disqualified, to exercise all the functions of directors, such persons are, as to third parties, who have acted on the faith of their ostensible authority, the directors of the corporation; and the corporation, by a subsequent acquiescence, or acts of ratification, is estopped from questioning their authority.

6. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

A state statute, making the written consent of stockholders owning two-thirds of the stock of a corporation a prerequisite to the execution of a valid mortgage by it, would, if construed as applicable to mortgages executed in compliance with a valid contract, made prior to the passage of the statute, be unconstitutional, as impairing the obligation of contracts.

7. CORPORATIONS—EXECUTION OF MORTGAGES—CONSTRUCTION OF STATUTE.

Laws N. Y. 1890, c. 566 (which, together with chapter 565, constituted a revision of the laws relating to corporations), repealed, among others, section 2 of chapter 228 of the Laws of 1852, which section, by implication, authorized corporations organized thereunder to mortgage their property. The repealing chapter contained, in section 161, a saving clause, which declared that the repeal should not affect or impair any right acquired under any law thereby repealed. *Held*, that an accrued contract right to have a corporation, organized under the act of 1852, execute a mortgage on its steamship, was within the saving clause, so as to render inapplicable to such mortgage the new provision, contained in Acts 1890, c. 564, requiring the written assent of the holders of two-thirds of the corporate stock before a valid mortgage could be executed.

Appeal from the District Court of the United States for the Southern District of New York.

James McKeen, for appellant R. Hutson.

Maxwell Evarts (Robt. D. Benedict, on the brief), for appellants Collis P. Huntington and others.

W. P. Butler and Cary & Whitridge, for appellants John Crosby Brown and others.

Edmund L. Baylies (Carter & Ledyard and Walter F. Taylor, on the brief), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The steamships having been sold upon a writ of venditioni exponas issued upon a decree in rem in a suit in the district court of the United States for the Southern district of New York, the proceeds, after satisfying the decree, were paid into the registry of the court. The Atlantic Trust Company, claiming title to the proceeds as a mortgagee of the vessel, under two mortgages executed to it, as a trustee for bondholders, by the United States & Brazil Mail Steamship Company, filed its petition, praying that the proceeds be paid over to it towards satisfying the bonds secured by the mortgages. The appellant Hutson intervened, and answered in the proceeding, claiming a lien upon the proceeds under an execution issued upon a judgment against the United States & Brazil Mail Steamship Company, levied upon the steamships prior to the act. It is insisted by the appellant that the mortgages of the Atlantic Trust Company did not transfer the title of the steam-

ships, and, consequently, of the proceeds, as against him, because (1) they were void for usury; (2) they were not filed conformably with the state statutes respecting mortgages; and (3) they were never validly executed by the steamship company.

The United States & Brazil Mail Steamship Company was a corporation in the city of New York, duly organized pursuant to an act of the legislature, entitled "An act for the incorporation of companies formed to navigate the ocean by steamships," and the various acts amendatory thereof, having its principal office for managing its business in the city of New York. It was the owner of three steamships, the Alliance, the Advance, and the Finance,—vessels duly registered in the office of the collector of the port of New York. December 12, 1889, for the purpose of borrowing money to pay off its outstanding obligations, and of constructing and equipping two new steamships, the corporation, by its president and treasurer, pursuant to a vote of authorization of its then acting board of directors, executed a mortgage, bearing date July 1, 1889, to secure the payment of 1,250 bonds, of \$1,000 each, to the Atlantic Trust Company, as trustee, upon the three steamships, and upon all its right, title, and interest which it then had or might thereafter acquire in two new steamships then in process of construction at Chester, Pa., but unfinished, and not admitted to registry, to be named, respectively, the Seguranca and Vigilancia, or by whatever name the same should be known. The mortgage contained a covenant that the mortgagor would execute and deliver to the mortgagee a further mortgage upon the two new steamships as soon as they should be completed and entitled to a certificate of registry. December 12, 1889, the mortgage was duly recorded in the office of the collector of the port of New York. The Vigilancia was completed on the 4th day of December, 1890, and on that day duly registered in the office of the collector of the port of New York. June 5, 1891, the steamship company, by its vice president and treasurer, acting by the authority of its board of directors, executed and delivered to the Atlantic Trust Company a supplementary mortgage on the steamship Vigilancia to secure said bonds, as required by the covenants in that regard in the original mortgage. June 13, 1891, the supplementary mortgage was duly recorded in the office of the collector of the port of New York.

Because of the lien acquired by his execution, the appellant is in a position to challenge the validity of the mortgages, and, even though they were sufficient, as between the mortgagor and the mortgagee, to transfer the title to the vessels, if they were void by force of the statutes against usury, or in respect to chattel mortgages, his lien must prevail. Unlike a creditor at large, who has no status in that behalf, except through the medium of a representative of the whole body of creditors, such as a receiver, a lien creditor can invoke any statute which invalidates a hostile lien. In the absence of some such statute, a lien creditor by judgment and execution can have no better title to the property against which he asserts his lien than he acquired from the judgment debtor; and any previous transfer of the property by the judgment debtor, which was valid as be-

tween the immediate parties to it, is equally valid as to him. *Osterman v. Baldwin*, 6 Wall. 116; *Sisson v. Hibbard*, 75 N. Y. 542; *Lamont v. Cheshire*, 65 N. Y. 30.

The bonds which the two mortgages were created to secure were negotiated at 80 cents on the dollar of their face value, and the appellant contends that the mortgages were void for usury. A sufficient answer to this contention is found in the statute of New York (Laws 1850, c. 172), which declares that no corporation shall hereafter interpose a defense of usury. According to the repeated and uniform construction placed upon it by the highest courts of the state, this statute operated as a repeal of the statutes of usury as to all contracts with corporations stipulating to pay interest. *Curtis v. Leavitt*, 15 N. Y. 85; *Trust Co. v. Packer*, 17 N. Y. 52; *Rosa v. Butterfield*, 33 N. Y. 665; *Stewart v. Bramhall*, 74 N. Y. 87; *Bank v. Wheeler*, 60 N. Y. 613; *Gamble v. Water Co.*, 123 N. Y. 108, 25 N. E. 201; *Duncomb v. Railroad Co.*, 84 N. Y. 190. As thus construed, the statute has become a rule of property, and to question it now would unsettle titles in which enormous investments have been made. A very large proportion of the bonds secured by corporate mortgages are originally negotiated at a discount beyond the legal rate of interest; and it is quite too late to urge that the language of the statute only operates upon a corporation in personam, and not upon the contract it has made.

The contention, for the appellant, that the mortgages are void, because not filed and refiled as required by the provisions of the state statute in regard to chattel mortgages, is sufficiently met by the proof that they had been duly recorded in the office of the collector of the port before the appellant acquired his lien, and even before the debt originated upon which his lien is founded. State statutes are inoperative as to vessel mortgages, which have been properly recorded pursuant to the laws of congress. *Bank v. Smith*, 7 Wall. 646; *Aldrich v. Aetna Co.*, 8 Wall. 491.

It is insisted, for the appellant, that the first of the two mortgages was not properly executed, because the board of directors who authorized the president and treasurer to execute it had not been duly elected, the stockholders' meeting at which their election took place not having been called conformably with the by-laws of the company. The by-law required notice of the time and place of holding the election to be published "not less than twenty days previous thereto, in a newspaper printed in the city of New York." The meeting was held May 28, 1889, and the first publication of the notice was May 8, 1889. Whether this notice was sufficient or not we do not care to inquire. The directors who were elected proceeded to act as such under color of the election, had possession of the offices and books of the company and custody of its corporate seal, administered all its affairs, and their authority was never called in question by any of the stockholders. The corporation received the avails of the mortgage bonds, used them in paying its debts and building the new steamships, and paid the interest on the mortgage for several years, and until it became financially unable to do so. Persons dealing with a corporation are under no obligation to

investigate and ascertain whether those who are recognized and held out by it as its directors have been duly and regularly chosen, or whether they are duly qualified in any respect. Directors are but the agents of the corporation, and, like the agents of individuals, may be invested with an apparent authority, which is equivalent to an actual authority, in their dealings with third persons; and if those who have not been regularly elected, or are ineligible or disqualified, are permitted by the body of stockholders to exercise all the functions of the office, they are, as to third persons, who have acted on the faith of their ostensible authority, the directors of the corporation; and the corporation, by a subsequent acquiescence or acts of ratification, is estopped from questioning their authority. *Railroad Co. v. McPherson*, 35 Mo. 13; *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 12 N. H. 223; *Anglo-Californian Bank v. Mahoney Min. Co.*, 5 Sawy. 255, Fed. Cas. No. 392; *Richards v. Mechanics' Institute* (Pa. Sup.) 26 Atl. 210; *Trustees v. Hills*, 6 Cow. 23; *Green v. Cady*, 9 Wend. 414; *Atlas Nat. Bank v. F. B. Gardner Co.*, 8 Biss. 537, Fed. Cas. No. 635. If it were necessary to decide the question, we should not hesitate to affirm, in view of the receipt of the avails of the mortgages by the corporation, and its payment of the interest on the mortgages, that, if the directors had never authorized the president and treasurer to execute the mortgages, the instruments, nevertheless, would be valid and binding securities, as between the corporation and the mortgagee.

The appellant contests the validity of the second or supplementary mortgage because it was not accompanied by the written consent of the stockholders to its execution, in compliance with the provisions of chapter 564, Laws 1890, a statute of New York enacted intermediate the execution of this mortgage and the first mortgage. The statute reads as follows:

"In addition to the powers conferred by the general corporation law, every stock corporation shall have power to borrow money or contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation; and may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for the purposes herein specified; and the amount of the obligations issued and outstanding at any one time secured by such mortgages, excepting mortgages given as a consideration for the purchase of real estate, and mortgages authorized by contracts made prior to the time when this act shall take effect, shall not exceed the amount of its paid-up capital stock, or an amount equal to two-thirds of the value of its corporate property at the time of issuing the obligations secured by such mortgages, in case such two-thirds value shall be more than the amount of such paid-up capital stock. No such mortgages excepting purchase money mortgages shall be issued without the written consent, duly acknowledged, of the stockholders owning at least two-thirds of the stock of the corporation, and such consent shall be filed and recorded in the office of the clerk or register of the county where it has its principal place of business."

Although this statute is apparently intended primarily for the protection of the stockholders of the corporation, in view of the interpretation placed upon cognate statutes by the highest court of the state, it must be construed as operating to destroy the validity and

lien of mortgages executed without the requisite consent. *Vail v. Hamilton*, 85 N. Y. 453; *Bank v. Averell*, 96 N. Y. 467. In the language of the latter case:

"No assent of the stockholders having been obtained, it was invalid, and created no present lien upon the property."

If the statute were intended to apply to mortgages by a corporation, executed pursuant to a valid contract with the mortgagee, made prior to the enactment, we are unable to doubt that it would impair the obligation of the contract, and consequently be inoperative, as to such mortgages, because of the constitutional interdiction.

By the covenant contained in the earlier mortgage, the mortgagee was entitled to a further mortgage as soon as the new steamships should be completed; and a court of equity would have compelled specific performance of the contract, notwithstanding the refusal of the directors and the entire body of stockholders of the steamship company. The right to that remedy was an inseparable element of the contract,—as much so as though incorporated into it by express language. The remedy of a contract "is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is therefore void." *Edwards v. Kearzey*, 96 U. S. 595; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190; *Louisiana v. New Orleans*, 102 U. S. 203. To require a party who has a plain and easy remedy against a corporation by a suit against it in a court of equity to seek out its various stockholders, scattered, perhaps, throughout the different states of the Union, make them parties to the suit, and prosecute it against all of them, until the requisite majority have executed consents, pursuant to a decree against them for specific performance, would impose upon him an intolerable burden, and sometimes, possibly, interpose obstacles which would prove fatal to his success. The statute applies to small mortgages as well as large ones, and what would be the value of a contract for the delivery of a small mortgage if it had to be enforced in such a suit? The constitutional validity of a statute is determined, not by its actual consequences in a particular case, but by the nature of the consequences which it may legitimately effect.

The intention to impair the obligation of previous contracts is not to be unnecessarily imputed to the statute; and the salutary rule of construction, by which courts endeavor to give such a meaning to a statute as will prevent an interference with vested rights, can be safely applied to the present case, in view of other provisions of the general scheme of legislation of which it is a part. Chapters 565 and 566 of the Laws of 1890 were concurrently enacted, and are to be considered together as a revision of the statutes relating to corporations. Chapter 566, while repealing sections 3–14 of chapter 228 of the Laws of 1852, under which the steamship company was incorporated, left in force section 2 of that chapter, which was the section conferring power upon such corporations to convey, and impliedly to mortgage, their property. Chapter 566, among other

things, repealed that section, but contained a saving clause (section 161), which declared that the repeal should not affect or impair any act done or right accruing or acquired under or by virtue of any law thereby repealed, but that the same might be asserted and enforced as fully and to the same extent as though there had been no repeal.

The agreement to execute a mortgage, and the right acquired by the mortgagee to have it executed, were founded upon the power delegated to the corporation by the repealed law, and by the saving clause were not to be affected or impaired in any way. The provision imposing new conditions upon the execution of corporate mortgages must be construed harmoniously with the saving clause, and, thus read, is apparently not intended to apply to mortgages the right to which had accrued, and which, therefore, in contemplation of a court of equity, were already executed.

These views lead to the conclusion that the mortgages of the Atlantic Trust Company are in all respects valid and effectual, and entitle it to the proceeds in the registry of the court.

The decree of the district court is therefore affirmed, with costs.

In re BREEN.

(Circuit Court, S. D. New York. March 31, 1896.)

1. EXTRADITION—EVIDENCE—CERTIFICATION BY AMERICAN AMBASSADOR.

The certificate of the American ambassador to Great Britain that the papers containing the evidence in relation to the commission of the crime by the person held for extradition "are properly and legally authenticated, so as to entitle them to be received in evidence for similar purposes by the tribunals of Great Britain," is in proper form, and the documents are to be received as competent evidence.

2. SAME—PROCEEDINGS BEFORE COMMISSIONER.

The old doctrine, that proceedings for the extradition of an alien are to be conducted with extreme technicality, has been abandoned. The proceedings before the commissioner are not to be treated as if it were a trial before a petit jury.

3. SAME—EMBEZZLEMENT—EVIDENCE.

Where the extradition papers show that the party charged received checks for money due a municipality, and deposited them in bank to the credit of the corporation, but that he accounted for only a part thereof, this is sufficient proof of embezzlement to warrant delivering him up, and it is immaterial whether the amount unaccounted for, as testified to, was greater or less than the amount charged.

This was an application by David Breen, who is held for extradition to Great Britain, for a writ of habeas corpus.

Joseph L. Keane, for petitioner.

Chas. Fox, for the British government.

LACOMBE, Circuit Judge. The certificate of the American ambassador that the papers "are properly and legally authenticated, so as to entitle them to be received in evidence for similar purposes by the tribunals of Great Britain," is in proper form.

The only other question left is whether, accepting the documents as competent evidence, there was proof before the commissioner tending to show that the prisoner had been guilty of the offense of embezzlement within the meaning of the treaty. Such proof there undoubtedly was. Persons in a position to know testified that he received checks from a Mr. Begg for money due as market rent to the corporation of the city of Dublin; that those checks, indorsed by him, either with his full name or his initials, were deposited in bank to the credit of the corporation; that the total deposits so made by him, including these checks, aggregated some £5,102, but that the amount he received for market rent, exclusive of the Begg checks was also £5,102, and that for £5,102 only did he account. Whether the amount thus unaccounted for, as testified to, was greater or less than the amount charged, is immaterial.

The old doctrine, that proceedings for the extradition of an alien are to be conducted with extreme technicality, has long since been abandoned. The investigation before the commissioner is not to be treated as if it were a trial before a petit jury.

Writ dismissed, and prisoner remanded.

UNITED STATES v. LAMKIN.

(Circuit Court, E. D. Virginia. April 8, 1896.)

No. 755.

1. VIOLATION OF POSTAL LAWS—OBSCENE LETTERS—CONSTRUCTION OF STATUTE.

If an act of congress denounces the mailing of letters containing obscene language (Rev. St. § 3893, as amended in Supp. Rev. St. p. 621), and does not also denounce the mailing of letters written for an obscene purpose, then an indictment founded on letters containing no obscene language, and charging only obscenity of purpose, cannot be maintained.

2. SAME.

There is no federal statute providing a punishment for the mailing of letters which are free from lewd and indecent language, expressions, or words, although they may have been written for the purpose of seduction, or to obtain meetings for immoral purposes.

This was an indictment against Zephania G. Lamkin, for violating the statute prohibiting the mailing of obscene letters (Rev. St. § 3893, as amended by Supp. Rev. St. p. 621). The indictment was found in the district court, from which it was transferred to this court. The case was heard on a motion to quash.

The following are the letters on which the indictment was founded:

Letter No. 1.

Monday, 6:30 p. m.

Miss Lena: Why did you fail to meet me as you promised? See me Tuesday at one and a half at corner Twenty-Third and Grace, and explain to me.
Your Friend.

Letter No. 2.

Miss Lena: Don't get angry with me for writing to you, but I think you have treated me badly after you promised to meet me, and failed to do so. If you had not wanted to meet me, you could of told me so, and all would of been well. I have been a friend to you, and will still be so, but I want you

to see me and explain or write to me and tell me the reason you did not keep your promise to meet me. You will please answer this note.

Twenty-Third Street Friend.

To A. Goodfellow, care of T. B. Williams, corner Twenty-First and Marshall streets.

March 13, 1896.

If you don't get this in time to answer, come. I will be at place any way.
Saturday night.

Letter No. 3.

Miss Lena: I went at 7:45 to Twentieth and Marshall, and waited till 8 and after. Now, if you intend to be a friend, you meet me at 4 o'clock Monday, at Fourteenth and Broad, for this is the last time I shall ask you. I don't want to be fooled again. If you want boys instead of my friendship, that is all right. You come, if you have to stay home from work. You shall be paid for the week's time. Come sure. This is the last time I will ask you.

Your Friend.

Monday, 16th, 4 p. m., Fourteenth and Broad.

Letter No. 4.

Tuesday.

Miss Lena: I said to you in my last note that I would not trouble you again, but as you did not think well enough of me to answer it, I will break my word to write this one, asking you if you wish my friendship to cease. If so, answer. I will not get mad, for I don't think from the way you act you care much for it. You can't say that I have not tried to be a friend to you. You will please do me a favor to destroy notes. You have envelope addressed.
Answer to

A. Goodfellow.

Corner Twenty-First and Marshall, Care of T. B. Williams.

Hoping you may do well with boy friends. You will find your error soon; mark my words.

Letter No. 5.

Tuesday Eve.

Miss Lena: Why don't you keep your promise, and meet me at Twenty-Third and Franklin to-day, as you promised? You must meet me Wednesday at 4 o'clock.

A. Goodfellow.

Care of T. B. Williams, Twenty-First and Marshall.

These letters were set out in full in separate counts of the indictment. The counts upon letters 1, 3, and 5, each concluded as follows: "Meaning by the said letter to convey a proposition from a married man to an unmarried woman for a clandestine meeting for a grossly immoral purpose, against the peace," etc. The counts upon letters 2 and 4 each concluded as follows: "Meaning by the said letter to convey a proposition from a married man to an unmarried woman for a clandestine correspondence for a grossly immoral purpose, against the peace," etc.

James Lyons and William Flegenheimer, for the motion.

The indictment in this case should be quashed upon the following grounds:

(1) The indictment does not allege that the defendant deposited or caused to be deposited for mailing or delivery anything declared to be nonmailable matter by section 3893, Rev. St. U. S., as amended by the act of congress of February 26, 1888, or by any law of the United States.

(2) The indictment does not charge the defendant with any offense. The letters are set forth in full in the indictment, and show on their face that there is not one word in them which is obscene, lewd, lascivious, or indecent. The policy of the statute under which the indictment is found, and the purpose of the said act of congress, were to purge the mails of obscene, lewd, lascivious, and indecent matter, but the statute does not apply to cases which are not em-

braced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress. *U. S. v. Chase*, 135 U. S. 255, 10 Sup. Ct. 756; *U. S. v. Sheldon*, 2 Wheat. 119; *U. S. v. Wiltberger*, 5 Wheat. 76; *U. S. v. Morris*, 14 Pet. 464; *U. S. v. Hartwell*, 6 Wall. 385; *U. S. v. Reese*, 92 U. S. 214. It is respectfully submitted that this case is not within the terms of the statute, and that the indictment must be quashed.

F. R. Lassiter, Dist. Atty., for the United States.

This indictment is drawn under the act of February 26, 1888, which is amendatory of section 3893, Rev. St. U. S. Of the many questions that have risen out of the subject-matter of this statute since its origin in the act of June 8, 1872, only one is raised in the present issue, namely, whether the letters on which the indictment was found are obscene, lewd, or lascivious, or of an indecent character. The last act on the subject (under which this indictment is drawn) seems to have set at rest most of the questions formerly raised, but the question now presented, being a mixed question of law and fact, might well arise in every appeal to the statute, and is to be determined by the jury, under the guidance of the court, which will define the meanings of the terms employed, and explain the intent of the enactment. *U. S. v. Harmon*, 45 Fed. 418.

History of the Law.

The history of the legislation on this subject is traced in *Re Wabhl*, 42 Fed. 825. It is interesting to follow the gradual stages of the law, because at each successive amendment the law has become more general and sweeping in its character. "I think no one can follow the legislation from 1872 up to September 26, 1888, without being convinced that congress intended finally to purge the United States mail, and, as far as possible, prevent it from becoming a vehicle for the transmission of obscene, indecent, and lascivious messages." "It is said that the history of the legislation clearly shows that the congress determined to exclude from the mails writings of an impure and immoral character, and not such as was merely coarse, rough, or vulgar." *U. S. v. Males*, 51 Fed. 42.

Definitions.

The words of the statute have been successively defined as follows: "The word 'obscene' ordinarily means something that is offensive to chastity, something that is foul or filthy, and for that reason is offensive to pure-minded persons." *U. S. v. Clarke*, 38 Fed. 733. "A standard dictionary says that 'obscene' means 'offensive to chastity and decency; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be expressed.'" *U. S. v. Harmon*, 45 Fed. 417. "Obscenity is such indecency as is calculated to promote the violation of the law and a general corruption of morals, * * * includes what is immodest and indecent, and is calculated to excite impure desires, or to corrupt the mind." *U. S. v. Males*, 51 Fed. 42.

Tests of Obscenity.

It has been held that the proper test to be applied to the foregoing definitions will be found in such considerations as the following: "There is another large class to be found in every community—the young and immature, the ignorant, and those who are sensually inclined—who are liable to be influenced to their harm by reading indecent and obscene publications. The statute under which this indictment is framed was designed to protect the latter class from harm, and it is a wholesome statute. Hence, in judging of the tendency of the publication to deprave or corrupt the mind or to excite lustful or sensual desires (which are the tests of obscenity and lewdness), you should consider the effect that the publication would have on the minds of that class of persons whom the statute aims to protect." *U. S. v. Clarke*, 38 Fed. 734. "The test of obscenity is this: Where the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall," and "where it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of the most impure and libidinous character. * * * Rather

is the test, what is its probable reasonable effect on the sense of decency, purity, and chastity of society extending to the family, made up of men and women, young boys and girls,—the family, which is the nursery of mankind, the foundation rock upon which the state reposes?" *U. S. v. Harmon*, 45 Fed. 417. "The test is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands such matter may fall. The writing need not use words which are themselves obscene, in order to be obscene. Courts have regard to the idea conveyed by the words used, in the writing, and not simply to the words themselves." *U. S. v. Males*, 51 Fed. 42.

Object of the Law.

As to the intention of congress, compare the gradual growth of the legislation on this subject and *Ex parte Jackson*, 96 U. S. 727. Congress may exclude what it pleases from the mails. *Id.* 732. "In excluding various articles from the mail, the object of the congress has not been to interfere with the rights of the people, but to refuse facilities for the distribution of matter deemed injurious to the public morals. All that congress meant by this act was that the mail should not be used to transport corrupting publications or writings, and that any one who attempted to use it for that purpose should be punished." *U. S. v. Males*, 51 Fed. 42. "The purpose of the statute was to prevent the mails from being used to circulate matter to corrupt the morals of the people." *Ex parte Doran*, 32 Fed. 76. "And while it may be conceded to the contention of counsel that the federal government, under its constitutional limitations, ought not to take upon itself the office of censor morum, nor undertake to legislate in regulation of the private morals of the people, yet congress may, as the basis of legislation of this character, have regard to the common consensus of the people that a thing is *malum in se*,—is hurtful to the public morals,—endangering the public welfare, and therefore deny to it as a vehicle of dissemination the use of its post office and post roads devised and maintained by the government at the public expense for the purpose of promoting the public welfare and common good." *U. S. v. Harmon*, 45 Fed. 418.

Application and Comparison.

The foregoing definitions and principles have been recently in this state applied to a state of facts which seem identical with the case at bar. Compare the opinion and letters set out in the case of *U. S. v. Martin* (decided by Paul, District Judge), in 50 Fed. 920.

HUGHES, District Judge. These letters are not, in terms, obscene. Because they are not, they have been published in full in the Richmond daily newspapers, and in other public journals. They contain no indecent language, words, or expressions. They contain requests that the girl should meet the writer on a public street in the daytime; complaints of her failure to meet him in that manner, as requested before; and warnings that he would cease to make these requests any longer, and that he would withdraw his friendship from her. They were mailed, and, if there is any law of the United States making the mailing of such matter penal, the accused is liable to prosecution in this court for mailing them. But there is no such law on the federal statute books. Although they are free from lewd and indecent language, expressions, and words, yet they may have been written for the purpose of seduction, or to obtain meetings for immoral purposes; and the accused, by mailing them, may have abused the privilege of the mails given to every citizen. This misuse of the mails and abuse of the citizen's privilege for the purpose of seduction, or for assignations, is a heinous offense against society; but I do not see that it is an offense against any statute law of the

United States. There probably ought to be such a law, and it is probable that before very long congress will see the propriety of passing one; but as yet it has not done so, and there is none on the statute books.

It is the province of the state to protect the morals of society, and to punish all violations of them. There are state laws which do seek to effect this object, but I do not know of any state law punishing the crime of writing letters for the purpose of seduction and procuring assignation meetings. If there be, the crime of writing and sending such letters is a state offense, punishable by the state courts. In order for the sending of such letters to be cognizable by the federal courts, two things must concur: First, the letters shall be mailed; and, second, the offense of mailing letters intended for seduction or procuring immoral assignations shall be made penal by some express statute of the United States. I repeat that I know of no law of the United States making penal the mailing of letters intended for seduction or for procuring such assignations. If congress had intended to make such mailing penal, it could have easily done so by an act couched in plain, unmistakable words. Congress has not done so, and this indictment has been drawn upon a statute (section 3893, Rev. St., amended in Supp. Rev. St., at page 621) prohibiting the mailing of obscene, lewd, lascivious language, pictures, words, phrases, letters, and otherwise indecent publications. The language of this statute is, so far as applicable to this case: "Every obscene, lewd, or lascivious letter of an indecent character." Such a letter is declared to be unmailable, and the offense is subjected to heavy penalties. Obviously, two things must concur to make up the offense: First, the letter must be obscene, lewd, etc.; and it must be of an indecent character. Inasmuch as every letter is written, and is a composition of words, it necessarily follows that for a letter to be obnoxious to this statute its language must be obscene, lewd, or lascivious, and it must be of indecent character. The statute does not declare that the letter must be written for an indecent or obscene purpose, but that the letter itself, in its language, shall be of indecent character. The letters set out in the indictment are not themselves of indecent character, and, if used for such purposes as have been named, congress has not made such purposes criminal. When a law denounces a letter containing obscene language, and does not denounce a letter decent in terms, but written for an indecent purpose, an indictment founded only upon the obscene purpose cannot be maintained.

No laws are more dangerous or more offensive to the public sense of justice than "judge-made" penal laws. No principle of construction, in respect to penal laws, is more thoroughly settled than that they are to be construed by their very language, and the plain intention with which that language is used. For the courts to interpolate a purpose of such use not expressed by the law, and not necessarily implied from its tenor, is for the courts themselves to make penal laws not enacted by the legislative power.

Cases have been cited at bar showing that several courts have interpolated into the statute—have "read into the law"—from which I

have quoted language which makes it virtually read: "Every obscene, lewd or lascivious letter of an indecent character mailed [for the purpose of seduction or for procuring an immoral assignation] shall be punishable by fine and imprisonment." If congress had intended that the crime should consist of writing and mailing indecent and obscene letters, written with such a purpose, it would have so declared. It did not interpolate such a purpose in the offense, and no court has a right to do what congress did not do, and what congress could readily have done if it had intended to denounce the use of the mails for the purpose of seduction or procuring immoral assignations. It is not competent for the courts to create, by interpolation in a penal statute, a crime of purpose or intention not expressed in plain words in the statute itself. In the case at bar the accused is indicted for mailing a letter free from the immoral language inhibited by a statute, written apparently for the purpose of seduction or procuring assignations, under a statute which prohibits the mailing of obscene language, and does not prohibit the mailing of letters written for the purpose of seduction or appointing assignations. He is sought to be tried for an offense not prohibited by law, under a statute denouncing another offense. The motion to quash must be granted.

In re HACKER.

(District Court, S. D. California. January 6, 1896.)

No. 818.

HABEAS CORPUS—DEFECTIVE INDICTMENT.

Where a prisoner is held to answer an indictment, he will not be discharged on habeas corpus, for insufficiency of the indictment, unless it affirmatively appears that the facts of the case cannot, under any possible statement of them, constitute a crime, and, further, that there are special circumstances, requiring earlier judicial action than can be had, by demurrer or otherwise, through the ordinary course of procedure in defending against the indictment.

Application for Writ of Habeas Corpus.

J. W. Kemp, for petitioner.

The United States Attorney, for the government.

WELLBORN, District Judge. Petitioner shows that he is held in custody of the United States marshal of this district to answer an indictment against him in this court for unlawfully cutting timber upon public lands of the United States, contrary to section 4 of the act of June 3, 1878, relating to public lands of the United States. 1 Supp. Rev. St. 168. The indictment, a copy of which is attached to and made a part of the petition, fails to allege an intent upon the part of the defendant, the petitioner herein, to export or dispose of the timber which he is charged with having cut on the public lands, and for this reason he insists that no offense is charged against him, and therefore his imprisonment is unlawful, and relievable by habeas corpus.

Assuming that the indictment is defective in the particular stated, and this is the most favorable view for applicant, does it follow therefrom that a writ of habeas corpus should now be awarded to inquire into the cause of his detention, in advance of a hearing upon demurrer, or other determination in the regular course of criminal procedure? This question, it seems to me, cannot be otherwise answered than in the negative. I am aware that there are adjudicated cases and expressions in text-books which would seem to indicate that, where an essential ingredient of an offense sought to be charged is omitted from the indictment, the writ of habeas corpus is a proper remedy for relief against the imprisonment, even before a trial upon the merits or hearing upon demurrer. See *In re Corryell*, 22 Cal. 178; also, Church, *Hab. Corp.* § 245. This view, however, is superficial, and cannot be accepted without material qualifications. What these qualifications are will appear from careful reading of the above cited and other similar authorities. In the California case, for instance, it will be seen, by an examination of the opinion, that the indictment was defective, not merely from omission to state an essential constituent of the offense, but because the matters charged against the defendant were themselves of such a nature that it was not possible for any additional allegation to so help the indictment as that a crime would be charged; and, perhaps, this suggestion indicates one of the rules separating those cases of commitments under defective indictment, where the defendant should be discharged, from those cases where he should be remanded. The rule thus indicated is this: Where the offense sought to be charged in the indictment is not and cannot be so charged as to constitute an offense, the accused may, under certain circumstances, hereinafter noted, be discharged on habeas corpus; but where the matters are of such a character that the indictment, although defective for lack of a statement of an essential ingredient of the offense, may be perfected into a sufficient accusation of crime, there the defendant should be held to abide the judgment or order of the court on the indictment. That this rule, or something kindred thereto, was in the mind of the judge who delivered the opinion in the California case, above cited, is fairly inferable from the following paragraph in his opinion:

"The counsel for the petitioner contends that no offense punishable by law is charged in the indictment, and that, consequently, the order of commitment under which he is held is illegal and void. It is objected, on the other side, that the present is not a proper proceeding for the determination of that question, that the commitment emanated from a court of competent jurisdiction, and that its action in the premises is not subject to review on habeas corpus. Considerations of great importance are involved in this objection, and, although we are compelled to overrule it, as applied to a case of illegal imprisonment, we find it extremely difficult to lay down a rule under which abuses may not be practiced, and the business of the courts improperly interfered with. The vice of the objection is that it assumes that the court had jurisdiction, whereas, the fact of jurisdiction is the very fact which the petitioner disputes, alleging that the offense charged is not one known to the law." 22 Cal. 181.

The rule above stated is expressly approved by the supreme court of the state of Nevada. *Ex parte Kitchen*, 18 Pac. 886. The syllabus of the case is as follows:

v.73f.no.3—30

"A prisoner in custody under a defective indictment should not be discharged upon habeas corpus, if enough appears from the whole record to show that he should be detained."

The opinion is brief, and as follows:

"The applicant and several other persons were indicted by the grand jury of Eureka county for the crime of conspiracy. A writ of habeas corpus has been applied for, to the end that applicant may be discharged from the custody of the sheriff. It is urged that applicant's imprisonment is illegal, because the Sixth judicial court in and for the county of Eureka had no jurisdiction over the person of the defendant or the subject-matter set forth in the indictment against him, in that the facts set forth in said indictment do not constitute a public offense, nor does the said indictment charge the said defendant with the commission of any crime. We express no opinion as to whether or not the indictment is defective in fact. We only say that, if it is so, taking the most favorable view for applicant, enough appears to prevent his discharge, should the writ issue. Church, Hab. Corp. § 246. Writ denied."

To the same effect, but with greater elaboration, is the statement in Church, Hab. Corp. § 246:

"246. Defective Indictment. Where the court renders such a judgment on the record as the law demands, and, on taking the whole record together, in investigating a proceeding on habeas corpus, and where a defective indictment is the point in controversy, is satisfied that enough appears, although the indictment is clearly defective, and so much so that a demurrer to it would be sustained, to retain the accused in custody until another term of court, it will not discharge the prisoner. A defect in an indictment for an assault with intent to commit murder, consisting in leaving out the name of the person assaulted, and without any averment that the person's name was 'to the grand jury unknown,' is not a sufficient ground upon which to discharge an accused party on habeas corpus in vacation; and it is doubtful whether it would be insufficient in term time. The next court where the indictment is found, after the hearing, can either discharge the party or permit the defective indictment to be nol. pros'd, and order another one to be preferred, or the first indictment may be amended by consent of the accused."

The same rule, substantially, though in different language, has been enunciated by the supreme court of Mississippi, in *Emanuel v. State*, 36 Miss. 627. The second paragraph of the syllabus is as follows:

"A prisoner will not be entitled to a discharge if it appear, upon the return of the writ of habeas corpus, that an indictment has been preferred against him which has been adjudged sufficient by the court in which it is pending; nor, where there has been no judgment affirming the validity of the indictment, will be discharged on account of its insufficiency, unless the evidence on which it was found be adduced, and it appear therefrom that he should not be held in custody in the matter."

In the case reported in 22 Cal., above referred to, while the evidence against the defendant was not adduced, still the statement in the indictment showed, beyond question, that, if adduced, the facts could not, in any possible aspect of the case, constitute a crime.

The syllabus of a case decided by the supreme court of Florida states the rule thus:

"Habeas corpus does not lie to correct any irregularity of procedure where there is jurisdiction. This writ is not the proper remedy for relief against defective indictments for acts which are offenses under criminal laws, although it may be a remedy where an indictment charges as a criminal offense an act which was not made so by the laws obtaining at the time the act was done. It cannot be used as a substitute for a demurrer, a motion to

quash, a writ of error, or an appeal, or certiorari." *Ex parte Prince* (Fla.) 9 South. 659.

The rule deducible from the foregoing authorities, in connection with the case hereinafter cited, seems to me to be this: Where a prisoner is held to answer an indictment, he will not be discharged on habeas corpus, for insufficiency of the indictment, unless it affirmatively appears that the facts of the case cannot, under any possible statement of them, constitute a crime, and, further, that there are special circumstances requiring earlier judicial action than can be had, by demurrer or otherwise, through the ordinary course of procedure in defending against the indictment. The latter branch of this rule, namely, that there must be some peculiar occasion of urgency before a court will, by habeas corpus, arrest or disturb the regular course of criminal procedure, has been substantially announced by the supreme court of the United States, in a case where the prisoner, indicted under a state law alleged by him to be repugnant to the federal constitution, petitioned the circuit court of the United States for the Eastern district of Virginia for a writ of habeas corpus, and that he have judgment discharging him from custody. The circuit court dismissed the petition, on the ground that the court was without jurisdiction to discharge the prisoner from prosecution. From this judgment an appeal was taken, and the judgment of the circuit court affirmed. The supreme court held, in substance, that, while the circuit court had power to issue the writ of habeas corpus, and to discharge the accused, in advance of his trial, if he was restrained of his liberty in violation of the national constitution, it was a power committed to the court's discretion (meaning, of course, legal discretion), and to be exercised only in those exceptional cases where special exigencies required immediate action. After declaring the existence of this power, the opinion proceeds as follows:

"It remains, however, to be considered whether the refusal of that court to issue the writ and to take the accused from the custody of the state officer can be sustained upon any other ground than the one upon which it proceeded. If it can be, the judgment will not be reversed because an insufficient reason may have been assigned for the dismissal of the petitions. Undoubtedly the writ should be forthwith awarded 'unless it appears from the petition itself that the party is not entitled thereto,' and the case summarily heard and determined, 'as law and justice require.' Such are the express requirements of the statute. If, however, it is apparent, upon the petition, that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 3, 111. What law and justice may require in a particular case is often an embarrassing question to the court, or to the judicial officer before whom the petitioner is brought. It is alleged, in the petitions,—neither one of which, however, is accompanied by a copy of the indictment in the state court, nor any statement giving a reason why such a copy is not obtained,—that the appellant is held in custody under process of a state court in which he stands indicted for an alleged offense against the laws of Virginia. It is stated, in one case, that he gave bail, but was subsequently surrendered by his sureties; but it is not alleged, and it does not appear, in either case, that he is unable to give security for his appearance in the state court, or that a reasonable bail is denied him, or that his trial will be unnecessarily delayed. The question as to the constitutionality of the law

under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the state court to pass. Under such circumstances, does the statute imperatively require the circuit court, by writ of habeas corpus, to wrest the petitioner from the custody of the state officers in advance of his trial in the state court? We are of the opinion that, while the circuit court has the power to do so, and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the national constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the constitution of the United States. The injunction to hear the case summarily, and, thereupon, 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution. When the petitioner is in custody, by state authority, for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court, or judge thereof, or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations,—in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus, and discharged prisoners who were held in custody under state authority. So, also, when they are in the custody of a state officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the state court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the constitution and laws of the United States." *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734.

The principle of this decision is that, where, under our system of government and laws, a speedy and efficacious remedy, in the usual and orderly course of criminal procedure, has been provided for the discharge of a prisoner held under a bad indictment, the court will not interfere with and confuse such procedure, by undertaking to grant relief on habeas corpus, in advance of a regular trial or hearing upon demurrer, unless it be shown affirmatively that, because of special circumstances, suitable relief cannot be had through the procedure above indicated. The case (*In re Greene*, 52 Fed. 104) cited by petitioner does not antagonize, but, on the contrary, in view of the authorities therein cited, is confirmatory of, the above principle. There the petitioner was a citizen and resident of Ohio, and, hav-

ing been arrested upon a warrant of a United States commissioner, was about to be removed to the district of Massachusetts for trial. The right and duty, on habeas corpus, in such case, to inquire into the sufficiency of the indictment, results from the fact of the proposed removal of the petitioner into a foreign domicile for trial. The court says:

"In such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions. Such has been the uniform practice of the federal courts. *In re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102; *In re Doig*, 4 Fed. 193; *U. S. v. Brawner*, 7 Fed. 86; *U. S. v. Rogers*, 23 Fed. 658; *U. S. v. Fowkes*, 49 Fed. 50; *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407."

The court also cites the case of *In re Lancaster*, 137 U. S. 393, 11 Sup. Ct. 117, and this case supports the principle of the case of *Ex parte Royall*, *supra*. The syllabus of the Lancaster Case is as follows:

"Where persons indicted in the circuit court, and in custody, have not invoked the action of the circuit court by a motion to quash the indictment or otherwise, the court will deny leave to file here a petition for writ of habeas corpus, asked upon the ground that the matters charged do not constitute any offense under the laws of the United States or cognizable in the circuit court, and that for other reasons the indictment cannot be sustained."

In the present case, it does not appear but that another and a good indictment may be found against the defendant, upon the overt acts charged in the present indictment; and, further, as was said by the supreme court in the case of *Ex parte Royall*, *supra*, it is not alleged that the petitioner "is unable to give security for his appearance, * * * or that reasonable bail is denied, or that his trial will be unnecessarily delayed." Nor do the circumstances detailed in the petition suggest any reason why this court may not, or will not, promptly, in its regular course of procedure, determine the question of the alleged insufficiency of the indictment.

I am clearly of opinion, adopting, again, language employed by the supreme court in the Royall Case, that "it is apparent, upon the petition, that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody," and therefore the writ is denied.

NEW DEPARTURE BELL CO. v. BEVIN BROS. MANUF'G CO.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

1. PATENTS—INVENTION.

There is no invention in the insertion of an additional gear and pinion wheel in a train of such wheels arranged to transmit motion, or in substituting a reacting spring at one end of the train of motion for a similar spring at the other end.

2. SAME.

There is no invention in inclosing the operative mechanism of a bell in an old form of bicycle, double-dish shell, when used for a bicycle bell, instead of mounting it on a standard, for a call bell; affixing it to a door

jamb, for a door bell; or arranging it to engage with an opening window sash, for a burglar alarm.

8. SAME—BICYCLE BELLS.

The Rockwell patent, No. 471,982, for a bicycle bell, consisting of a combination of a base plate, with a revoluble striker bar, spring-actuated in one direction, a lever operatively connected therewith, and adapted to rotate the striker bar in opposition to the force of the spring, and a gong, held invalid because of anticipation by the English patent, No. 2,425, of June 22, 1877, to Alfred Bennett, for improvements in call bells, door bells, etc. 64 Fed. 859, reversed.

This is an appeal from a final decree of the circuit court for the district of Connecticut on pleadings and proofs, sustaining the validity of letters patent No. 471,982, enjoining defendant from infringing the same, and directing the payment by defendant of \$175 as profits and damages by reason of acts of infringement by it committed. 64 Fed. 859.

Chas. L. Burdett, for appellant.

John J. Jennings and Frederick H. Betts, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The bill of complaint charged infringement of three patents, all granted to E. D. Rockwell, assignor to complainant, as follows: No. 456,062, July 14, 1891; No. 471,982, March 29, 1892; No. 471,983, March 29, 1892; the first two relating to improvements in bicycle bells; the third intended for and adapted to stationary bells used on doors. The circuit court sustained the validity of all three patents, but held that defendant had not infringed either No. 456,062 or No. 471,983; and from this decision complainant has not appealed. The only questions, therefore, coming up for review here, are as to the validity of No. 471,982, and whether defendant's bicycle bell infringes.

The specification states that the object of the invention is to—

"Produce a bicycle bell that is compact, simple, strong, durable, and reliable, and by which a sound resembling an electric bell, but of increased purity of tone, may be produced."

The details of complainant's device, and its advantages, are fully set forth in the brief of his counsel, as follows:

"It consists of an alarm bell, capable of construction in any size, and light or heavy, according to the taste and needs of the user. It is attractive in appearance, and capable of attachment to the handle-bar in such a way that only the thumb of the rider is needed to sound the alarm, and the grip of the hand upon the bar is not materially interfered with. Very few parts are necessary for its construction, and these are of such a character, and so combined, as to form a structure very strong, not easily thrown out of order, and capable of safely experiencing any ordinary accident to which it is likely to be subjected. It is inexpensive to manufacture. * * * The bell consists of a base plate which is dish-shaped, and contains and protects the intermediate mechanism, in a compact form, between the base plate and the gong. The base plate is of such form that means can be and are provided for affixing the bell to the bicycle handle bar. In the form shown a gong is provided, which is joined firmly to the base plate by means of a screw. A lever of convenient form is pivoted to the base plate, one end being a thumb piece projecting beyond the circumference of the bell, and the other carries a segmental gear. This gear engages with a pinion upon a gear wheel, which, in turn, meshes

with a pinion upon one side of the striker bar, which is loosely pivoted upon a stud. The striker bar carries loosely-pivoted strikers. A tensile spring attached to the lever tends to keep it in one position, and operate the striker bar in reverse direction to the direct action of the thumb-pressed lever."

The gong, so says the specification, is—

"Preferably provided on one side with a lug against which the strikers impinge when the striker bar is revolved, producing a clear, musical sound. * * * Hand pressure upon the handle [i. e. the thumb piece] will operate the lever, and, through the train of gearing, impart several revolutions to the striker bar. When the handle is released the spring will retract the lever to its first position, and cause the striker bar to revolve in the opposite direction."

The second claim of the patent, which is the only one which it is claimed defendant infringes, is as follows:

"(2) The combination, with a base plate, of a revoluble striker bar, spring-actuated in one direction, a lever operatively connected therewith, and adapted to rotate the striker bar in opposition to the force of the spring, and a gong, substantially as set forth."

The specification states:

"The form of the striker bar is immaterial; a revoluble head, adapted to carry strikers, being the essential characteristic."

The form shown in the patent is the one patented by the same inventor in No. 459,602. Of such a striker bar the judge who tried the cause in the circuit court says:

"Various suggestions are made in support of the claim of novelty in the centrally pivoted swinging arm. Thus, it is said that the arm must extend almost across the inside of the gong, and be adapted to swing around the entire diameter. But the Bennett patent [referred to *infra*] shows the arm swinging around the entire diameter of the gong, and it surely would not require invention to duplicate said arm by extending it in the same way on the opposite side."

And he found patentable novelty in complainant's striker-bar patent solely because of the form and arrangement of its strikers. The statement above quoted from the specification precludes reading into the second claim of this patent any peculiar form or arrangement of the strikers themselves.

Conceding that complainant's bicycle bell is compact, simple, durable, reliable, convenient, and attractive, it does not necessarily follow that it exhibits patentable novelty. Whether it is or is not an invention is a question to be determined by a reference to the state of the art prior to Rockwell's application, September 17, 1891. Of the many bicycle bells introduced in evidence, it will be sufficient to refer to two only,—the "Starr Bros. bell, of March, 1890," and the "Bevin Bros. bell, of July, 1891." These bells, in the following particulars, are practically identical with complainant's. They are alarm bells, capable of construction in any size, and light or heavy, as desired. They are attractive in appearance, and capable of attachment to the handle bar in such a way that only the thumb of the rider is needed to sound the alarm, the grip of the hand on the bar not being interfered with. Each of them has a base plate which is dish-shaped, and contains and protects the intermediate mechanism, in a compact form, between the base plate and gong. Each base plate is of such form that means of attachment can be and are

provided for affixing the bell to the bicycle handle bar, and the gong is fastened to the base plate by means of a screw. Each apparatus is set in motion by pressure upon a thumb piece projecting beyond the circumference. The interior mechanism of these Starr and Bevin bells is materially different from that of complainant's, but these and many other exhibits show that it was old in the art to form a bicycle bell of two shells, one being a base plate to hold the mechanism, the other a cover to protect it and also to act as a gong; to actuate the operative parts by pressure on a thumb piece conveniently protruded through the slot left between the two shells; and to affix the whole apparatus to the handle bar. Conceding that the interior mechanism used in bicycle bells before Rockwell's device was unsatisfactory in one or other respect, it is difficult to see how there could be any invention in putting some other interior mechanism, well-known in the bellmaker's art, and, by reason of its compactness and continuity of sound, well adapted for such use, into the old, double-dish shell, affixed to the handle bar in the old way, and operated by thumb pressure on the old projecting thumb piece. No prototype of complainant's interior mechanism is shown in the prior art of this country. It is found, however, in a British patent, No. 2,425, of June 22, 1877, to Alfred Bennett, for "improvements in call bells, door bells, and other bells." The specification states that the—

"Invention consists of the construction and arrangement of the parts of the striking mechanism of call bells, door bells, and other bells, whereby a repeating action is obtained in the bell; that is, the bell is struck several times in succession when it is operated upon by the hand, or by a lever or other actuating mechanism."

The inventor first describes a call bell having a swiveled or jointed revolving hammer set in motion by a push rod:

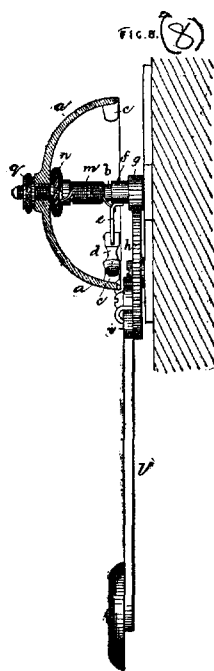
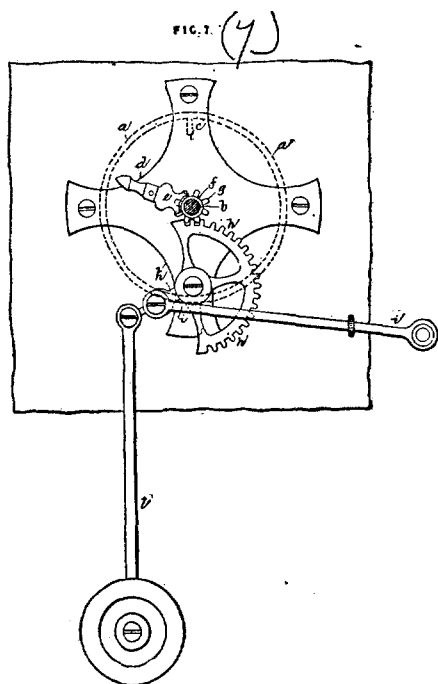
"When the push rod is pressed down by the hand or finger, the pin or stud on it, by working in the helical slot in the hammer tube, gives rotation to the hammer tube, and the swiveled or jointed hammer on the said tube is thereby made to strike three or more times the lugs or projections on the inside of the bell; and, on the push rod making its return or upward motion by the action of its spring, the hammer tube is made to rotate in the opposite direction, and the hammer is again made to strike several times the lugs or projections on the inside of the bell. The repeating action of the bell is thus effected both on the advance or descending motion of the push rod, and on its return or ascending motion."

It is unnecessary to go into the details of structure of the Bennett call bell, except to say that its characteristic feature is a revoluble striker arm, with a swiveled head, which, being rotated in one direction by direct pressure of the hand, and in the opposite direction by a spring, makes several revolutions back and forth when pressure is applied, thus producing a continuous alarm. Having described his "call bell," Bennett proceeds:

"Fig. 7 represents in front elevation, and Fig. 8 in side elevation, partly in section, a door, house, or other like bell, to which repeating mechanism, constructed according to my invention, is applied. a is the bell supported on the pillar, b, in the usual way; c, c, are the lugs or projections on the bell for the jointed hammer, d, to strike against. The arm, e, to which the jointed hammer, g [manifestly a misprint for d], is connected, is fixed to the short tube or collar, f, capable of rotating freely on the bell pillar, b. This tube or collar, f, carries a pinion, g, which gears with the teeth of the semicircular wheel

or toothed sector, h. By means of the said toothed wheel or sector, h, gearing with the pinion, g, a rotary motion may be given to the tube or collar, f, and to the jointed hammer, d, carried by it, and the said hammer, d, be made to strike several times in succession the lugs or projections, c, c, on the inside of the bell, a, as described with respect to the call bell. The half toothed wheel or sector, h, is worked by the pulling of the wire attached to the arm, i, which wire may either be acted upon by a bell pull, or by the motion of a door. The said arm, i, is jointed to the crank, k, on the axis of the half wheel or sector, h. When several bells are arranged side by side, each bell may be provided with a pendulum, l, connected to the crank, k, for indicating which bell has been used. The motions of the several parts of the bell are effected by the coiled spring, m, around the bell pillar, b. One end of the coiled spring, m, is fixed to the rotating hammer arm, e, and the other end to the adjustable collar, n, fitted on a square or angular part of the pillar, b. When the pinion and the collar, f, g, are rotated by the operation of the half wheel or sector, h, the spring, m, is coiled upon the pillar, b; and it is by the uncoiling of the spring, when the bell arm, i, has come to the end of its advance stroke, that the return motions of the jointed hammer, d, e, collar, f, pinion, g, wheel, h, and arm, i, are effected. By changing the position of the collar, n, with respect to the square or angular part of the bell pillar, b, on which it is fixed, the coiled spring, m, may be tightened or coiled more or less on the said pillar, and any required amount of tension given to it. The required power for working the bell may thus be adjusted with great nicety."

The drawings referred to are as follows:



Of the mechanism of this Bennett patent, it may be observed that it is not restricted to call bells, but, in modified form, is, as the inventor points out, applicable for "door bells and other bells * * * operated upon by the hand, or by a lever or other actuating mechan-

ism." Once published to the world, it became a part of the bellmaker's art. Moreover, the description of the device and the drawings are fuller and more explicit than is frequently the case with British patents. There is no difficulty in understanding from the patent just what it was that Bennett devised, how it worked, and what its distinguishing characteristics were. The record does not show whether any bells made according to his patent came into use in England or elsewhere, but a model has been put in evidence, which, except for the pendulum (the use of which the patentee says is optional), is an exact reproduction of the drawings and description, with no modification of a single element, no readjustment of parts. This model may be put in operation by a pull upon the rod, i, but may be operated equally well by thumb pressure applied at the end of the crank or lever, to which the pendulum is attachable. When pressed by the thumb in one direction, the lever moves the toothed sector, h, which transmits motion through the pinion to the revoluble striker bar, causing it to make more than one complete revolution, the swiveled striker head sounding successive strokes on the gong; and when the thumb pressure is released the action of the spring drives the revoluble striker bar back for an equal distance, the swiveled striker head repeating its strokes. This is identically the combination of the second claim of the patent in suit. Referring, moreover, to the description of Rockwell's bell quoted supra from the brief of complainant's counsel, it will be seen that in Bennett's bell there is a lever of convenient form pivoted to the base plate, one end being available for the application of thumb pressure, and projecting beyond the circumference of the bell. The other end of the lever carries a segmental gear. One pinioned gear wheel which is found in Rockwell is wanting in Bennett; the segmented gear at the end of the lever meshing with a pinion upon one side of the striker bar, which is loosely pivoted on a stud or pillar. This striker bar carries a loosely-pivoted striker. A spring—attached to the lever in Rockwell's, and coiled around the stud in Bennett's—tends to keep the lever in one position, and to operate the striker bar in reverse direction to the direct action of the thumb-pressed lever. The insertion of an additional gear and pinion wheel in a train of such wheels arranged to transmit motion is certainly not invention; nor is it invention to substitute a reacting spring at one end of the train of motion for a similar spring at the other end. With these differences, the interior mechanism of Bennett is the same as that of Rockwell, and the earlier patent discloses all the elements of the second claim of the later one, viz.: (a) A base plate, (b) a revoluble striker bar, (c) spring-actuated in one direction, (d) a lever operatively connected therewith, (e) and adapted to rotate the striker bar in opposition to the force of the spring, (f) and a gong, substantially as set forth. Moreover, no particular rearrangement or reorganization is required to adapt the Bennett bell for use on a bicycle. Besides the projecting crank on which thumb pressure may be applied, a small part of the toothed segmental wheel projects beyond the periphery of the gong; but it is only necessary to enlarge the diameter of the gong, and to substitute the well-known dish-shaped base plate, with

its fastening appurtenances, in order to obtain a bell operated in the same way as complainant's, by means of the same mechanism, protected by a similar shell composed of gong and base plate, and affixable in like manner to the handle bar of a bicycle. We are unable, therefore, to find any patentable novelty in patent No. 471,982. The learned judge who tried the cause in the circuit court reached an opposite conclusion, mainly for the reason set forth in the following excerpt from his opinion:

"The great number of patents introduced into this case, all issued since the British patent, show the amount of inventive skill which has been brought to bear upon this class of inventions. If the changes necessary to adapt this [Bennett] bell to a bicycle bell were such as would occur to the ordinary mechanic, skilled in the art, it would seem as though it must have occurred to some one during the fourteen years of the life of said patent. A comparison of the bell [of the Rockwell patent] with [others] previously manufactured by defendant shows how crude and imperfect were the latest devices of the prior art, and furnishes additional evidence in support of the claim of patentable novelty. * * * The mass of evidence offered by defendant shows that the desired results have been accomplished, after repeated and futile attempts on the part of others, by a device which, upon defendant's own showing, is only anticipated by the earliest of all the devices,—the Bennett British patent of 1877 for a door bell."

For years prior to 1892 the demand for bicycles and bicycle bells was steadily increasing. To supply that demand, new improvements were being continually sought after. An alarm bell, which should be compact, simple, strong, durable, reliable, attractive, efficient, and easily operated, was a desideratum. One after another, the bellmakers of this country produced bicycle bells, differing in mechanism, some containing clockwork, some escapements and trembler hammers, but all, as the evidence shows, having one or other drawback,—a circumstance which continually stimulated mechanics and inventors to further effort to supply the want. If, during all this period, a bell-striking mechanism such as Bennett's was being turned out of the bell manufactories of Connecticut, as the operative part of call bells, door bells, and other bells, a court might find it extremely difficult to understand why it did not occur to any mechanic possessed of the ordinary skill of his calling to insert such mechanism in the double-dish shell of a bicycle, but would yet feel constrained by the argument that the reason so common a device was not put to a new use was because it required inventive genius to discover its adaptability thereto. This argument, however, is not applicable to the case at bar. There is no reason to suppose that Bennett or his bell was ever heard of by any bell manufacturer in this country until his patent was unearthed by a search for anticipating devices. The inability of the mere skilled mechanic to encase the Bennett mechanism in a bicycle bell shell, so as to produce a practicable bicycle alarm, is not to be taken for granted merely because it was not done, unless there is at least a reasonable probability that such mechanic knew of the Bennett mechanism. In this case the probabilities are all the other way. If Bennett's mechanism was used in the bellmaking industry here, it may safely be assumed that, in a record as carefully prepared as this, there would be some evidence of it. And so well adapted is that mechanism to bicycle bells that it is

almost inconceivable that it could have been known to bellmakers here during the 14 years in which they were trying to improve such bells, and yet was not availed of. No doubt, Rockwell devised the striking mechanism set out in his patent independently, and with no knowledge of what Bennett had done; and, since that mechanism was better adapted to meet the requirements of a bicycle bell than anything which rival manufacturers had succeeded in producing, it may be accepted as the fruit of an inventive conception, but its novelty is negatived by the British patent. The statutes authorize the granting of patents only for such inventions as have not been patented or described in any printed publication in this or any foreign country before the applicant's embodiment of his own conception. It may be a hardship to meritorious inventors, who, at the expenditure of much time and thought, have hit upon some ingenious combination of mechanical devices, which, for aught they know, is entirely novel, to find that, in some remote time and place, some one else, of whom they never heard, has published to the world, in a patent or a printed publication, a full description of the very combination over which they have been puzzling; but in such cases the act, none the less, refuses them a patent. The real invention here is the combination of a base plate with a revoluble striker bar, spring-actuated in one direction, a lever operatively connected therewith, and adapted to rotate the striker bar in opposition to the force of the spring, and a gong,—an ingenious mechanism, which, by reason of its simplicity and durability, its facility of operation, its reciprocating action, and the character of the alarm it sounds, is peculiarly fitted for a bicycle bell. But this precise mechanism was described and published to the world in the Bennett patent, and is used in complainant's bell with no other reorganization of operative parts than the insertion of an additional gear and pinion wheel, and such a shifting of the spring as introduces no new function. In our opinion, such unsubstantial changes do not involve invention. Nor is it invention to inclose the operative mechanism in an old bicycle, double-dish shell, when used for a bicycle bell, instead of mounting it upon a standard, for a call bell; affixing it to a door jamb, for a door bell; or arranging it to engage with an opening window sash, for a burglar alarm. The decree of the circuit court is reversed, and the cause remitted to that court, with instructions to dismiss the bill, with costs of both courts.

RICHARDSON et al. v. AMERICAN PIN CO.

(Circuit Court, D. Connecticut. March 20, 1896.)

No. 804.

1. PATENTS—INTERPRETATION—INFRINGEMENT.

Where the patentee of a hook for garments claimed and illustrated a tongue having its free end forming a loop coincident with the bend of the hook, explaining that what he meant thereby was such a loop as to engage and afford a seat for the eye, and thus afford a triple bend to strengthen the

hook, *held*, that no other construction would infringe, unless it performed some one of these functions in the same way.

2. SAME—ESTOPPEL—STATEMENTS IN FILE WRAPPER AND CONTENTS.

Where the patent is not for a broad invention, but merely for a change of form, statements and admissions contained in the file-wrapper and its contents, in respect to amendments made upon the citation of references involving the issue of novelty, constitute an estoppel against the patentee, in the interpretation of his claims. *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, distinguished.

3. SAME—HOOK FOR GARMENTS.

The De Long patent, No. 411,857, for a hook for garments, construed, limited, and *held* not infringing.

This was a bill in equity by Thomas De Q. Richardson and others against the American Pin Company for alleged infringement of letters patent No. 411,857, issued October 1, 1889, to Frederick E. De Long, for a hook for garments.

Bradbury Bedell, Strawbridge & Taylor, and Frederick P. Fish, for complainants.

George E. Terry, Edmund Wetmore, and Benno Loewy, for defendant.

TOWNSEND, District Judge. When Frederick E. De Long, the patentee herein, filed his original application for a hook for garments, he said:

"The tongue has a loop or looped extension, C, which is coincident with the bend, d, of the hook, so that the eye or loop engages with both extension and bend; said extension increasing the strength of the hook, as is evident."

All of his claims covered a locking tongue or hump in said hook. Upon citation of references, he amended his claim to cover—

"A garment hook having an auxiliary hook at the bend of the hook proper, forming a reinforce for the hook at said bend, substantially as described."

The references being insisted on, his attorney wrote, saying, concerning the Rodgers English Patent, No. 8,068, of 1839:

"But it has no auxiliary hook, serving as a reinforce to the main hook. None of the references * * * have this feature."

Finally, the attorney differentiated his hook from the prior art referred to by the patent office, by the following amendment:

"Continuous of the tongue, B, is a loop or looped extension, C, which is coincident with the bends, d, of the hook; it being noticed that said loop, C, is between the side pieces or portion, a, of the hook, A. The tongue or loop, C, is coincident with the bends, d, of the hook proper; it being noticed that the hook consists of the sides, a, the eyes, b, the front, c, and the bends, d, between said sides and front, so that the eye which is connected with the hook engages with both the looped extension, C, and the bends, d; said extension increasing the strength of the hook, as is evident, and also preventing the eye from slipping behind the tongue."

That such looped extension, forming a reinforced seat for the eye of the hook, originally described and continuously insisted on as the only departure from the prior art, was the essential feature of the construction, which gave it patentable novelty, is manifest from an examination of both applications, the other contents of both file wrappers, and the patent as finally granted. It now appears, accord-

ing to the argument of counsel for complainants, that what De Long really invented was the means for preventing the ancillary hook from sticking into the garment, and the eye from slipping behind said tongue, and which consisted in turning up the point of said tongue. But Fig. 2 of the original drawings, and the patent itself, indicate that he did not think of or claim a nonabrading hook; and complainants' expert admits, as to the protection of the eye, that one of the figures of said Rodgers patent illustrates a construction which "possesses the same advantages, namely, that the eye cannot get on the wrong side of the tongue," and that, if one were to bend it up so as to get it out of the way of the garment, he would make the invention of the patent in suit. The applicant had the right to select as to which of two courses he would pursue in the patent office. He could then insist, as his counsel now insist, that his invention resided merely in bending up the point of the tongue of the prior art, or he could abandon or ignore this feature, and differentiate his construction from the prior art by so extending the tongue beyond prior constructions as to form an auxiliary, reinforcing loop, coincident with the bend of said hook. He chose the latter alternative. Thereby he has strengthened the claim of novelty in his patent, but narrowed its scope.

But it is further contended that the patent office was mistaken in its view as to the effect of the earlier constructions. It would seem, in view of its references, and of the Federbaken, Tyler, Rodgers, and other constructions, that the examiner was right, and that Judge Colt, in his opinion sustaining the patent in suit, took this view. He says:

"The Rodgers hook has a yielding, resilient, humped tongue, and to this extent is similar to the De Long structure; but the end of the tongue, in this hook, is not carried around the bend of the hook. There are two defects in the Rodgers hook: First, the end of the tongue, when the eye is inserted in the hook, is pressed down below the plane of the shank of the hook, and, coming in contact with the fabric, tends to abrade it; and, second, in inserting the eye in the hook the spring tongue may become bent or displaced, in which case the eye, in attempting to unhook it, may pass behind or under the end of the tongue, and so prevent the disengagement of the eye from the hook." *Richardson v. Shepard*, 60 Fed. 273.

In the arguments of counsel for complainants it is said that neither the patent nor the file wrapper say how far the tongue must extend around the bend of the hook. But when the patentee claims and illustrates a tongue having its free end forming a loop coincident with the bend of the hook, having explained that what he meant thereby was such a loop as to engage and afford a seat for the eye, and thus afford a triple bend to strengthen the hook, it is evident that no other construction will infringe, unless it performs some one of these functions in the same way.

Counsel further cite from the able and exhaustive opinion of Judge Putnam in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, to support the claim that De Long should not be estopped to claim infringement herein by reason of the statements in the file wrapper and contents. But that was a case involving the application of the broad doctrine of equivalents to a

pioneer patent, where amendments were made, not upon citation of anticipations, but upon a theory of the examiner that the claims must conform to the operation explained in the specification. Here the alleged invention covers a mere change of form, and was thus amended upon citation of references involving the question of novelty. The rule applicable in such cases is stated in said opinion by Judge Putnam, quoting from *Ball & Socket-Fastener Co. v. Ball Glove-Fastener Co.*, 7 C. C. A. 498, 58 Fed. 818, as follows:

"The rule touching the effect of such amendments has been several times laid down by the supreme court in patent causes, although it is only a peculiar application of the general principles of law relative to the interpretation of instruments. In the case at bar the amendments relate to the very pith and marrow of the alleged improvement, touch directly the question of novelty, and were understandingly and deliberately assented to, so that the rule of interpretation referred to undoubtedly applies."

Judge Putnam adds that the application of this rule "when the invention is in mere matter of form or detail would be more freely made than when it is of a broad character."

The tongue of defendant's hook is slightly longer than that of Rodgers, and the end is sufficiently curved so that it will not abrade the cloth. In defendant's hook, there is not the "tongue having its free end forming a loop coincident with the bend of the hook," as claimed; there is practically no "auxiliary hook serving as a reinforcement to the main hook," certainly none in the sense in which applicant described it, "so that the eye * * * engages with both the looped extension, C, and the bends, d; said extension increasing the strength of the hook, as is evident"; and the eye is not "seated both in the bend, D, and the loop, C." Were it essential to the decision herein, it might be further shown, from the state of the prior art, that other devices, such as those of Tyler, Jenkins, Federhaken, Church, and Mason, approached so closely to the defendant's construction that De Long could not have protected it by a valid patent. These considerations, however, are only here referred to as tending to show that the De Long invention was in no sense of a primary character. Complainants' expert admits that the only structural change necessary in Fig. 26 of the Rodgers patent, in order to bring it within the invention of the patent in suit, would be to bend the elongated end of the tongue so as to make it coincident with the bend of the hook, and that if you took the hook of Fig. 26, "and found that the straight end of the tongue stuck into your garment, and bent it up so as to get it out of the way, you would make the invention of the patent in suit."

Counsel for complainants further argue that the defendant "has what the complainants contributed to the art, and gets it by having 'a tongue whose free end forms a loop coincident with the bend of the hook' for a certain distance." There are several answers to this argument. The bend in the tongue does not form a loop, which is defined to be "a fold or doubling of a string, etc., in such a manner as to form an eye or a curve through which something may be passed, as a hook or another cord." But if, in the sense of "a curve or bend of any kind," it does form a loop, and if such a loop is coincident with

the bend of the hook for a certain distance,—which I very much doubt,—yet, the patentee is estopped, as already shown, to cover such loop, unless the certain distance during which it is coincident either covers the whole of the bend, or so much thereof that the loop may serve as a seat for the eye, and thus increase the strength of the hook. And if this were not so, and the alleged invention could be construed to consist in what the inventor originally ignored,—that is, in merely turning up such prolongation of the tongue,—there is, at most, nothing more than the skill of the mechanic, in view of the prior art. In any event, the applicant—having presented to him the direct issue of novelty, in view of the prior art, and having failed to claim the upturned end, and having elected to show, describe, claim, and insist upon his invention as consisting in a certain kind of loop, having certain definite functions—is bound by his admission, and is not now in a position to claim that his invention consisted in a mere lengthening and upturning of the end of the tongue, sufficient to prevent abrading the cloth.

Finally, the evidence fails to establish that the alleged defects of the earlier hooks caused the falling off in the sales thereof, or that the alleged advantages of the patented hooks account for their popularity. On the contrary, the changes in women's fashions, and extensive advertising, not of the patented improvement, but of the hump, appear to have contributed largely to its success. Like the Orum lock, in *Duer v. Lock Co.*, 149 U. S. 216, 13 Sup. Ct. 850, it was put upon the market just at the time when the public were looking for a hook of this description, and the eye of the people was caught by an alluring trade-mark and seductive signs. Let the bill be dismissed.

BINDER et al. v. ATLANTA COTTON SEED OIL MILLS.

(Circuit Court, N. D. Georgia. March 25, 1896.)

1. INFRINGEMENT OF PATENTS—PROCESS FOR EXTRACTING OILS.

A patent for a process for extracting oil from animal or vegetable substances, by exposing them to the direct action of dry superheated steam, for the purpose of liquefying the oil and opening the oil cells in readiness for expression, is not infringed by merely subjecting such substances to direct action of ordinary steam, in order to moisten them, when too dry, before cooking by external heat in a steam-jacketed heater.

2. SAME.

The Binder patent, No. 434,696, for a process for the extraction of oil from animal and vegetable substances, construed, and *held* not infringed.

This was a bill in equity for the infringement of a patent.

George Westmoreland, for complainants.

B. F. & C. A. Abbott, for defendant.

NEWMAN, District Judge. Charlotte F. Binder, as administratrix of the estate of Charles F. Binder, and H. N. Low and H. C. Johnson, as assignees, bring this their bill in equity against the At-

lanta Cotton Seed Oil Mills, charging it with the infringement of a patent obtained by said Charles F. Binder (application for which was filed November 13, 1886, and the patent itself granted August 19, 1890, No. 434,696) upon a process for the extraction of oil from animal or vegetable substances, by the direct application of steam to the material used. Complainants claim, in their bill, that the defendant company has used, for many years, in its oil mill, near Atlanta, the process for which the above patent was issued.

In the specifications attached to the letters patent the patentee describes his invention in this way:

"My improvement consists in applying the dry or superheated steam directly to the material from which the oil is to be extracted, for a sufficient length of time only to open the oil cells, when the material is taken to any approved press, and the oil extracted by pressure. In continuing the application of steam to the material for a sufficient length of time to open the oil cells, the material is sufficiently heated to liquefy the oil or grease.

"The most approved practice has heretofore been, in preparing animal fat or oleaginous seeds for the extraction of oil by pressure, to heat them by any means,—generally in a steam-jacketed vessel,—to liquefy the oil or grease, thus rendering its expression more easy by reason of its greater fluidity. This system, however, of heating the substance from which the oil or grease is to be extracted by dry heat, has but the one advantage of rendering the oil or grease more fluid, while it has the disadvantage of closing the oil cells. It has also been customary to subject animal fat to the direct action of steam in a digester, until the water of condensation shall have digested the material, and floated the oil on the top, whence it may be drawn off by corks as it accumulates. The latter process, however, besides separating the oil or grease from other substances contained in the digester, dissolves the gelatine matter, which is consequently drawn off with the water, and with it any nitrogenous matter that it may contain, leaving, as refuse, if this process is continued, only calcium-phosphate.

"It is the purpose of my invention to liquefy the oil in the cells, and open them, by reason of which the oil or grease will be more easily expressed, and at the same time minimize the amount of the water of condensation. I accomplish this result in various ways, several of which I illustrate in the accompanying drawings. It may, however, be accomplished in other ways, the discovery being the introduction of dry steam, and its escape before condensation, heating and expanding the cellular tissue, and providing for the more ready extraction of the oil by pressure. An excess of moisture is also driven out of the material by the use of very dry or superheated steam, or by the application of external heat, by either a steam jacket around the vessel in which the material is treated, or by other means; but it is not necessary to apply external heat in any case if the steam is of sufficiently high temperature."

The specifications wind up with the claim of the patentee stated as follows:

"(1) The herein-described process for the extraction of oil, consisting in subjecting the material from which the oil is to be extracted to direct contact with superheated or dry steam of such a high temperature that only sufficient moisture is applied to the material to take the place of the oil in the cells, and then expressing the oil, substantially as set forth.

"(2) The herein-described process for the extraction of oil, consisting in subjecting the material from which the oil is to be extracted to direct contact with superheated or dry steam, and thereby opening the oil cells, and preparing the material for the extraction of the oil, without moistening it, and then expressing the oil by mechanical force, substantially as set forth.

"(3) In the extraction of oil, the improvement which consists in subjecting oleaginous material to the direct action of steam, and thereby opening the oil cells, without moistening the material treated, and then expressing the oil, as set forth."

It is the process, then, set out in these specifications and in the claim, to which complainants have the exclusive right, and to which their bill applies.

The defendant company sets up in its answer that it does not now, and never has, used the process embraced in Binder's patent. It admits, however, that it uses steam, applied directly to the meats, but not for the purpose of opening the oil cells by reason of the action of the steam. The steam used, it claims, is a lower grade of steam than that of the process claimed by Binder, and used for the purpose of supplying moisture when the meats are too dry. The cooking process is, as the answer asserts, carried on by the admission of steam into the jacket surrounding the heater in which the meats are contained.

The complainants claim that the steam used by the defendant company is the same kind of steam claimed in Binder's process, and that it is used for the same purpose, namely, the injection of steam upon the meats to prepare them for the extraction of oil. Much evidence has been introduced upon the issue thus raised. The evidence upon that subject is conflicting, but there seems, really, to be a preponderance in favor of the defendant company. Certainly, there is no preponderance in favor of complainants. It appears, from the evidence, that steam had been used for some years before Binder obtained his patent, in the oil mills of the South, for the purpose of moistening the material for the extraction of oil.

The strength of the case for the complainants, and on which I understand them mainly to rely, is the fact that the defendant company commenced the use of steam shortly after a conversation between Dr. Binder, Harrington, the then superintendent of the defendant's oil mill, and Mr. Thornton, who was president, at that time, of the defendant company, on that subject; and it is contended—and, indeed, there is evidence to this effect—that the preparations then made for the use of steam for the purpose described were in pursuance of information received in that conversation from Dr. Binder. The further fact relied on is the effort which Thornton made about that time to obtain a patent for the direct application of steam, in connection with the preparation of cotton-seed meats for the extraction of oil, and which was prevented by an interference filed by Dr. Binder, resulting in the refusal of the patent office to issue a patent to Thornton, and the grant of letters patent to Dr. Binder.

Whatever may be said as to the contention that Thornton was endeavoring to obtain, for himself or for his company, the benefit of Dr. Binder's inventive genius, it does not affect the distinct issue presented to the court in this case. It may be remarked that the specifications and claims filed by Mr. Thornton are not in evidence, and we are left without information as to what his claim really was. But whether the process which Thornton claimed to have discovered was the use simply of wet or ordinary steam, or the use of dry or superheated steam, would be immaterial, except in so far as it throws light on the issue here, and that is: Does the use of steam of the kind, in the manner and for the purpose used by the defendant company, infringe the process for which Binder obtained his patent?

The Binder patent is for a process which applies the dry or superheated steam directly to the meats, the effect of which, it is claimed, will be to liquefy the oil or grease contained in the meats, and, if the steam is of sufficiently high temperature, to obviate the necessity for the application of external heat. The claim clearly is to render unnecessary to a very great extent—and, if the steam be of sufficiently high temperature, to render unnecessary entirely—any other heat than that contained in the steam itself. The issue presented, then, is this: Has the defendant invaded the rights of complainants to the process thus described? Now, the method which the defendant company is using for the extraction of oil from cotton-seed meats is to place the meats in a "heater," incased in an outer covering called a "jacket," and steam is injected into this jacket, in order that it may circulate all around the heater, for the purpose of cooking the meats, to prepare them for the expression of oil. Frequently, during dry seasons, or from other causes, the meats were too dry for this external heat alone to accomplish the purpose, and it was therefore necessary to apply a moistening agent in some way, in order to procure a better flow of oil, and to supply this moisture they injected ordinary or boiler steam on the meats. Now, it may be true that Thornton, who was then president of the defendant company, got his idea of the use of steam, to be applied directly to the meats, either from Dr. Binder, or from Binder through Harrington; but, however this may be, the method adopted was used by other mills long before Binder obtained his patent, and, even if this were not true, it is a method which is not claimed or covered by the Binder patent.

The view I take of this case, then, is this: Mr. Thornton, the president of the defendant company, probably availed himself of Dr. Binder's suggestion as to the use of steam to be applied directly to the cotton seed in the course of preparation for the extraction of oil. He did not, however, do more than use ordinary steam from his boiler. If Dr. Binder suggested to him the use of dry or superheated steam, he did not avail himself of the suggestion. Subsequently, when Dr. Binder made his application for a patent, he only made claim to the use of dry or superheated steam, the advantages of which, as he claims them to have existed, have already been set forth. So that the extent to which it can be said Thornton adopted his suggestion was not an infringement of the improvement for which Binder subsequently obtained a patent. I have gone through the evidence carefully, and have taken some time to consider this matter, and the above seems to me to be the necessary conclusion, taking all the evidence together. I cannot, therefore, hold that the precise and specific improvement for which Dr. Binder's patent was issued has, under the evidence here, been infringed by anything the defendant has done. A decree may be taken dismissing the bill.

ENGLE SANITARY & CREMATION CO. v. CITY OF ELWOOD.

(Circuit Court, D. Indiana. April 8, 1896.)

No. 9,128.

1. PATENTS—INFRINGEMENT—MECHANICAL EQUIVALENT.

It is an essential rule, governing the application of the doctrine of equivalents, that not only must there be an identity of function between the two things, but that function must be performed in substantially the same way.

2. SAME—OVENS FOR BURNING OFFENSIVE MATTER.

In furnaces for burning wet and offensive matter, an open-work grate, upon which the matter is dumped, and through which the liquids percolate, leaving only the solid matter to be consumed by fire, is not the mechanical equivalent of an oven which receives and holds both liquid and solid matter, until the one is evaporated and the other consumed.

3. SAME.

The Engle patent, No. 372,305, held not infringed as to claims 1, 2, and 3.

This was a suit in equity by the Engle Sanitary & Cremation Company against the city of Elwood, for alleged infringement of a patent.

Chambers, Pickens & Moores (Albert H. Walker, on the brief), for complainant.

C. A. Snow & Co., Andrew Wilson, and Morgan & Morgan, for defendant.

BAKER, District Judge. This is a suit in equity for the alleged infringement of claims 1, 2, and 3 of letters patent of the United States No. 372,305, granted, on the invention of Andrew Engle, to Andrew Engle, James Callanan, and James C. Savery, on November 1, 1887, for improvements in furnaces for burning wet and offensive substances. The complainant derails title to the invention by mesne assignments from the original patentees. The bill of complaint is in the usual form in such cases. The answer admits that the defendant is a municipal corporation, existing in due form of law in the state of Indiana, but denies every other averment of the bill. The sole ground of defense interposed on the hearing was that the furnace used by the defendant does not infringe either of the claims of the letters patent of the complainant which are alleged to be infringed. In view of this contention, it is unnecessary to determine the validity or patentability of the invention embraced in such claims.

The claims alleged to be infringed are as follows:

"(1) The combination of the oven, 2, provided with an opening in the front, and a valve in the rear thereof, with the fireplace, 4, provided with an outlet under the oven and with the valve, 5, closing that outlet, all arranged and operating together, substantially as described.

"(2) The combination of the oven, 2, provided with an opening in front, the fireplace, 40, in the rear of the oven, and connected therewith, and provided with a valve rearward thereof, and the fireplace, 4, provided with an outlet under the oven, and with the valve, 5, closing that outlet, all arranged and operating together, substantially as described.

"(3) The combination of the oven, 2, provided with an opening at the front and a valve in the rear thereof, the fireplace, 4, provided with an outlet under

the oven, and with the valve, 5, closing that outlet, and the fireplace, 10, placed in the rear of the valve, 5, and above its level, all substantially as described."

Each of these claims involve what is known as a combination; and it is a rule of universal application, in the construction of such claims, that the omission in the alleged infringing device of one element of the combination embodied in any claim of the patent will repel the charge of infringement based on that claim. "A combination is an entirety. If one of its elements is omitted, the entire claim disappears. Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement. The patentee makes all parts of the combination material when he claims them in combination and not separately." Walk. Pat. § 349. "A claim for a combination covers the exact combination claimed, and nothing more. It does not protect the elements of the combination, nor their mode of union, nor their co-operative law, separately considered. It does not embrace any other union of the same elements, with each other, or with additional elements, nor a combination of a portion of these elements among themselves. Where it omits certain elements, it excludes them from the combination, though they are in fact essential to it as an operative means; and where it treats certain elements as necessary, they cannot afterwards be declared by the inventor to be unnecessary, although the real invention was complete without them." Rob. Pat. § 527; *Vance v. Campbell*, 1 Black, 427; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274; *Schumacher v. Cornell*, 96 U. S. 549; *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. 236; *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021; *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. 493; *Manufacturing Co. v. Sargent*, 117 U. S. 373, 6 Sup. Ct. 931; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76; *Richards v. Elevator Co.*, 159 U. S. 477, 16 Sup. Ct. 53.

The elements of the first claim are—First, the oven, 2, with an opening under the oven, and a valve in the rear; and, secondly, a fireplace, 4, provided with an outlet under the oven, and a valve, 5, closing the outlet. The defendant's furnace has neither the valves nor the oven which constitute elements in the complainant's furnace, as described in this claim. Counsel, in his brief, makes no mention of the valves which are made material elements of the subcombination of this claim, nor does he attempt to account for their absence in the defendant's furnace. He endeavors to show infringement of this claim by attempting to prove that the open-work grate in the defendant's furnace is an equivalent of the oven, 2, in the complainant's patent; and that certain natural gas burners employed in the defendant's furnace are the mechanical equivalents of the fireplace, 4, of complainant's patent. If this contention were conceded, it would not avail the complainant, because the valves which are made material elements of the first claim are not found in the defendant's furnace. But the claim of counsel is unfounded. The open-work grate of the defendant's furnace is not a mechanical equivalent of the oven, 2, found in complainant's structure. "One thing, to be the

equivalent of another, must perform the same function as that other; and, while it can be such an equivalent if it does more than that other, it cannot be such equivalent if it does less." Walk. Pat. § 352. And it is an essential rule, governing the application of the doctrine of equivalents, that not only must there be an identity of function between the two things claimed to be equivalents, but that function must be performed in substantially the same way by an alleged equivalent, as by the thing of which it is alleged to be an equivalent, in order to constitute it such. Walk. Pat. § 353; Machine Co. v. Murphy, 97 U. S. 120; Roller Mill Patent, 156 U. S. 261, 15 Sup. Ct. 333; Seeley v. Electric Co., 44 Fed. 420.

The oven, 2, in the Engle patent, simply serves to retain the wet and offensive substances which are to be burned, and, being made of solid brick work, there can be no separation of the liquid matter from the solid prior to decomposition. The liquid matter in the oven must first be evaporated into steam, and partially volatilized into gases, before any combustion of the solid matter can take place. This involves the maintenance of a great heat, involving a considerable consumption of fuel; and the process, in the nature of things, must be slow. In the defendant's furnace, the wet and offensive substances are dumped directly on a grated surface, and, as soon as they are thus placed, the liquid matter is separated from the solid, inasmuch as the fluids percolate through the grate into a chamber below, while the solid matter remains upon the grate, ready for immediate consumption by fire. In this way the solid matter is more speedily consumed, and with less expenditure of fuel than occurs in the complainant's furnace. The complainant's oven, 2, serves only the one function of receiving and holding both the liquid and solid matter deposited therein, and there subjecting them to consumption by fire. The defendant's open-work grate performs the additional function of separating the liquid from the solid matter, thus permitting each at once to be separately acted upon by fire. It is therefore apparent that the defendant's open-work grate does not perform the same function as the oven, 2, in complainant's furnace, and in substantially the same way, which is of the essence of equivalency.

The foregoing considerations apply with equal force to the second and third claims of the complainant's patent, and show that the defendant has not infringed either of them. It follows that a separate consideration of the alleged infringement of these claims is unnecessary. The complainant has failed to establish the alleged infringement complained of, and its bill must be dismissed, for want of equity, at its cost, and it is so ordered.

WHITELY v. FADNER et al.

(Circuit Court, N. D. Illinois. December 16, 1895.)

1. PATENTS—INFRINGEMENT—IMPROVEMENTS—COLORABLE VARIATIONS.

Infringement is not avoided merely because the alleged infringing device is better, more useful, and more acceptable to the public, nor

because, by some colorable variation or expedient, it merely impairs or narrows the function and usefulness of the patented device.

2. SAME—EXERCISING APPARATUS.

Patent No. 418,257, for improvements in elastic cord exercising apparatus, construed, and *held* valid and infringed.

This was a suit in equity by Alexander A. Whitely against Frederick J. Fadner, R. S. Hopkins, and J. C. Billingslea, for alleged infringement of a patent.

Francis W. Parker and Edward D. Cooke, for complainant.

Frank B. Thomason and Dyrenforth & Dyrenforth, for defendants.

SHOWALTER, Circuit Judge. This is a bill to enjoin an alleged infringement of the first claim of letters patent No. 418,257, dated December 31, 1889, for an invention relating "to elastic cord exercising apparatus." Said claim is in the following words:

"As an exercising apparatus, a cord, elastic throughout its entire length, having pulleys thereon, over which the elastic cord travels, and hooks to which said pulleys are adapted to be secured."

It is said that this is an aggregation, not a patentable combination. Apart from the exceptional convenience of this apparatus as an exerciser, its adaptation to the strength of whatever person may happen to use it, and its adjustment to muscular movement in indefinite variety, the special function or result seems to be resistance to muscular contraction, which is approximately uniform while such movement continues, but gradual,—that is to say, without jerk or wrench, at the inception of such movement. By means of the pulleys the cord is given the requisite length, while the friction over the pulleys is also involved, to some extent, in the result named. I cannot say that said result is not the joint product of the combination, and in that sense new. As contrasted with apparatus wherein weights are lifted by nonelastic cords running over pulleys, that in suit does not oppose—at least, so as to cause any wrench, jerk, or undesirable effect—the initial muscular movement, and it adapts itself, during the continuance of such movement, to the strength of the person using it. This, I take it, may be deemed a distinction of function,—a difference in kind, rather than in degree. As contrasted with apparatus wherein the means of resistance is a spring, or short elastic substitute therefor, to which handles may be directly attached, or nonelastic cords, running over pulleys, that in suit opposes the movement or muscular contraction with a resistance which is approximately uniform. The special function of the spring, or elastic substitute therefor, as used prior to this patent, was rapidly increasing resistance as the muscles contracted, and while the movement caused by such contraction progressed. I think this difference may also be considered one of function, rather than of degree. The subsequent patent to Pickles, and the refusal of the patent office to grant a patent to these defendants, seem in line with the distinctions here made.

The evidence shows acceptance and use of complainant's apparatus by the public to a degree which is noteworthy as indicating a new and useful instrumentality,—a new result, through means not

obvious, or merely suggested by structures of the same general class previously in use. I am not able to say that the prima facie validity of this patent is overcome by the showing of this record, nor is the evidence as to anticipation by Graves clear and satisfactory. What he did was seemingly experimental. The distinctive ideas of this patent were apparently not present in his mind, or suggested by whatever it was he made. By driving a pin, through the middle of the cord, into the lower or central pulley of complainant's exerciser, so as to stop the play over that pulley, we have, substantially, the exerciser of defendants. If two pulleys, widely separated, be substituted for the one lower central pulley in complainant's apparatus, and the cord be pinned to each of these, we would again have substantially the apparatus made by defendants. In either case, defendants' apparatus would be "a cord, elastic throughout its entire length, having pulleys thereon,"—namely, the two upper pulleys,—“over which the elastic cord travels.” The function of complainant's apparatus, in large part, is not dependent on the play over the lower pulley, the cord at that point remaining stationary. In other words, the function, utility, or result of defendants' apparatus is contained in that of complainant. It makes no difference that defendants have chosen to cut the cord at the lower pulley and there secured the two ends. They might as well have pinned it to the pulley without cutting it.

An infringement is not avoided because the infringing device is better, more useful, and more acceptable to the public than that of the patent infringed; nor, on the other hand, because the infringing device, by some colorable variation or expedient, merely impairs or narrows the function and usefulness of the device infringed.

The injunction may issue, as prayed.

CALDWELL et al. v. POWELL.

(Circuit Court of Appeals, Third Circuit. April 10, 1896.)

No. 12.

1. DESIGN PATENTS—INFRINGEMENT SUITS—DEMURRER FOR WANT OF INVENTION
—COLLEGE BADGE.

The conception of a design for a college badge, of gold or other metal and enamel, triangular in shape, like a guidon, having on its face a combination of red and blue colors, in two horizontal stripes, and bearing the letters "U. P." embossed thereon, is not so manifestly wanting in invention as to warrant the court in holding a patent therefor void, upon demurrer to the bill. 71 Fed. 970, reversed.

2. SAME.

The Van Roden patent, No. 20,748, for a design for a college badge, held not void, on its face, for want of patentable invention. 71 Fed. 970, reversed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a bill by James E. Caldwell and others, against Charles S. Powell, for infringement of letters patent No. 20,748, for a design for

a college badge or pin. The circuit court sustained a demurrer to the bill for want of patentable invention, appearing on the face of said patent, and dismissed the suit. 71 Fed. 970. Complainants appeal.

J. P. Creasdale and Lewin W. Barringer, for appellants.

George J. Harding (George Harding, on the brief), for appellee.

Before ACHESON, Circuit Judge, and WALES and GREEN, District Judges.

GREEN, District Judge. This bill was filed to restrain the defendant from infringing a patented design. The design itself is for a badge or pin, and is of gold (or other metal) and enamel, triangular in shape, like a guidon, having upon the face a combination of red and blue colors, in two horizontal stripes or bars, and bearing the letters "U. P." embossed thereon. This badge or pin was intended mainly for the students in attendance at the University of Pennsylvania, and the colors on the badge are the well-known colors of that university. There is no question made as to the infringement of the design by the defendant. It is admitted.

The bill of complaint is in the usual form of such bills, and contains, *inter alia*, the allegation that one Van Roden "was the original and first inventor of the badge in question, which was not known or used by others in this country, and not patented or described in any printed publication, in this or in any foreign country, prior to the invention thereof by said Van Roden, and not in public use or sale in the United States for more than two years prior to the application for said patent, which application was filed in the United States patent office on the 11th day of April, 1891; the said Van Roden fully and in all respects complying with all the requisitions of the law in that behalf." The bill further stated that the said Van Roden, on the 7th day of April, 1891, by a certain instrument in writing, "did sell and assign to the firm of James E. Caldwell & Co. the entire right, title, and interest in and to the said invention and design for badge, and did thereby authorize and request the commissioner of patents to issue the said letters patent to the firm of James E. Caldwell & Co., which said instrument was recorded in the patent office on the 11th day of April, 1891; and the said James E. Caldwell & Co., the complainants, did, in accordance therewith, obtain letters patent for said design for badge, issued in due form of law to them, bearing date the 19th day of May, 1891, and numbered 20,748, whereby was granted and secured, according to law, to your orators, their heirs and assigns, for a term of 14 years from the said date, the full and exclusive right to make, use, and vend, throughout the United States and the territories thereof, the invention therein specified and claimed, as in and by said letters patent, or certified copy thereof, here in court to be produced, will more fully appear." The bill contained the further allegation that "the invention or design for badge described and claimed in said letters patent is of great value and importance; that badges or pins constructed in accordance therewith have been made and sold in large numbers since the grant

of the patent; that the rights of the complainants have been generally acquiesced in and acknowledged by the public; and that, but for the doings of this defendant, and others acting in collusion with him, they would be in the exclusive enjoyment of the rights and privileges granted by and under the said letters patent." The bill then avers that the complainants have placed upon every badge or pin by them made, of this design, the word "Patented," and the date of the granting of the letters patent, and charges the defendant with "the making, using, and vending of pins and badges embracing the invention or design for badge, or a material part thereof, patented as aforesaid, and thereby the said defendant has infringed, and still does infringe, upon the exclusive rights and privileges intended to be secured to the said complainants by their said letters patent." The bill concludes with the usual prayer for injunction and other relief. To this bill the defendant has interposed a general demurrer; and, for causes of demurrer, the want of invention and of novelty in the conception and production of the design were assigned. On the argument of the cause in the court below, the demurrer was sustained, and the bill dismissed. From that decree this appeal is taken.

It is a general principle of equity pleading that, as a demurrer proceeds upon the ground that, admitting the facts stated in the bill to be true, the complainant is not entitled to the relief he seeks, all matters of fact which are stated in the bill are admitted by the demurrer, and cannot be disputed in arguing the question whether the defense thereby made be good or not, and such admission extends to the whole manner and form in which it is here stated; or, to state the principle more concisely, every charge in the bill, well pleaded, is absolutely admitted by the demurrer. Treating the issue raised by the bill and demurrer simply as one of pleading, it would be difficult indeed to find the slightest ground for the justification of the demurrer. The bill is full, complete, and orderly in its statements of facts upon which the prayer for relief is based. It is not necessary to repeat again the averments and allegations, which have been already quoted at some length. The effect of the demurrer is to admit their truth. If so, stronger reasons for equitable relief could hardly be advanced.

But the defendant claims that the design itself, as described in the patent, shows absolutely no invention whatever. His insistence is that the badge or pin in question is in shape, or form, or general appearance, a mere copy of a well-known style of flag, commonly called a "guidon," and that the court will take judicial notice of this fact; and, having such knowledge, it cannot grant to the complainants any relief, for they utterly fail to show any cause for the interference of a court of equity. But can it be said by this court, upon demurrer, if it should find that a flag of the shape of a guidon is common and well known, that a badge or a pin, molded into a similar shape, bearing upon it, in combination, certain colors and letters, is not novel, and does not show invention? The statute which protects inventors requires the production of a new and pleasing design. The invention demanded consists in the conception and

production of a design which can be so characterized. The design in this case is not to be found alone in the triangular shape, but rather in a conception which combines shape, colors, and letters. As was pertinently said by Mr. Justice Bradley in *New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 137 U. S. 446-450, 11 Sup. Ct. 193:

"Whether or not the design is new, is a question of fact, which, whatever our impressions may be, we do not think it proper to determine, by taking judicial notice of the various designs which may have come under our observation. It is a question which may and should be raised by answer, and settled by proper proofs."

We think, under the circumstances, the defendant should have been put to his answer in this case, and hence the decree below is reversed.

NATIONAL CONDUIT MANUF'G CO. v. CONNECTICUT PIPE MANUF'G CO.

(Circuit Court, D. Connecticut. April 1, 1896.)

No. 814.

1. PATENTS—ASSIGNMENT BY PATENTEE—ESTOPPEL.

The foundation of the estoppel against a vendor patentee is the fact that he has received and retained a valuable thing in consideration of the statements contained in the application for, or specification of, the patent. Therefore, when an assignment is made pending the application for a patent, it is immaterial whether or not the vendor may have made representations to the purchasers concerning the probability of obtaining a patent. Nor is it material that the purchasers knew that the thing sought to be patented was old, when they understood that the patent was sought for a new application and use of it.

2. SAME—VOID CLAIMS—CONCEALMENT.

The fact that the claim of a pending application is void when an assignment is made, and has been so held by the patent office, does not affect the estoppel of the vendor, in respect to an amended claim subsequently allowed, where the purchasers were ignorant of the rejection of the claim, and the fact was concealed from them by false statements of the applicant.

3. SAME.

Payment, by the assignees of a pending application, of their note for one of the deferred installments of purchase money, after the knowledge of the rejection of the claim, and the vendor's concealment thereof from them, does not affect the estoppel against him. They have a right to elect between the remedy by repudiation of the fraud, or by ratification and estoppel.

4. SAME—RIGHT OF ASSIGNEES TO AMEND APPLICATION.

An applicant for a patent assigned "all rights under said letters patent that may hereafter be granted upon and by virtue of said application and any extension or reissue of the same." At the time of the assignment the claim had been rejected. *Held*, that the assignees had a right to amend to the same extent as from a surrender and reissue of a patent, and that the assignor was estopped in respect to a patent afterwards issued, and embracing such amended claims.

5. SAME—ESTOPPEL AGAINST CORPORATION.

The estoppel against the assignor of a patent operates against a corporation subsequently formed by him, and which is entirely owned and controlled by him. The corporation will be estopped, even if another party has a substantial interest therein, where it appears that at the time of acquiring his interest he had known of the patent and its assignment,

and had been associated with the assignor in the line of business to which the patent relates.

Warner & Noble, for complainant.

George D. Seymour and John K. Beach, for defendant.

TOWNSEND, District Judge. This is a bill for infringement of patent No. 395,584, for conduit for electric wires or cables, granted January 1, 1889, to Edward H. Phipps, assignor to Edward S. Perot and James P. McQuaide. The facts bearing on the issues raised are as follows: The patentee is the president, treasurer, and chief stockholder of the defendant corporation. It and its predecessors have, since 1865, continuously manufactured sheet-iron, cement-lined pipe, identical in structure with that now alleged to infringe said patent. The use of said pipe, however, was originally limited to the conveyance of water. It is now extensively manufactured, both by complainant and defendant, as a conduit for electric wires. In July, 1887, said Phipps received a large order for said pipe from the Phoenix Company to be used in the construction of an electric subway. About this time he consulted a patent solicitor as to the possibility of obtaining a patent for the use of such pipe for electrical conduits, and, as incident thereto, for a certain bridge construction thereof. While this application was pending he formed a partnership, in August, 1882, with said Perot and McQuaide (now the president, and secretary and treasurer, respectively, of the complainant corporation); he agreeing to contribute the patent on said pending application, if allowed, and said order, and certain machinery. Shortly afterwards said Phipps retired from said firm, the other members paying him, for his share therein, a certain sum in cash, and giving their notes for the balance of the purchase price; Phipps retaining said application as security for the payment of said notes. By a subsequent agreement the notes were surrendered, upon the payment of a certain sum, the application was assigned to McQuaide and Perot, and they organized the complainant corporation, and continued the business of manufacturing said conduits. Some months before Phipps retired from said firm, said application was rejected by the patent office, upon citation of anticipations; and, although Phipps knew this fact, he did not communicate his knowledge thereof to either Perot or McQuaide, but wrote them that his patent solicitor "has heard from Washington, and he thinks things look very favorable." In this condition of affairs, Phipps agreed to assign said application, "still pending in his name." Perot and McQuaide claim that they did not then know that said application had been rejected, and they made no inquiries in reference to it, as the prosecution of the application had been wholly intrusted to Phipps. They knew, however, before entering into the original partnership, that the pipe manufactured by Phipps, and contracted for by said Phoenix Company, and claimed in said application for electric conduits, had been used for many years for water pipe. The evidence shows that all the parties understood that Phipps expected to be able to obtain a patent which would cover the use for electrical conduits of the pipe which they proposed to manufacture. Perot and McQuaide further

claim that they considered said application as of great value, and that without it they would not have paid a dollar for Phipps' interest in the partnership. It appears that they settled the last one of their notes, for \$1,000, given therefor, by a shipment of pipes to Phipps after they knew that the application had been rejected.

In disposing of the various legal questions herein presented, it is unnecessary to determine the truth of the claims made by complainant and denied by defendant. It may be assumed that the conduct of Phipps was incompatible with the trust relations existing between the parties, and that complainant might have had its remedy by an appropriate action for relief, brought upon a discovery of the facts. These transactions occurred, and Perot and McQuaide knew of the rejection of said application, as early as May, 1888. But although Perot says he complained to Phipps' father, in 1889, of "the dishonorable manner in which his son was acting," and said "that he had attempted to infringe upon a patent which he had gotten up and sold to us," yet Perot continued to write friendly letters to Phipps long after May, 1888, said note for \$1,000 was accepted as aforesaid, and fraud is not alleged in this action. Phipps, after retiring from said partnership, manufactured and sold pipe for electrical conduits identical with that which he had originally manufactured for water pipe, and in 1892 he organized the defendant corporation. The defendant, *inter alia*, denies the validity of said patent. Counsel for complainant contend that, by reason of the foregoing facts, defendant is estopped to make said defense. To this claim defendant makes several answers, which will be considered in their order. It claims that it is not estopped, because there was neither a general representation of the validity of said application, nor any specific representation, other than a mere opinion upon a question of law, which neither Perot nor McQuaide ever attempted to investigate, and that they knew said pipe, as water pipe, was old. But the foundation of the estoppel against a vendor patentee is the fact that he has received and retained a valuable thing in consideration of the statements contained in the application for, or specification of, the patent. *Babcock v. Clarkson*, 11 C. C. A. 351, 63 Fed. 607. It is therefore unnecessary that the vendee should prove other representations. It is immaterial herein that the vendor may have made representations affecting the question as to the probability of obtaining a patent, because said patent afterwards issued. It is immaterial that the parties knew such water pipe was old, provided they understood that the vendor claimed that its use for electrical conduits covered by said application was new, and the consideration was paid upon such understanding. Such a sale is, in effect, upon the consideration of an agreement by the vendor that, whatever may be the status of the patent as to the public, he (the vendor) will not thereafter interfere with the vendee's rights in the invention covered thereby, during the life of said patent. Irrespective, then, of the representations of Phipps, he is now estopped to deny the statement in said original application, that his "invention consists in a conduit for electric wires or cables, composed of a sheet-metal tube or shell, and a lining of cement therefor."

But counsel for defendant argues that at the time of the final assignment the citation of references showed that the first claim was void, and therefore there is no presumption of consideration received, or title conferred, as to said claim. But Perot and McQuaide were ignorant of the facts. The prosecution of the application was in Phipps' charge, and they were not called upon to make further inquiry after Phipps' statement that his solicitor had "heard from Washington, and he thinks things look very favorable." It is further claimed that they paid the last one of their notes after they knew the application had been rejected. Whatever might be the effect of such payment upon an action for fraud, there is nothing therein necessarily inconsistent with this claim of estoppel. They might reasonably have concluded that having paid all of said purchase price, except \$1,000, their only way to secure the benefit of said patent was by the payment of said sum, to prevent further competition by Phipps. Defendant further argues that, even if it be assumed that Phipps did fraudulently conceal the rejection of said application, and did receive a large sum from Perot and McQuaide as the price thereof, yet that complainant has waived said fraud. But complainant had the right to elect between its remedy by repudiation for fraud, or by ratification and estoppel. And, if it elected to take the latter course, the payment of said note for \$1,000 was a condition precedent to the assertion of such claim.

But perhaps the argument most strongly pressed against the defense of estoppel is based upon the claim that said "application was perverted to a different invention by false and unauthorized amendments made after the assignment." The facts bearing upon this question are as follows: After the final assignment to Perot and McQuaide, they appointed a solicitor to prosecute said rejected application. He amended by inserting a statement that, while insulated cast-iron pipes were old, "my invention consists essentially, in this regard, of a sheet-metal tube or pipe, lined with hydraulic or like cement, which is not only an electric insulator, but which also hardens under water, takes a permanent form," etc. The defendant contends that it is not estopped as to the first claim of the patent in suit, because that claim is nonidentical with the corresponding claim of the original application. The original first claim was as follows: "A conduit for electric wires or cables, consisting of a sheet-metal shell or tube, and a lining of cement therefor, substantially as set forth." The claim in suit is as follows: "A conduit for electric conductors, consisting of a sheet-metal shell or tube provided with a lining of hydraulic cement, substantially as described." The only material difference is in the limitation of the original "cement" to "hydraulic cement." The application originally, and as amended, covered "an improvement in underground conduits for electric wires or cables." Phipps expressly assigned "all rights under said letters patent that may hereafter be granted upon and by virtue of said application, and any reissue or extension of the same," and agreed to execute all instruments "needed to make sure and certain the rights and privileges granted to said Perot and McQuaide." The assignees, by said amendment, merely did what they would have had

a right to do under a surrender and reissue, and in fact the right to amend was the chief thing that remained in the rejected application which Phipps assigned. If it were a fact that Phipps had thereby been made to swear falsely that he was the first inventor of a sheet-metal pipe lined with hydraulic cement, it would be immaterial to the issue herein. But such was not the fact, for the amended application only stated that he was the first inventor thereof "in this regard,"—that is, in regard to the new use,—which statement was practically identical with that made in the original application.

Finally, defendant claims that the defendant corporation is not estopped by the acts of said Phipps. It is well settled that a corporation has a distinct personality of its own, and that it is not responsible for the personal acts of the majority of its stockholders. I had occasion to examine this question at length in *Electric Ry. Co. v. Jamaica & B. R. Co.*, 61 Fed. 655, where the cases bearing on this question are cited. In the case at bar, of the 600 shares of stock, Phipps owns 500, and one Ward 95. Two other stockholders own the remaining 5 shares. It is doubtful whether Ward ever paid anything for his stock. The testimony of Phipps is indefinite on this point. But certainly there is no evidence that any one except Phipps and Ward ever paid value therefor. It appears that the defendant is merely a convenient medium through which said Phipps transacts his business. If it were necessary to the decision of this case, the court would have to find, from all the evidence, that the defendant was affected by the estoppel against Phipps. But, even if Ward has a substantial interest in said corporation, this would not prevent the operation of the estoppel. When it was organized, in 1892, he subscribed for his stock with notice that the patent in suit had issued to Perot and McQuaide, assignees of said Phipps. He had been the general manager and superintendent of the original firm, in which Phipps was a partner, and a partner with Phipps in the firm known as the Connecticut Pipe Manufacturing Company, and is the only person claiming to have a substantial interest in the defendant corporation. This corporation was organized for the purpose of constructing, among other things, electric light plants and conduits. I think, upon the state of facts herein, that either the corporation must be considered as a mere cover for the transaction of Phipps' business, or that the relations of Phipps and Ward to the corporation raise a presumption of such knowledge and privity of interest that it is bound by the estoppel against Phipps, or, at least, is not in a position where a court of equity should listen to it in an attack upon the validity of the patent.

The ingenious arguments of counsel for defendant have made it necessary to thus fully discuss the evidence herein. I do not consider, however, that the evidence as to fraud is material; and I do not find, upon the facts proved, that Phipps made either fraudulent statements or concealments. It is unnecessary to discuss the other questions raised herein. Infringement is sufficiently shown by competent expert testimony. Complainant has not been guilty of laches. The acts of the parties show that no reliance was put upon the claim for bridges, in said application. Upon the material facts, the con-

tract between the parties necessarily implied that Phipps would not, during the life of the patent, manufacture such pipe for electrical conduits. That this was the understanding of the parties not only appears from the evidence already considered, but is further supported by complainant's claim of right under said application, made in a notice to the city of Chicago that Phipps had no right to furnish it with electrical conduits, and by the agreement of Phipps to procure the pipe from complainant in order to fulfill said contract, and by letters written in 1889 to Perot by Daniel G. Phipps, the father and partner of Edward H. Phipps, assuring him that their firm would not infringe upon the rights purchased by the complainant company, and would make no pipe for electric light and telephone companies of any kind whatsoever, unless it should be water pipe. This promise, made in 1889 by the firm in which Phipps was a partner, and of which Ward was the superintendent and general manager, formulates the agreement as it was understood by the parties, and should be enforced by the court.

An injunction may issue, restraining the defendant from infringing said patent; such injunction, however, not to interfere with its manufacture or sale of water pipe.

THE WILLIAM WINDOM.

MARMANN v. THE WILLIAM WINDOM.

(District Court, N. D. Iowa, E. D. April 28, 1896.)

ADMIRALTY JURISDICTION—LIENS GIVEN BY STATE STATUTES—ORIGINAL CONSTRUCTION OF VESSEL.

A lien given by a state statute for labor done in the original construction of a vessel, even after she is launched, is not enforceable in the federal admiralty courts, for the contract is not of a maritime nature, the vessel not yet having become engaged in commerce. *Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 How. 129; and *Edwards v. Elliott*, 21 Wall. 532,—applied.

This was a libel in rem by Peter Marmann against the William Windom to enforce an alleged lien for labor performed upon her as a machinist. The cause was heard on exceptions to the amended libel for want of jurisdiction.

Duffy & Maguire, for libellant.

Lyon & Lenehan, for claimant.

SHIRAS, District Judge. The questions discussed by counsel on the hearing of the exceptions to the libel filed in the above-entitled case arise upon the following facts: The Iowa Iron Works, a corporation created under the laws of the state of Iowa, and engaged in the building and equipping of steam vessels, its principal place of business being at Dubuque, Iowa, entered into a contract with the United States for the construction of a steel-hulled propeller, intended for use in connection with the revenue service of the government. Until completed and accepted by the United States, the title and

ownership of the vessel remained in the Iowa Iron Works. Some time since, the hull of the vessel being sufficiently completed, the boat was launched, and placed in what is known as the "Ice Harbor," at Dubuque, the same being part of the Mississippi river, and the boat was formally named the William Windom, and the work of completing the vessel was proceeded with. After the boat had been launched as stated, one Peter Marmann, at the request of the owner of the boat, performed labor as a machinist in completing the equipment of the boat, and on the 28th day of September, 1895, he filed the libel in this case to enforce a lien for the amount due him for the work and labor by him done as stated, upon the ground that the statutes of Iowa gave him a lien upon the vessel, which he could enforce by a proceeding in rem in this court as a court of admiralty. A warrant of arrest was duly issued, under which the marshal seized the boat, and thereupon the Iowa Iron Works, as the owner thereof, intervened as claimant, and released the boat by executing a bond in the usual form. The claimant now excepts to the libel upon several grounds, the first being that the court, as a court of admiralty, has not jurisdiction; that for labor done or material furnished in building a boat no remedy can be had in admiralty, because, in effect, the contract therefor is to be performed on the land, and is not maritime in its substance or nature, and that, when the labor was done by libellant, the construction of the boat had not been completed to such an extent that it could be recognized as a boat or vessel, within the meaning of the term as used in the law maritime; and, further, even if the first ground of exception, to wit, that of want of jurisdiction, should be overruled, that it appears from the libel that the work and labor performed by libellant was performed in the home port, and therefore, under the maritime law, no lien upon the vessel was created thereby, and that the statutes of Iowa do not give or create a lien for such work and labor, and, there being no lien existing in favor of libellant, there is not foundation for a proceeding in rem, and therefore the libel must be dismissed.

The first question to be considered is that of jurisdiction, or, in other words, the question is whether this court, as a court of admiralty, has jurisdiction to enforce, by a proceeding in rem, a lien claimed by one who has furnished material or performed work or labor in the original construction of a vessel intended to ply upon waters within the admiralty jurisdiction of the United States. The primary point to be determined is whether the contract, express or implied, upon which the material was furnished or labor was done, so far pertained to matters of commerce and navigation as to be deemed a maritime contract. In *Ferry Co. v. Beers*, 20 How. 393, was presented the question whether a court of admiralty would have jurisdiction over a proceeding in rem to recover a sum due for the construction of the hull of a vessel, and it was held that the jurisdiction did not exist, it being said in the course of the opinion that "the admiralty jurisdiction, in cases of contracts, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation." In *Roach v. Chapman*, 22 How.

129, the question arose upon a libel filed to enforce payment for boilers and engines furnished in the original construction of a boat, and the supreme court held that jurisdiction did not exist, saying that "a contract for building a ship, or supplying engines, timber, or other materials for her construction, is clearly not a maritime contract." In *Edwards v. Elliott*, 21 Wall. 532, the general question came again before the supreme court, and it was expressly held that "a maritime contract does not arise in a contract to build a ship, or in a contract to furnish materials for that purpose." To the same effect is the ruling in *Norton v. Switzer*, 93 U. S. 355-366. Under the doctrine of these cases it must be held that a contract for the original building of a ship cannot be held to be a maritime contract; and therefore a lien based thereon, whether it be created by the contract of the parties or by the provisions of a state statute, is not enforceable by a proceeding in rem. The lien may exist, but, if it does, it is not of a maritime nature, and the remedy for its enforcement must be sought in a court of law or equity.

Counsel for the libellant have earnestly pressed upon the attention of the court the decision of Judge Deady of the district of Oregon in the case of *The Eliza Ladd*, 3 Sawy. 519, Fed. Cas. No. 4,364, wherein it was held that a contract to furnish materials to finish and equip a vessel after the same had been launched was of a maritime nature, and that a lien therefor, created by the statutes of the state of Oregon, was enforceable in a proceeding in rem. The learned judge bases his reasoning in that case largely upon the assumption "that by the general maritime law of the civilized world a contract to build a ship is a maritime contract, because it has relation to a ship as the agent or vehicle of commerce upon a navigable water." In *Edwards v. Elliott*, 21 Wall. 532-554, the supreme court expressly holds that, while this was the rule under the civil law, it had never been adopted as the rule in England or in this country, but, on the contrary, since the decision of the supreme court in the cases of *The Jefferson* (*Ferry Co. v. Beers*) 20 How. 393, and *Roach v. Chapman*, 22 How. 129, the settled rule is that a contract for the original construction of a ship, or for furnishing the materials in aid thereof, is not a maritime contract. It would also seem that Judge Deady had been misled in his conclusion by attaching too much importance to the expression used by the supreme court in *Ferry Co. v. Beers*, 20 How. 393, that a contract for the building of a ship or boat "is a contract made on land, to be performed on land." The true test is not whether the parties, when the contract was made, happened to be on the land or on the water, nor whether the vessel was on the land or in the water when the work was done. In the case of torts the jurisdiction depends on the matter of locality, but in the case of contracts it does not. Thus, in *Philadelphia, W. & B. R. Co. v. Philadelphia & H. Steam Towboat Co.*, 23 How. 209-215, it is said: "The jurisdiction of courts of admiralty in the matters of contract depends upon the nature and character of the contract, but in torts it depends entirely on locality." The test given for determining whether a given contract is or is not maritime in its nature is the question whether it pertains to rights and duties belonging to the

commerce and navigation that are under the control of the national government, including contracts for furnishing repairs and supplies for vessels engaged in such commerce and navigation. The doctrine of the supreme court is that, while a boat or vessel is being originally built it is not connected with commerce and navigation in such sense that contracts made for the building the boat, in whole or in part, or for furnishing the labor or materials, can be said to be connected with or have reference to commerce or navigation. Such contracts may be entirely completed, the vessel may be wholly built, and yet may never be used in connection with commerce or navigation. A contract, to be of a maritime nature, must be connected with or in aid of commerce and navigation. Merely because it is connected with a ship does not make it maritime. Hence the supreme court holds that contracts connected with the original building and equipping of a ship or boat cannot be held to be of a maritime nature, because they are not, in any proper sense, connected with commerce and navigation. Under the doctrine and rule thus given by the supreme court, it must be held in this case that the contract under which the libellant performed the labor for which he seeks to recover is not of a maritime nature, because the labor performed was in connection with the original construction of the boat, and the Windom, when the labor was done, had not become engaged in any commerce or navigation; and therefore, if the libellant had a lien under the provisions of the state statute, it was not of such a nature that a court of admiralty could take jurisdiction thereof, but it could only be enforced by a proceeding in the state court. The exceptions to the libel on the ground of lack of jurisdiction in this court must therefore be sustained, and the libel must be dismissed.

To prevent a possible misconception of the effect of this ruling, it may be proper to add that this reasoning does not apply to cases wherein the court of admiralty, having properly taken jurisdiction in rem, is proceeding to condemn and sell a ship or other vessel. In such cases, wherein the jurisdiction has once rightfully attached, the court of admiralty can entertain intervening libels on behalf of all parties who have liens on the vessel, regardless of whether such liens are based upon maritime contracts or not.

Libel dismissed, at cost of libellant.

THE MAJESTIC.

CORRIGAN TRANSIT CO. v. THE MAJESTIC.

(District Court, N. D. Illinois. March 16, 1896.)

MARINE INSURANCE—SUBROGATION—COLLISION—ADMIRALTY.

It is no reason for dismissing a libel for collision that some of the underwriters who underwrote the vessel in fault also underwrote the other vessel, and that the damages to the latter vessel have been paid by the underwriters, since that does not render the proceeding a suit of parties against themselves.

In Admiralty. Libel for collision by the Corrigan Transit Company against the steamer Majestic.

Schuyler & Kremer, for libellant.

Ray & Davidson, for respondent.

GROSSCUP, District Judge. The Australasia, belonging to the libellant, came in collision with the steamer Majestic, in consequence of which they both suffered injuries. The libel charges the Majestic with having been the cause of the collision. Upon this, after default, a decree was taken, finding the Majestic to have been in fault, and for damages. The underwriters of the Australasia and Majestic, respectively, were, with some exceptions, the same parties. My recollection is that three of the parties underwriting the former did not underwrite the latter. It appears that the damages to the Australasia have been already paid by her underwriters. I am not advised, however, whether the damages to the Majestic have yet been paid or not. In either instance, however, my conclusion would have been the same. Some of the underwriters of the Majestic now move that the decree finding her in fault, and assessing the damages, be set aside, and the libel dismissed, and, in support of the motion, contend that the libellant had at the time of the decree no remaining cause of action against the Majestic, for the reason that its damages had been satisfied by the Australasia's underwriters.

It is insisted that, because some of the underwriters of the Australasia were also underwriters of the Majestic, this suit, which is beneficially for the Australasia's underwriters, becomes, in substance, a suit of parties against themselves. I do not assent to this proposition. In the absence of satisfaction of its damages, the right of the libellant to bring this action against the party in fault is, of course, incontrovertible. The receipt of its damages does not affect this right, except to enable the underwriters who have paid them to intervene, for the purpose of having a share in the control of the case and the results of the judgment. The underwriters of the Majestic have not underwritten her liability for a tort. Their contract is to make the Majestic as good as she was before the collision. The lien of the libellant and his interveners may, on proper process, be extended, not only to the remnant of the Majestic, but to the fund that covers her injury. The remnant and such fund together constitute the res against which their right of lien and action may be made to run. What effect an innocent payment to the owners of the Majestic might have upon the liability of her underwriters I am not now determining.

Now, the fact that some of the parties who are entitled to intervene, under the libellant, are at the same time liable to make good to the res, against which the lien of the court runs, what otherwise would be lost, does not prevent this action taking the same course as if the interveners and the parties liable over to the fund were, in their personality, entirely separate. The most equitable course open for me is to give to all parties having contributed to the owners of the Australasia, on account of her damages, leave to intervene under the libel. If any of the underwriters of the Majestic wish to contest the question of her fault

for the collision, or wish to contest the extent of the damages suffered by the Australasia therefrom, and can make a proper showing of the probable existence of either of these defenses, I will open up the decree to the extent of giving them leave to defend upon such terms relating to costs as would be equitable. I will permit the libellant, and the interveners under them also, to make the underwriters of the Majestic parties, for the purpose of ascertaining the respective amount of their liability, if there be any, on account of the injuries to the Majestic, and to require them to pay such amounts into the fund against which the lien runs. In this way, each underwriter can be compelled to pay his equitable portion of the loss on both ships, and will also receive his equitable portion, by subrogation to the rights of the owner of the vessel not in default.

GEORGE W. BUSH & SONS CO. v. FITZPATRICK et al.

(District Court, E. D. Pennsylvania. March 24, 1896.)

1. SHIPPING—PLEDGE OF FREIGHT—AUTHORITY OF MASTER.

The master has no more authority to pledge unearned freight for money borrowed in a foreign port than to pledge the vessel herself, and in either case he has such power only when the necessities of the vessel require it.

2. SAME—BURDEN OF PROOF.

Where a libel, based on a draft, by which the master undertook to pledge unearned freight for money borrowed in a foreign port, alleges the necessity of the vessel as a basis for the loan, and such necessity is denied by the answer, the burden is on libellant to show the necessity.

3. SAME—INDORSEMENT OF DRAFT CHARGED AGAINST FREIGHT.

Where one making a contract of affreightment directly with the owner, who was his neighbor, thereafter took by indorsement a draft for money borrowed in a foreign port by the master on the credit of the unearned freight, *held*, that it was his duty to make inquiry of the owner before parting with his money, and in default thereof he could not recover on the draft, where it appeared that there was no necessity authorizing the master to make the loan.

This was a libel by the George W. Bush & Sons Company against John Fitzpatrick and others, owners of the schooner John F. Davis, to recover money paid out for a draft drawn by the master in a foreign port.

Horace L. Cheyney and John F. Lewis, for libellant.

Henry R. Edmunds, for respondents.

BUTLER, District Judge. This suit must be regarded as for money borrowed by the master of the schooner Davis of Ellis & Hussy, as witnessed by the draft given them, which is as follows:

\$250.

Jacksonville, Fla., Dec. 16, 1892.

At sight pay to the order of Ellis & Hussy two hundred and fifty dollars, value received and charge the same to account of disbursements of schooner John S. Davis, on account of freight.

[Signed]

Thomas F. Barrett,
Master Schr. John F. Davis.

If a recovery can be had it must be on this draft and the loan which it represents. To authorize the master to make such a loan, the existing necessities of the vessel must have required the money. It is unimportant that the draft is in terms against the unearned freight, payable in her home port, on delivery of cargo. The master had no more authority to pledge this undue freight than he had to pledge the vessel. Pledging the former, pledges the latter to earn it. If necessity required he could pledge both; otherwise he could not pledge either. The libel, as originally drawn, rests on this theory; and was amended to make it plainer. It was therefore the duty of Ellis & Hussy to see that the money was needed for the purpose designated; if it was not needed they could not look to the vessel, her unearned freight, or owners. The libel consequently charges that the money was needed to supply the necessities of the vessel, in a foreign port, (her home being Philadelphia) and that without it she could not complete her voyage. This charge is denied by the answer; and thus is raised the only issue in the case. The burden of proof is on the libelant, he must sustain his charge. 2 Pars. Shipp. p. 17, and note; *Nippert v. The Williams*, 42 Fed. 533; *The Woodland*, 104 U. S. 180. The evidence however not only does not sustain it, but disproves it. The loan was made to the master, without inquiry, so far as appears, after notice to Ellis & Hussy from the managing owner of the vessel that the master was forbidden to borrow, and would be furnished with all necessary supplies from home on application. The libelant stands in Ellis & Hussy's shoes—occupying no better situation because of the indorsement. If he suffers loss it results from his negligence alone. He and the managing owner are virtual neighbors; and he might and should have inquired respecting the master's authority, before parting with his money. He knew this owner's relation to the vessel, and made the contract of affreightment with him. The master's act was a plain fraud, (judged by the evidence,) and he was enabled to perpetrate it only by means of the libelant's carelessness, and Ellis & Hussy's misconduct.

It is unimportant that the libelant undertook with the master to accept the draft on account of the unearned freight. The money paid by him on the instrument was a loan and could be recovered back as such if the vessel failed to keep her pledge, by delivering the cargo—provided the master was justified in borrowing. It was not payment of freight (none was due) but an advancement, a loan, or pledge of the vessel to deliver the cargo, or return the money.

The libel must be dismissed, with costs.

THE ADVANCE.

THE ALLIANCA.

THE SEGURANCA.

THE VIGILANCIA.

BROWN et al. v. THE ADVANCE et al.

(Circuit Court of Appeals, Second Circuit. April 6, 1896.)

MARITIME LIENS—LETTERS OF CREDIT—CONTRACT.

Where the freights were expressly pledged as security for money to be paid on drafts drawn pursuant to letters of credit, for the purpose of disbursing vessels in a foreign port, *held*, that a further agreement by the shipowners to "furnish any additional security they may desire, whenever they see proper to demand it," did not, of itself, create a maritime lien on the ships themselves, nor any equitable assignment, which might be recognized on a distribution of surplus moneys. 63 Fed. 726, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

Willard Parker Butler, for appellants.

Edmund L. Baylies, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. These four cases grew out of the insolvency of the United States & Brazil Steamship Company. The business of this company; its financial needs; its methods of providing, by letters of credit in New York, the money necessary to disburse its vessels in Brazilian ports; its insolvency; the claims for maritime liens which sprang up upon its failure; and the principles of law which this court deemed applicable to some of these claims,—were stated in the opinion recently given in the case of *Huntington v. Proceeds of The Advance*, 72 Fed. 793. The additional facts which are of importance in these cases are as follows: The libellants are the partners composing the banking house of Brown Bros. & Co., of New York City, and the London banking house of Brown, Shipley & Co. Brown, Shipley & Co. issued in New York City, upon the express request, in New York City, of the owner of these vessels, four letters of credit,—the first dated July 13, 1892, for £2,000; the second dated September 24, 1892, for £8,000; the third on September 29, 1892 (but no claim in respect to this letter is made); and the fourth dated November 29, 1892, for £8,000. Each of these letters was issued, in whole or in part, for the purpose of enabling the steamship company to disburse its vessels in Brazilian ports. Each letter contained upon its back the written agreement of the steamship company as follows:

"All the freight moneys earned and to be earned, and the policies of insurance thereon, are hereby pledged and hypothecated to them [Brown, Shipley & Co.] as collateral security for the payment as above promised [of the bills drawn by virtue of said credit]; and we further agree to give them any additional security they may require, whenever they may see proper to demand it."

Drafts were drawn under these letters of credit between November 9, 1892, and January 21, 1893. Not being payable until after 90 days' sight, the first one was paid March 2, 1893, and the last one was paid April 24, 1893. On February 23, 1893, Brown Bros. & Co. wrote to the president of the steamship company that one of the letters of credit had been canceled, and furthermore as follows:

"We also request that you deposit with us the securities called for by the various letters of credit, amounting to ——."

No other demand was made, unless the filing of the libels can be considered a demand, and no additional security was deposited or furnished by the company. On March 18, 1893, a receiver was appointed for the corporation, and subsequently all of its steamers were sold under libels filed to enforce maritime liens. These four libels were brought upon the ground that the libelants had a maritime lien against the four named vessels, to recover from their proceeds such portion of the avails of the drafts drawn under the letters of credit as had been applied towards paying the disbursements of the respective vessels in foreign ports upon their voyages during the latter part of 1892. The entire sums alleged to be due were between \$52,000 and \$53,000. The district court dismissed the libels. The question in the case is whether, upon the foregoing facts, a maritime lien existed in favor of the libelants upon the named vessels.

It may now be considered as settled that the owner of these vessels had given, by express agreement made in the home port, a maritime lien upon the freights of the vessels which were to be "disbursed" in foreign ports by the necessary aid of the letters of credit, and that these letters were issued in part, at least, upon the strength of the security furnished by this maritime lien, and that the owner had the power, if it so chose, of entering into an express contract, or contract proved by the circumstances, which should place a maritime lien upon the vessels also. The libelants say that when the owner agreed to give them "any additional security they require, whenever they may see proper to demand it," this agreement was a maritime lien upon the vessels, because such a lien was the usual security which material men had when they advanced money in a foreign port for the benefit of vessels, and because such a lien was the only additional security which the owner had in its power to give. The conclusion of the libelants, which was that an unexecuted promise to furnish whatever additional security was required created a maritime lien upon the vessels, is a non sequitur. The promise is capable of two constructions,—one, that the owner would furnish additional security when required; the other, that it would furnish that particular additional security which should be asked for. Whichever construction is given to it, the unfulfilled promise does not create a lien upon the vessels, for such a lien is the result of a contract evidenced by the express agreement or by the conduct of the parties. An unfulfilled contract that it would furnish security of some kind cannot be turned into an executed contract for a particular maritime lien. Neither can a maritime lien upon the vessels be created out of a contract to furnish the kind of security which was asked for, for

the letter of February 23d was silent as to the kind of security required. An existing maritime lien upon the vessels cannot be evolved out of a general promise that the owner would furnish more security when it was asked for, without any intermediate progressive steps in the development of the lien. We agree with the district judge when he says:

"The agreement 'to give further security' would have been as truly fulfilled by giving further personal security as by giving a further maritime lien. So indefinite an agreement does not constitute, of itself, any lien upon the vessels, nor even any equitable assignment or appropriation, such as might be recognized on a distribution of surplus moneys; nor does it extend the maritime lien beyond that specified and agreed upon at the time."

The decrees of the district court are affirmed, with costs.

UNITED STATES v. COUDERT.

(Circuit Court of Appeals, Second Circuit. April 6, 1896.)

1. CIRCUIT COURT OF APPEALS—JURISDICTION—TUCKER ACT.

The circuit court of appeals has jurisdiction to review, on writ of error, a judgment rendered by the circuit court in an action against the United States, brought under the Tucker act of March 3, 1887 (24 Stat. 505).

2. ADMIRALTY—SALE OF VESSEL—LIABILITY FOR PROCEEDS.

Where a vessel and cargo are sold by order of the district court, in admiralty, and the proceeds deposited, in lieu of such vessel and cargo, not in the treasury of the United States, but in a bank, subject to the order of the court, the government is not responsible for any loss or diminution of the fund; and a decree for the restitution of the vessel and cargo to the owner carries only what may remain of the fund, and imposes no liability upon the government for any part of it which may have been lost.

Joseph King, for petitioner.

Wallace Macfarlane, U. S. Dist. Atty.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Charles Coudert, as ancillary executor of Rafael Madrazo, brought a petition against the United States in the circuit court of the United States for the Southern district of New York, under the act of March 3, 1887 (24 Stat. 505), known as the "Tucker Act," to recover a sum of money alleged to be due to the testator's estate from the United States. The writ of error to this court was brought to review the judgment of the circuit court in favor of the petitioner.

The following statement of the facts, upon which the claim was based, is admitted to be substantially correct: In November, 1863, the United States vessel *Granite City* seized the Spanish bark *Teresita*, then the property of Rafael Madrazo, in the Gulf of Mexico, as a blockade runner, and brought the *Teresita* to New Orleans for condemnation for alleged violation of the blockade by the military and naval power of the United States over the entrance to the Rio Grande river. Legal proceedings for condemnation and forfeiture of the vessel as a prize were duly begun in the district court for

the Eastern district of Louisiana. During the progress of the condemnation proceedings and by virtue of an order of the district court for the Eastern district of Louisiana, dated August 23, 1864, rendered in a suit in admiralty for the condemnation and forfeiture of said vessel and her cargo, which was commenced in said court on December 16, 1863, and in which the United States of America were libelants, the said bark and her cargo were sold by the United States marshal for the Eastern district of Louisiana. The proceeds of such sale, amounting to \$10,359.20, after deducting costs and other charges, were deposited by the marshal in the First National Bank of New Orleans, then a special or designated depository of public moneys of the United States, to await the further orders of the court. The district court thereafter decided in favor of the claimant against the United States. The United States appealed to the supreme court of the United States, obtaining a supersedeas pending the appeal. At the December term of the supreme court in 1866 a decision was rendered affirming the decree of the district court in favor of the claimant and against the United States, and restitution of the vessel and cargo was directed. The *Teresita*, 5 Wall. 180. Pending the appeal, the First National Bank of New Orleans, in which the proceeds of the sale of the *Teresita* had been deposited, failed, and was placed in the hands of a receiver pursuant to law. Thereafter, in liquidating the affairs of the bank, the receiver paid to Madrazo, during his lifetime, and to his representatives after his death, dividends amounting in all to \$8,183.77. The first payment was made on May 1, 1871, and the last on September 28, 1882. Madrazo died in Cuba on the 14th day of April, 1877, and on the 20th day of September, 1888, ancillary letters of administration were issued in the county of New York to the defendant in error. The receiver of the bank had no further assets in his hands applicable to the payment of this claim after the payment of September 28, 1882, and the petition in this suit was filed on September 24, 1888, to recover a sum equal to the balance of the proceeds of the sale of the *Teresita*, after deducting the payments made by the receiver of the bank; that is to say, for the sum of \$2,175.43. The circuit court awarded judgment to the petitioner, with interest from the 28th day of September, 1882.

It manifestly appears that the questions were so presented to the circuit court that the disposition of the case was considered to be a matter of routine. The theory of the petitioner is that, inasmuch as the final decree in the prize case directed the government to make restitution of the *Teresita* and her cargo, and as the decree has not been fully complied with, a claim sounding in contract has arisen out of said decree in favor of the decedent and his estate against the government. This theory omits consideration of the facts that the vessel and her cargo were sold by order of the district court, that the proceeds of such sale remained subject to its order in lieu of the vessel and cargo, that the fund was not deposited in the treasury of the United States, and that the government is not responsible for its diminution. A similar claim against the United States, arising out of the failure of a bank in which the proceeds from the

sale of cotton seized under the confiscation act had been deposited, was examined by the supreme court in *Branch v. U. S.*, 100 U. S. 673. The suit for condemnation of the cotton had been dismissed, and judgment had been entered for the defendants, who thereupon brought suit against the United States to recover the unpaid amount of the original deposit. The supreme court held that the money which had been deposited belonged for the time to the district court as a trust fund, that it was not paid into the treasury, and that, therefore, the claimant was not entitled to recover. In this case also, the entire proceedings in regard to the sale of vessels and cargo and their proceeds having been taken by the district court, the government is not responsible any more than was the petitioner or the decedent for any calamity to the fund. The decree of restitution of the vessel and cargo was a decree for whatever remained of the fund which was a substitute for the vessel and cargo.

The petitioner insists that no writ of error lies to this court from the judgment of the circuit court in an action brought against the government of the United States under the provisions of the act of March 3, 1887. It was settled in *U. S. v. Davis*, 131 U. S. 36, 9 Sup. Ct. 657, that an appeal or writ of error lay to the supreme court from a judgment against the United States rendered under the jurisdiction conferred upon district or circuit courts by that act; and the contention of the petitioner is that, as the Tucker act alone furnishes the district or circuit courts with jurisdiction to entertain actions against the United States, it alone controls the right of appeal or review. The act of March 3, 1891, was intended to be a comprehensive statute, which should regulate the jurisdiction of the supreme court by appeal or writ of error from the district and circuit courts. The fifth section provides six classes of cases in which appeals or writs of error may be taken directly to the supreme court from those courts, and which do not include cases arising therein under the act of March 3, 1887; section 6 provides that the circuit courts of appeals shall exercise appellate jurisdiction to review final decisions in the district and existing circuit courts in all cases other than those provided in the fifth section, unless otherwise provided by law; and section 14 provides that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act" are repealed. The supreme court, in *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517, has shown that the words of section 6, "unless otherwise provided by law," were not intended to limit the effect of the general repealing provisions of section 14, but "were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away, except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act, and be inconsistent with its context and its repealing clause." Immediately after the passage of the act of March 3, 1891, some uncertainty existed in the minds of learned counsel as to which court an appeal

or writ of error should be taken in cases arising under the Tucker act, but this uncertainty has disappeared. The judgment of the circuit court is reversed.

THE EMILY A. FOOTE.

FISKE v. THE EMILY A. FOOTE.

(District Court, E. D. Virginia. March 30, 1896.)

1. COLLISION BETWEEN STEAMERS—INCOMPETENT LOOKOUT.

A steamer coming up the river, and rounding in to the pier at Pinner's Point, below Norfolk, held in fault for collision with a steam barge, which was just leaving the slip, because her lookout, who saw the barge at a considerable distance, either neglected to report the fact to the pilot, or the pilot neglected to recognize and respond to his report.

2. SAME—INCOMPETENT LOOKOUT.

The employment of incompetent, ignorant, and heedless men as lookouts, upon vessels moving in the crowded harbor of Norfolk and the approaches thereto, condemned.

This was a libel by S. G. Fiske, master of the steam barge O. R. Whitney, against the steamer Emily A. Foote, to recover damages resulting from a collision.

On the night of the 3d of January last, between 6 and 7 o'clock, when it had become quite dark, the steam barge O. R. Whitney, 109 tons, on a trip from Smithfield, on James river, to Norfolk, touched at the pier on Pinner's Point below Norfolk, threw out her lines, and made temporarily fast at the wharf. On inquiry of the wharfman, her master, Fiske, was informed that she could not remain there; that the Clyde steamer Gulf Stream, of Philadelphia, was expected, and was then in sight, destined for that wharf; and that all the wharf space of the pier was otherwise engaged. Under necessity of leaving at once, she moved out from the pier slowly, bound up to Norfolk. The witnesses she put upon the stand testified that, before she was entirely clear of the pier, she saw the lights of a steamer bound apparently for the wharf, and gave two clear whistles, which were preceded by a defective whistle, that was made indistinct by water in the pipe. This signal of two whistles seems to have been given for a steamer at some little distance down the river; and she soon gave another signal of two whistles, and followed it by a third signal of two additional ones, making three signals of two whistles each in the course of a very brief interval. Most or all of them were given for a steamer which was approaching, and had got very near, which proved to be the Emily A. Foote. These signals were given before the barge had got more than 50 or 75 feet clear of the wharf, before her speed was more than two miles an hour, and when she had not obtained steerage way, just after her engines had got three bells and a jingle from the pilot house to go back hard, and had obeyed them. All of the Whitney's lights were in place and burning. The Foote had come up from beyond Old Point, and was making for the Pinner's Point pier. The Foote had sighted the barge when abreast of the red buoy, which lies 470 feet below the pier on the south of the channel, and was rounding in from the buoy towards the pier. She claims not to have seen the lights of the barge, nor heard her whistles, and did not pass to port of the barge in response to her signals. Just after the rounding into the slip in front of the pier, she struck the barge on her starboard bow two or three feet aft of her stem. The barge was sunk, and filled with water, one or more of the pipes of her boiler having exploded by the sea water which inundated the hold. The barge's deck, before she was struck, was not more than an average of two feet and a half above the level of the water. She had a deck load of railroad ties on, the level of the top of which was about even with the top of her cabins, which was some five feet above the deck. The barge was afterwards raised and repaired, at an expense which is shown in the proofs, which constitutes

the chief part of the damages claimed by the libel in this cause. The water around the pier at Pinner's Point, and out to the main channel, is artificially deepened to the width, including the pier, of some 400 feet. The collision happened in this deepened slip of water in or near the main channel, somewhere about 150 to 175 feet from the end of the pier. The pier consists of two parts, with a slip between, a warehouse standing on each part, the eaves of which are 17 feet above the floor of the pier, which floor is 9 feet above the water at mean tide. The floor of the pier extends 8 feet out from the sides of the warehouses, and the width of the pier, including the slip between its two parts, and including the side floors, amounts to a total of 278 feet. There were 4 electric lights along the front of the pier, placed on each corner of the two parts into which it is divided. Besides these front lights are 6 other lights, 3 on each side of the warehouses, making 10 in all, front and sides. They are of 32 candle power. As before stated, the night was dark. There was a strong wind from the northward, and the tide was in the last quarter of flood, moving in at about the rate of a mile an hour, according to some of the testimony, but more probably at the rate of two miles an hour. The strong wind also blew the Foote inward.

The wharfman, who is a disinterested witness, states that, when the barge had got about 20 feet out from the pier, he heard the signal of two clear whistles, which immediately followed a defective whistle, but that he left the front of the pier immediately, and paid no further attention to the barge. Lippold, a stevedore, and disinterested, who was out on the end of the pier when the barge left it, also heard the signal of two distinct whistles as she was moving off. Both of these witnesses saw the stern light of the barge as she moved off. J. H. Kief, an employé of the Southern Railway Company on Pinner's Point pier, recollects seeing the stern light and the head light of the barge up, when she was ordered away, and does not recollect her side lights, as he was paying no attention to her. He heard the defective whistle, and then the signal whistles clear and loud. William Dorn, a lineman on duty on the pier, saw the barge as she was lying at the pier, with her bow pointing down the river, her port side to the pier, and saw her stern light and her red light. John Lynch, on duty on the pier for the Southern Railway Company, saw the barge lying at the pier with her port side to it just before she left, and noticed her stern light up and her red light. Her starboard side being off shore, he did not see or know what was there.

The most important witness on the part of respondent was John Dyott, the lookout on duty just before the collision. I give extracts from the passages of his testimony which bear most materially on the controlling facts at issue in this cause: "I have no particular occupation. Have followed the sea very little. Have been to sea four trips, I think. Have been on small schooners of ten tons some fifteen years. Hold no license. Was on steamer Foote as helmsman, lookoutsman, filling the mate's place. This was my first trip. I was on the lookout on night of collision, outside on the pilot house. Was elevated above the deck. Was going two or two and a half miles an hour before I discovered the bugaboo. Saw the red buoy. There, the wheel was thrown over hard a-port to round the red buoy. When about midships of the buoy, discovered the barge. Did not see what kind of boat it was. It was perfectly dark aboard of her. Saw no lights, and heard no whistles. Man was standing on her between the bow and the pilot house. As soon as I saw the boat, told the captain, and he gave the bells to go back. We struck her, and she passed our bow, and then I saw lights in engine room and cabin; saw the lights in the windows. The decks seemed to be low down. If there had been any lights, I could have seen them, because I was up there, and I am neither color-blind nor hard of hearing, and I heard no whistles. When I first saw the boat, she could not have been more than 60 or 75 feet away. We were going slow. The barge seemed to be coming as fast as she could, coming right into us. Don't know how the tide was. I don't take much notice of tides. I am always ashore. As soon as I put my eyes on the object, I says to Captain Hamilton, 'There's a boat;' and he gave bells to go back immediately. I never saw the wharf [pier] until after we struck and got clear of her; then I saw the wharf. Never saw lights on the wharf until we got clear of the boat. No lights on the wharf, but one on the corner of the wharf. Saw electric lights, but not on

the front of the wharf. Couldn't see the front of the wharf where we struck. Before we noticed the boat, I did not see the lights on the wharf. It was my first trip. There was quite a lot of lights, and, being my first trip, I didn't notice them. (Repeating.) I did not see the end of the wharf and electric lights until after I saw this vessel, and after the collision, and after we got clear of the vessel. I did not see the wharf. It was so dark I couldn't see it, and I did not see the electric lights. I did not know how many lights were on the end of the wharf. It was my first time. I don't think there were any lights on the side of the wharf. I don't know. I never noticed the electric lights around the wharf. I know there is lots of lights around Norfolk, electric lights and others, but I never noticed them particularly. I was looking out for vessels, not for shore lights."

Brief parts of testimony of other witnesses were as follows: Garrett P. Messick, engineer of the steamer Foote, said: "She carries 50 to 75 pressure of steam, with 75 to 80 revolutions, making 8 to 8½ miles an hour. About Lambert's Point got one bell to slow down. After that she was running very slowly, say, at fourth speed for ten minutes. Then got 3 bells and a jingle to slow down hard, and reversed engine at once, causing a back motion of steamer. Then felt the jar of collision. Foote hailed from Tappahannock. Saw no lights, and heard no signals on barge." John Green (colored), fireman: "I heard three bells and a jingle ten minutes before we got to the red buoy. Had 75 to 80 pressure on when we had collision. Had then been backing the engine for one minute. We were running before the wind." Ephraim Campbell (colored), deck hand, said: "We passed Old Point about dark. I was on deck smart while before collision. Captain Hamilton was inside of pilot house, and Captain Dyott in front outside. Myself, Wood Rankin, and Ned Rankin were on deck. Wilson was there also. Didn't hear any whistles before the collision." W. T. Wilson (colored), cook, said: "I was standing forward on ford, deck at collision, 12 feet from stem of Foote. Captain Dyott was right in front of pilot house, on the upper deck. I heard no whistles and saw no lights at all on barge before the collision. We had then all eaten supper and cleaned up things, and me and the other boys were on deck. We were going under one bell, slow. I heard no whistles, and didn't see a single light. I was just up there looking out to see what I could see coming into town. Heard three bells and a jingle just before the collision, and I felt the wheel going back. Didn't hear any report of the Capt. before I heard a man holler from the barge. Didn't hear Capt. Dyott make any report until then. Didn't see any lights before or after the collision, on the barge. When I came up on deck after supper, I saw town lights and the lights on the wharf we were going to. They were lantern lights. We saw electric lights on another wharf." (His testimony is utterly self-contradictory and confused on the subject of lights.) Ned Rankin (colored), deck hand, said: "I helped in pilot house sometimes. But Capt. Hamilton was in there coming up from Old Point. Capt. Dyott was up in front of him. Barge looked like she was moving right fast coming across our bow. The wind was blowing. It looked like a head wind to me." Wood Rankin (colored), deck hand, seemed to be very dull, and gave testimony in line with that of his comrades on the Foote, saying, among other things, he was a deck hand, and was on deck of Foote, saw no lights on barge, and heard no whistles. "Me and the other deck hands were all out on deck long time before the collision." Edd Rankin said: "I helped the captain sometimes, and took the wheel in the pilot house. Was on the lower deck going up from Lambert's Point. Capt. gave one bell after we passed there, to slow down, and we then went very slow when we saw the object ahead. Didn't see red buoy. Never saw no lights on the barge until we hit her, and then I saw only one light, a globe lantern. Heard no whistles at all. The barge was moving fast when they struck. She looked like she was coming across our bow. It looked to me like the wind was blowing on our bow. All the deck hands were on deck, as we came up, setting down talking. Saw lights on the wharf we were coming to, but didn't give constant attention to them." Robert Hamilton, master of the Foote, said, among other things: "Had had license for eight years, as master for four years. I was at the wheel from before we got to Old Point up to time of collision. Our speed is about eight miles. We slowed down just after passing Lambert's Point. Then moved at slow

speed, slower all the time. As soon as sighted the red buoy, ported my wheel to go in the slip at Pinner's Point. Heard no whistles as I ported, except those of the steamer Gulf Stream. When I had my wheel hard a-port, saw this boat ahead about 75 or 80 feet, and I went back full speed. I saw it about where the lookout reported it. This back movement of engine had a tendency to stop the steamer. It was a dark night, the wind blowing about N. N. E. very hard, about 18 to 20 miles an hour, astern of us. There were electric lights on the pier, one right on the corner, and four on the side; 16 candle power; little incandescent lights, about ten feet above the dock. They bend down and shine right on the wharf. Can see them a good distance. The men, except the fireman and engineer, were all back aft down on the deck, talking. I never heard any signals at all, and never saw anything at all ahead until I saw the bow of the barge. At that time the Foote was barely making three miles. The wind helped us along a little. With wind and tide helping us, still we were making barely three miles through the water. The engines were driving the boat two miles of this. After we had come alongside of the barge, saw the lights of the cabin. Before that saw no lights at all, neither the bow light, nor either of the side lights; no lights at all. Never heard any whistles. Struck the barge on her starboard bow, about two feet and a half from her stem. The Foote is an ocean-going steamer,—a fishing steamer. Our lights were all up and burning. The barge had about 2½ feet of freeboard, and was very low down in the water. The Foote has about 70 tonnage, and is about 108 feet long. I ported at the red buoy to go into the slip, which made a change in our course of about three points. The barge was right ahead when we saw her, about 75 or 80 feet off, and between me and the wharf. When we came together, she was about 100 feet clear of the wharf. Barge was moving in the teeth of the wind. We struck her about ten minutes to 7 p. m. I made protest, but did not extend it." (It makes no mention of there being no lights on the barge.)

It has not been attempted in the foregoing epitome of the testimony of respondent's witnesses to do more than touch the salient points of the case.

Robert M. Hughes, for libellant.

Floyd Hughes, for respondent.

HUGHES, District Judge (after stating the facts). It is very plain that the evidence given on either side of this controversy is entirely contradictory on all material facts, and cannot be reconciled. That of one side or the other is essentially untrue; and I am driven to consider and determine which is the more reliable. I have rarely heard a case in which the correct navigation of a vessel was more clearly established than that of the steam barge O. R. Whitney was, on the night of the collision out of which this libel grew. I saw and heard every witness that was examined in her behalf, and I was struck with the apparent candor and consistency which characterized their testimony. There was nothing in their bearing or in their manner of testifying which suggested a suspicion that they had been "coached" by their master for the occasion. They proved as satisfactorily as such facts are generally or can well be proved that the barge, at and on leaving the Pinner's Point pier, had her head and stern white lights and her red and green lights up and in place and burning. They proved, in the same manner, that the barge gave a signal of two clear whistles immediately when leaving the wharf, and two signals, each of two distinct whistles, very soon after giving the first signal. They proved that the helm was starboarded to go to port in accordance with these whistles; and the circumstances of the occasion showed that the barge had not acquired, so soon

after getting under way, as much headway as to permit of her striking with any force a vessel ahead of her. Disinterested witnesses on the wharf confirm, as far as they observed and recollected what transpired, the testimony of the barge's crew on all essential particulars. The case of the barge is proved by the consistent and concurrent testimony of all her crew, and is confirmed by all the disinterested witnesses who were examined on the subject. I do not feel justified in speaking in like terms of the witnesses for the respondent. The testimony of Dyott, the Foote's lookout, is anything but credible; and that of Hamilton, the pilot, fails to create the belief that he endeavored to "give the truth, the whole truth, and nothing but the truth." The testimony of the colored witnesses on the same side is contradictory, confused, and unconvincing. Like the testimony of the ignorant class of colored witnesses generally, it is obviously more compliant with the wishes of their employers than truthful for the truth's sake. I am unable to believe the testimony of the witnesses for the respondent, against that given by the crew on board the barge, and of the disinterested testimony of the men employed on Pinner's Point pier. I accept the testimony of the libellant as establishing the real facts of the case.

The steamer Foote came up the river from a distance below, and was in full command of her own movements. She was in condition to pass clear of the barge, which had but just got into partial motion. Her own lookout testifies that he saw the barge when the Foote was about midships of the red buoy, which is planted 470 feet below Pinner's Point pier. Either he neglected to report what he then saw to his pilot, or else the pilot neglected to recognize and respond to his report. If this had been done, there would have been no collision, and he was in fault in not taking heed of the barge in time, and maneuvering accordingly. Even independently and irrespectively of this fact, I think the collision was due, in chief part, to the ignorance, incompetency, and heedlessness of the man who acted as lookout of the Foote on this occasion. I desire in the present case to emphasize my reprobation of the employment of incompetent lookouts on steamers entering and moving in the crowded harbor of Norfolk, and the waters through which it is entered. The testimony of Dyott, the lookout, is essentially a confession of fault in almost every particular in which I have epitomized it in the résumé of facts and testimony which I have prefixed to this opinion. I feel that it was a piece of fatuity to intrust him with the duties of lookout in these waters on this fine steamer. His own evidence makes his conduct as lookout almost grotesquely absurd. He seemed to have heard nothing that he ought to have heard, to have seen nothing that it was his duty to see, and done nothing which he ought to have done. I think the casualty that happened was due to his incompetency as a lookout, and his failure to do in that important capacity what almost any person placed in his position would have done as a matter of common prudence, care, and attention.

I will sign a decree for the libellant.

SMITH v. TRAVELERS' INS. CO.

(Circuit Court, E. D. Pennsylvania. March 23, 1896.)

No. 70.

REMOVAL OF CAUSES—AVERMENT OF JURISDICTIONAL FACTS—SECOND REMOVAL—DIVERSE CITIZENSHIP.

When a cause has once been removed from a state court to a United States court, and has been remanded, on motion, because the petition for removal does not sufficiently allege diverse citizenship of the parties at the commencement of the suit, as well as at the time of removal, a second removal on the same ground is not allowable. *Johnston v. Donovan*, 30 Fed. 395, followed.

Sur Motion to Remand.

At the beginning of this suit in the state court a statement of claim was filed on July 29, 1895, and a copy thereof was served on the defendant on the same day. Under the practice there, the defendant was obliged to file all pleas in abatement within 4 days from this time, and also an affidavit of defense within 15 days. The first petition for removal was filed on October 5, 1895, and, after the case had been removed to the circuit court, it was remanded for the want of the averment in the petition of proper facts to give jurisdiction. An affidavit of defense was then filed in the state court on February 3, 1896. The petition for removal under consideration was filed on February 8, 1896, and alleged that the suit was between citizens of different states; the plaintiff residing in Pennsylvania, and the defendant corporation being a citizen of Connecticut.

Joseph H. Tanlane and Richard P. White, for plaintiff.
Frank P. Pritchard, for defendant.

ACHESON, Circuit Judge. In *Railroad Co. v. McLean*, 108 U. S. 212, 2 Sup. Ct. 498, the supreme court distinctly ruled that if, upon the first removal, the federal court declines to proceed, and remands the cause, because of the failure to file a copy of the record in due time, the same party is not entitled to file in the state court a second petition for removal, upon the same ground. In *Johnston v. Donovan*, 30 Fed. 395, this principle was applied to a second removal upon the ground of diverse citizenship. We feel constrained, then, to sustain this objection. Whether the other objections to the removal are well taken, need not be considered. The cause is remanded to the court of common pleas No. 1 of Philadelphia county.

WABASH R. CO. v. BARBOUR.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 362.

REMOVAL OF CAUSES—JURISDICTION—FEDERAL QUESTION NOT SHOWN IN COMPLAINT.

Plaintiff brought an action against defendant in a state court, his complaint disclosing no federal question involved. Defendant, upon a petition alleging that such a question was involved, secured the removal of the cause to a federal court, in which the case was tried and judgment rendered for plaintiff. Defendant then moved to set the judgment aside, for want of jurisdiction in the federal court, and to

v.73 F.no.4—33

remand the case to the state court. *Held*, that the federal court had no jurisdiction, and the judgment must be vacated, and the cause remanded.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This action was originally brought by the plaintiff, Edwin S. Barbour, below, in the Wayne circuit court, against the Wabash Railroad Company, to recover damages for an injury sustained by the plaintiff while a passenger on the defendant railroad company's train running from Chicago to Detroit. Among other counts in the declaration was one averring that the plaintiff became a passenger on the train of the defendant leaving the city of Detroit for the city of Chicago, and occupied one of the sleeping berths on said train, and the said defendant then and there accepted and received the plaintiff as a passenger on said train, and, in consideration that the plaintiff then and there became liable to pay, and promised to pay, to the said defendant, the regular fare charged by it for passage from Detroit to Chicago, to wit, the sum of \$8.50, the said defendant undertook to carry him on said train. After the filing of the declaration the defendant filed a petition for the removal of the cause to the circuit court of the United States for the Eastern district of Michigan, which was in the words following:

"State of Michigan, Circuit Court for the County of Wayne.

"Edwin S. Barbour vs. The Wabash Railroad Company. No. 32,694.

"Petition for Removal to United States Court, to the Circuit Court for the County of Wayne, Aforesaid.

"The petitioner, the Wabash Railroad Company, defendant in the above-entitled cause, shows to the court as follows:

"(1) That the matter and amount in dispute in the above-entitled cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

"(2) That this cause is a suit of a civil nature, at law, arising under a law of the United States, to wit, an act entitled 'An act to regulate commerce,' approved February 4, 1887, and the amendments thereof, commonly called the 'Interstate Commerce Law.' That the facts in this cause, involving the construction of said law, so that this cause arises under said law, are that said plaintiff, Edwin S. Barbour, at the time he was a passenger on a train of the defendant, as set forth in the declaration, was traveling on a free pass granted to him by the defendant, from Detroit to Chicago and return, which pass exempted defendant from all liability for any injury to the plaintiff. And the defendant claims that said pass was good and valid by proper construction of said interstate law. And the plaintiff claims that the said free pass was utterly void and of no effect by reason of the provisions of the act of congress aforesaid. And said plaintiff accordingly claims, in the second count of his said declaration, that the defendant 'accepted and received the plaintiff as a passenger on said train, and, in consideration that the plaintiff then and there became liable to pay, and promised to pay, to the said defendant the regular fare charged by it for passage from Detroit to Chicago, to wit, the sum of \$8.50, the said defendant undertook to carry him on said train, and in a sleeping car as aforesaid, from said city of Detroit to said city of Chicago,' which said count is framed on the theory, as plaintiff claims, that said plaintiff was and is bound by an implied promise to pay fare, because the pass which he held was utterly void by reason of the interstate commerce law aforesaid, and that the said conditions of said pass are not binding on plaintiff. But defendant claims that said pass was not made void by said law, but was good and valid, and its conditions binding on plaintiff. The said pass was issued to plaintiff as a stove manufacturer, attending a convention of such manufacturers at Chicago, and like passes were issued at the same time to all other stove manufacturers in Detroit going to said convention, and plaintiff and all said manufacturers were shippers of stoves by defendant's road. And defendant claims that the issuance of said pass was not a violation of said interstate law, forbidding unjust discrimination in transportation, where the service is like and contemporaneous, and under

substantially similar circumstances and conditions, and that said pass was valid under said law, and the exemption therein binding on plaintiff, even if there was an unjust discrimination in its issue.

"(3) Your petitioner offers herewith good and sufficient surety for the entry by it in the circuit court of the United States for the Eastern district of Michigan, on the first day of its next session, of a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

"Your petitioner therefore prays this court to proceed no further in this suit, except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed into said circuit court of the United States for the Eastern district of Michigan.

"[Signed]

The Wabash Railroad Company,

"By Alfred Russell, Its Attorney."

The plaintiff made a motion to remand, which motion was overruled. The case proceeded to trial, and resulted in a verdict for the plaintiff of \$5,000, together with his costs. After judgment had been entered, the defendant moved to vacate the judgment, and to remand the case to the state court, on the ground that the circuit court had no jurisdiction of the case. The motion was denied. Defendant then brought this writ of error, assigning error not only to the ruling as to jurisdiction, but also to the rulings of the court at the trial and on the merits.

Alfred Russell, for plaintiff in error.

Fred. A. Baker, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

We are very loath to rule with the defendant in this case, and reverse the judgment, which, on the merits of the case, is clearly a just one. We are especially reluctant to do this when we must do it in favor of the party which first sought the federal jurisdiction, and now seeks to avail itself of the benefit of an error into which it urged the court below. We are not, however, able to discover any theory upon which the jurisdiction of the court below can be sustained, in view of the decisions of the supreme court of the United States. In *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, it was held that:

"Under Act Aug. 13, 1888, c. 866, the circuit court of the United States has no jurisdiction, either original, or by removal from a state court, of a suit, as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim."

This view has been affirmed by the same court in *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34; *Postal Telegraph Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192; and *Land Co. v. Brown*, 155 U. S. 488, 15 Sup. Ct. 357.

Under these cases, no statement in a petition for removal can supply the absence of averments, in the plaintiff's statement of his own claim, showing that the case involves a federal question. In the case at bar, the plaintiff did not make, in his declaration, the slightest suggestion from which it could be inferred that there was a federal question involved in the consideration and decision of the cause of action which he set out. It was not until the petition for

removal was filed that the possibility that a federal question might arise on the trial appeared. Hence the court below had no jurisdiction. Nor is it material that the removal was caused by the party now complaining of it. It is well settled, by decisions of the supreme court, and on principle, that the party improperly removing the case from the state court may assign as error the want of jurisdiction over the subject-matter of the court to which the removal has been had. *Martin's Adm'r v. Railroad Co.*, 151 U. S. 674-690, 14 Sup. Ct. 533; *Railway Co. v. Swan*, 111 U. S. 379-382, 4 Sup. Ct. 510; *Capron v. Van Noorden*, 2 Cranch, 126; *Brown v. Keene*, 8 Pet. 112. The defect in jurisdiction here is not merely modal, like the time within which a petition for removal is to be filed, but it goes to the substance of the jurisdiction.

The judgment of the circuit court is reversed, with directions to remand the case to the circuit court of Wayne county, Mich. The costs of this court, and the costs of the circuit court, and of the trial had therein, will all be taxed to the Wabash Railroad Company.

ANDREWS et al. v. NATIONAL FOUNDRY & PIPE WORKS, Limited,
et al.

(Circuit Court of Appeals, Seventh Circuit. April 6, 1896.)

No. 283.

APPEALABLE DECREES—FINALITY.

In a creditors' suit against a corporation and certain of its stockholders, who were also its mortgagees, a decree was entered, which, among other things, fixed the amounts due to both secured and unsecured creditors, and adjudged that certain creditors had liens superior to the mortgages; that the corporate property and franchises be sold to satisfy the same; that the individual defendants were holders of specified amounts of unpaid stock, and should pay the specified demands of the unsecured creditors. *Held*, that this decree was final and appealable as to these provisions, and would not be dismissed.¹

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This was a creditors' bill filed by the National Foundry & Pipe Works, Limited, against the Oconto City Water Supply Company, S. D. Andrews, W. H. Whitcomb, and others. An order granting a preliminary injunction was reversed on appeal by this court. See 10 C. C. A. 60, 61 Fed. 782. Various other creditors interfered, and, after full hearing on the merits (68 Fed. 1006), a decree was entered fixing the rights of all the parties. Defendants appeal. Motion to dismiss.

Before WOODS and SHOWALTER, Circuit Judges.

¹As to the finality of decrees of the federal courts for purposes of appeal, see note to *Trust Co. v. Madden*, 17 C. C. A. 238.

WOODS, Circuit Judge. The appellees have joined in a motion to dismiss this appeal on the ground that the decree was not final. The brief in support of the motion contains this statement:

"The bill was filed, alleging, among other things, that the defendants Andrews and Whitcomb were personally liable to the complainant and other creditors for the amount of their claims, upon the ground that they were the owners and holders of stock for which no consideration had been paid. The prayer for relief asked that such stockholders be adjudged to pay the claims of the creditors. The decree entered ascertains and fixes the amount due to both the secured and unsecured creditors, and adjudges that the complainant, National Foundry & Pipe Works, Limited, and the intervener, R. D. Wood & Co., have mechanics' liens upon the property of the Oconto Water Company prior to all other liens, and that they are authorized to proceed to the enforcement of such liens in accordance with the decrees of the court establishing the same. The decree contains the following further provision: 'That said defendants, S. D. Andrews, and W. H. Whitcomb, be, and they are hereby, ordered and required, and are hereby adjudged, to pay the amounts respectively adjudged due to the above-mentioned unsecured creditors, to wit, Chapman Valve Manufacturing Company, Sherwood, Sutherland & Company, Dickinson Brothers & King, and Cook & Hyde, together with their respective costs, as herein adjudged, and also that said defendants S. D. Andrews and W. H. Whitcomb, be, and they are hereby, ordered and required to pay any deficiency that may be found due to said secured creditors, to wit, the said National Foundry & Pipe Works, Limited, and the said R. D. Wood & Co., if any there shall be after applying to the satisfaction of their said respective mechanic's lien decrees hereinbefore referred to the proceeds of the sales made thereunder; the amount of such deficiency being made to appear to the satisfaction of this court, and an order for such payment entered at the foot of this decree.'"

The authorities cited in support of the motion are: *McGourkey v. Railway Co.*, 146 U. S. 536, 13 Sup. Ct. 170; *Elder v. McClaskey*, 17 C. C. A. 251, 70 Fed. 529, 557; *Hohorst v. Packet Co.*, 148 U. S. 262, 13 Sup. Ct. 590,—distinguishing *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690, and approving *Montgomery v. Anderson*, 21 How. 386.

The brief for the appellees contains the following fuller statement of the decree:

"The case went to hearing upon the pleadings, proofs, and arguments of counsel. The controverted issues raised by the amended pleadings are: First. Whether appellees (the complainant and interveners, R. D. Wood & Co.) had liens upon all of the rights, franchises, and property of the defendant Oconto Water Company and the plant constructed by that company in the city of Oconto, Wis., and, if so, to what extent? Second. Whether, if they had such liens, they were assertable against appellants (Andrews and Whitcomb) who were not parties to the actions in which the decrees were rendered, or as against appellants' interest in the property as purchasers at a sale made under a decree of mortgage foreclosure and sale, and if so, were such liens paramount or subordinate to appellants' interest? Third. Whether appellants were holders of unpaid stock of the defendant Oconto Water Company, and, if so, to what extent? Fourth. Whether there were unsecured creditors of the defendant Oconto Water Company, and, if so, how many and the right amount of the claim of each? Fifth. Whether the bonds of the defendant Oconto Water Company, issued to appellants as collateral security, were void. Sixth. Whether the instruments of mortgage under which appellants claim were made in good faith, and for a valuable consideration, and, if so, whether they were withheld from record by their procurement or with their consent or in fraud of creditors. And, seventh, whether compensation for the services and disbursements of the receiver appointed early in the case by an order subsequently reversed by this court

upon appeal, and of his counsel, should be made out of the funds collected by him during his receivership as the rents, issues, and profits of the water-works plant. All these issues were determined in favor of appellees, except those mentioned in the sixth paragraph above, viz. whether the instruments of mortgage under which appellants claim were made in good faith, and for a valuable consideration, and, if so, whether they were withheld from record by their procurement, or with their consent, or in fraud of creditors, which were determined in favor of appellants. And the decree in terms declares the validity of the mechanic's lien decrees obtained by appellees to the full extent of the amount of each of those decrees, with interest; that appellants were privies to and concluded by said lien decrees; that each of said lien decrees was, as a lien, prior to the instruments under which appellants claim, and to all other liens or rights of appellants in the property, and should be enforced, and specifically authorized appellees to proceed to the enforcement and satisfaction of their respective mechanics' liens upon and against the franchises and property of said Oconto Water Company 'in accordance with and as provided in their respective decrees establishing the same'; that appellants were stockholders of the defendant Oconto Water Company, of its unpaid stock, amounting to \$100,000, and liable for all unpaid amounts upon such stock so far as may be necessary to discharge the indebtedness of said Oconto Water Company, not exceeding, however, the sum of \$100,000; that defendant Oconto Water Company's indebtedness to unsecured creditors was as follows, viz.: To Chapman Valve Manufacturing Co. on a judgment, for the sum of \$838.88, with interest; to Sherwood, Sutherland & Co. for \$790.22, with interest; to Dickinson Bros. & King for the sum of \$341.63, with interest, and to Cook & Hyde for the sum of \$85, with interest; that appellants pay 'the amounts respectively adjudged due to the above-mentioned unsecured creditors (naming them), together with their respective costs as herein adjudged; and also that said defendants S. D. Andrews and W. H. Whitcomb be, and they are hereby, ordered and required to pay any deficiency that may be found due to said secured creditors, to wit, the National Foundry & Pipe Works, Limited, and the said R. D. Wood & Co., if any there shall be after applying to the satisfaction of their said respective mechanics' lien decrees hereinbefore referred to the proceeds of the sales made thereunder, the amount of said deficiency being made to appear to the satisfaction of this court, and an order for such payment entered at the foot of this decree'; that the bonds issued by the defendant Oconto Water Company and held by appellants were void, and that they be delivered up to the clerk of the court to be canceled; that the receiver be paid for his services and disbursements and for those of his counsel the sum of \$5,000 out of the moneys collected by him 'arising from the operation of said plant by said receiver'; and that complainant recover of the appellant its costs in the suit, taxed at the sum of \$254, and have execution for their collection. Andrews and Whitcomb, the Oconto City Water Supply Company, and the city of Oconto (defendants below) prayed an appeal from the decree, which the court allowed."

The authorities cited in opposition to the motion are: *Trust Co. v. Madden*, 25 U. S. App. 430, 17 C. C. A. 238, 70 Fed. 451; *Elder v. McClaskey*, *supra*; *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 206, 9 Sup. Ct. 265; *Dainese v. Kendall*, 119 U. S. 53, 7 Sup. Ct. 65; *Bank v. Sheffey*, 140 U. S. 445, 11 Sup. Ct. 755; *Grant v. Insurance Co.*, 106 U. S. 429, 1 Sup. Ct. 414; *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 Sup. Ct. 6; *Ex parte Norton*, 108 U. S. 237, 2 Sup. Ct. 490; *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690; *Forgay v. Conrad*, 6 How. 202; *Whiting v. Bank*, 13 Pet. 15; *French v. Shoemaker*, 12 Wall. 86; *Railroad Co. v. Fosdick*, 106 U. S. 82, 1 Sup. Ct. 10; *Dufour v. Lang*, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 913; *Blossom v. Railroad Co.*, 1 Wall. 655; *Bronson v. Railroad Co.*, 2 Black, 528; *Railway Co. v. Sim-*

mons, 123 U. S. 52, 8 Sup. Ct. 58; *Marin v. Lalley*, 17 Wall. 14; *Fleitas v. Richardson*, 147 U. S. 538, 13 Sup. Ct. 429.

We are of opinion that, in so far, at least, as it was determined that the decrees which had been obtained by the National Foundry & Pipe Works and R. D. Wood & Co., respectively, were prior to the mortgage of Andrews and Whitcomb, and that the franchises and property of the Oconto Waterworks might be sold to satisfy those decrees; that Andrews and Whitcomb were the holders of unpaid stock, and should pay the demands specified of unsecured creditors; and that the bonds held by the appellants were void, and should be surrendered for cancellation,—the decree was final. The motion is therefore overruled.

BALTIMORE & O. R. CO. v. McLAUGHLIN.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 387.

1. UNITED STATES COURTS — JURISDICTION — ALLEGATIONS OF CITIZENSHIP — AMENDMENT.

An amendment to the original pleading of the plaintiff in an action speaks as of the time of filing such original pleading; and, where it relates to the citizenship of the plaintiff, it need not expressly state that its allegations refer to that time.

2. SAME—CORPORATIONS.

An averment that the defendant in an action is an association of persons duly incorporated under the laws of a particular state is a sufficient allegation of citizenship for the purpose of giving jurisdiction to the federal courts.

3. CARRIERS—LIMITATION OF LIABILITY—CONTRACTS.

A railroad company cannot, by conditions in the contract of carriage, limit its liability for injuries to persons carried on its trains, caused by the negligence of its servants; and an attempt to limit the authority of an agent of such a company to make contracts of carriage, within the ordinary scope of his authority, by requiring such a condition to be inserted in the contracts, is nugatory.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

This action was begun in the circuit court of the United States for the Southern district of Ohio, Eastern division, by John R. McLaughlin, against the Baltimore & Ohio Railroad Company, to recover damages for an injury sustained by him while riding upon a freight car of the defendant, with two horses which he had shipped from Bloomingburg, Ohio, on the defendant's railroad, to Columbus, Ohio. In the original petition the plaintiff made no averment as to his own citizenship, and simply averred that the defendant company was an association of persons duly incorporated under the laws of the state of Maryland, and that on or before the 14th day of April, 1891, the defendant was in the occupancy of, and operating the Columbus, Cincinnati & Midland Railroad, a line of railroad running from Columbus, Ohio, in Franklin county, to Cincinnati, Ohio, and was engaged in the business of carrying passengers and hauling freight over the same for hire and reward. A demurrer was filed to this petition, for want of jurisdiction, which, by consent of counsel for plaintiff, was sustained, and leave was given to file an amended petition within five days from the entry. In that amended petition the averments as to jurisdiction were as follows: "Now comes John R. McLaughlin, plaintiff herein, by leave first obtained, and for his cause of action

against the said Baltimore & Ohio Railroad Company, defendant herein, says that the plaintiff herein is a citizen of the state of Ohio, resident at Columbus, Franklin county, Ohio; that the defendant is an association of persons duly incorporated under the laws of the state of Maryland; that on or before the 14th of April, 1891, the defendant was in the occupancy of, and operating, the Columbus, Cincinnati & Midland Railroad, a line of railroad running from Columbus, Ohio, and was engaged in the business of carrying passengers and hauling freight over the same for hire and reward." The amended petition was in every respect like the original petition, except the averment as to the citizenship of the plaintiff. The answer of the defendant admitted that it was a corporation, and organized as stated in said amended petition, and that the plaintiff was a citizen of the state of Ohio, as therein stated. The accident occurred by the giving way of a bridge or trestle across a creek. The negligence charged was that the bridge had not been maintained in a safe and proper condition, and that the timbers had been allowed to rot. There was a conflict of evidence as to what was the cause of the accident, the defendant claiming that it was a broken axle. This issue was submitted to a special finding of the jury. The third question submitted to the jury was: "What was the cause of the wreck of the train on which the plaintiff was riding when injured? Ans. Defective trestle. Fourth. Was the defendant, its agent or servants, guilty of negligence causing the injury to the plaintiff? If yes, in what did such negligence consist? Ans. Yes. For want of proper care of trestle." "Sixth. Was not the accident which caused the plaintiff's injuries caused by a broken axle, which produced the derailment of the train, and the breaking down of the trestle on defendant's road? Ans. No." There was a further conflict of evidence upon the question whether the contract of shipment by McLaughlin with the station master at Bloomingburg was written or verbal. A written contract was produced, and McLaughlin denied that he had ever signed the firm name as it appeared signed to the contract, but said that the contract was entirely verbal. This question was submitted to the jury as follows: "First. Was the contract of shipment in writing, or verbal? Ans. Verbal." The averment of the amended petition with reference to the contract between the plaintiff and the railroad company was as follows: "That on the 13th day of April, 1891, the said plaintiff herein, for a certain reward paid to said defendant herein, shipped certain live stock, to wit, two horses, from Bloomingburg, Ohio, a station on said Columbus, Cincinnati & Midland Railroad, to Columbus, Ohio; that at the instance and request of said company and its agents, and for reward paid said defendant, and with their knowledge and consent, he, the plaintiff, took passage on the same car with, and in charge of, said stock." The character of the contract, as alleged by the plaintiff, was shown by the following evidence of one of the plaintiffs: "The agent told me to put the horses on the car, and to get on the car and come to Columbus with the horses, and told me that he would make all the arrangements, and leave the papers in a box some place about the depot, so that the engineer and conductor, or whoever was supposed to do that on the train, would get them; and I, according to his instructions, loaded the horses, and about 11 o'clock at night, or probably midnight, I went down, and got on the car, and fixed one horse in one end of the car, and the other horse in the other end of the car, tied their heads towards each other, and their heels towards the end of the car; tied with ropes, so that the ropes would hold the horses in the center of the car; one rope to one side, and the other to the other side,—each side of the car. I fixed a cot in the middle of the car, and laid down and went to sleep. When the train came along I woke up, and went to the car door, and called to the conductor." He further said that the contract was oral, and that he was to pay 11 or 12 cents a hundred pounds for the transportation of his horses from Bloomingburg to Columbus. It was in evidence that the conductor spoke to him, and knew of his presence upon the train. It was contended by the defendant below that the station agent had no authority to ship stock, or to permit drovers or others to accompany them, except under a special contract for the transportation of live stock, which the defendant claimed McLaughlin had signed. This contract provided, among other things, in its third clause: "The owner, shipper, or consignee is to load, transfer, and unload said stock at his risk, and will examine for himself the

cars furnished for transportation, and all the means used in loading and unloading, to see that they are of sufficient strength, or of the right kind, and in proper order and repair, and properly adjusted for the purpose; and said company is not to be responsible for any damage because of any defects in said cars, or in said means of loading and unloading. The owner, shipper, or his agent or agents in charge of said stock shall ride on the train on which the same are transported at their own risk of personal injury from any cause, hereby releasing said company from any claim or damage on account of such injuries arising while upon or about the trains. And it is further agreed that the shipper or owner will indemnify and hold harmless said company from all damages on account of such claims or demands." One of the defenses relied upon was a settlement. The settlement was evidenced as follows:

G. E. S.

Loss and Damage.

The Baltimore & Ohio Railroad Co.
General Freight Department.
Depot No. 57,537.

To McLaughlin Bros.
Address: Columbus, O.

For loss of 2 horses in shipment from Bloomingburg, O., to Columbus, O.,		
April 14, 1891.....		\$350 00
Amt. claimed		\$500 00
Amt. compromised for.....	\$250 00	
Amt. not allowed	\$150 00	\$500 00
Approved:	Approved:	Approved for
	F. Harnett,	payment:
	Gen'l Freight Traffic Manager,	W. T. Winchir,
	A. L. McDermas.	Gen'l Auditor.

J. H. Collins, for plaintiff in error.

John S. Friesner, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts as above). The first objection made by the plaintiff in error is that the averments of jurisdiction in the amended petition are not sufficient to show that the plaintiff was a citizen of Ohio at the time of the filing of the petition. The amended petition in this case was merely the addition to the original petition of the averment with reference to the citizenship. It was an amendment to the original petition, and the new averment contained in the amendment had relation, in point of time, to the filing of the original petition. A case presenting a closely-analogous question has recently been decided by the court of appeals of the Eighth circuit. *Carnegie, Phipps & Co. v. Hulbert*, 16 C. C. A. 498, 70 Fed. 209-218. There the question was whether a statute of limitations constituted a good defense to the action. Suit had been brought within the statutory period, but the petition with which the suit was begun did not contain the requisite averment as to the diverse citizenship of the parties essential to give the circuit court jurisdiction. After judgment the case was reversed for want of jurisdiction, with leave to the parties to amend to make the proper averment. An amendment was made. By the time the amendment was made, the time of the statutory limitation had expired, and the contention was that the suit must be regarded as having been commenced from the time the proper jurisdictional averment was made. This contention was defeated on the ground that the amendment related back to the time when the original petition was filed. A similar question had been passed upon in the case of Bow-

den v. Burnham, 8 C. C. A. 248, 59 Fed. 752. There the question was whether an attachment sued out on a petition which did not make the proper jurisdictional averments would relate back to the time of filing the original petition, after an amendment had been made to the petition supplying the defect. In that case the court said, speaking by Judge Caldwell:

"But the court very properly granted the plaintiffs leave to amend their complaint, and it was amended. Nevertheless, the plaintiff in error asserts that as the complaint, at the time the attachment was issued, did not contain the necessary jurisdictional averments, every step taken in the cause prior to the amendment was void, and that the amendment of the complaint could not impart vitality or validity to anything done before the amendment was made. This contention is wholly untenable. It is everyday practice to allow amendments of the character of those made in this case, and, when they are made, they have relation to the date of the filing of the complaint, or the issuing of the writ or process amended. When a complaint is amended, it stands as though it had originally read as amended. The court in fact had jurisdiction of the cause from the beginning, but the complaint did not contain the requisite averments to show it. In other words, the amendment did not create or confer the jurisdiction; it only brought on the record a proper averment of a fact showing its existence from the commencement of the suit."

So, here, we think the averment by way of amendment to the original petition must be construed as of the date of the original petition, and be given effect as if the averment had been made a part of the original petition. It would be improper, in an amendment to a petition, for the plaintiff to aver a fact which happened subsequent to the filing of the original petition. A pleading averring such a fact would be a supplementary petition, and not an amendment to the original petition. An amendment to a petition is not to be construed in the same way, in this regard, as the petition for removal. A petition for removal is necessarily filed some time after the pleading which begins the cause, and the petition for removal is not in proper form unless it expressly avers the citizenship as of the time of the beginning of the suit. *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518; *Kellam v. Keith*, 144 U. S. 568, 12 Sup. Ct. 922. An averment in the present tense in a petition for removal is an averment as of the time of the filing of that petition, and not as of the time of filing the original pleading in the cause. Nor is there any defect in the averment that the defendant company was an association of persons duly incorporated under the laws of Maryland. The due incorporation under the laws of Maryland raises the conclusive presumption, in accordance with the decisions of the supreme court, that all the members of the association thus incorporated are and were citizens of Maryland. *Muller v. Dows*, 94 U. S. 444; *Frisbie v. Railway Co.*, 57 Fed. 1-3.

We find no error in the record. There was ample evidence to sustain the finding of the jury that the accident occurred by reason of the defective character of the bridge, and the failure of the company to maintain it in a safe condition.

There was no doubt of the authority of the agent to allow McLaughlin to ride with the stock which he had shipped, and to take charge of it on the trip. The only limitation of authority claimed was that the contract of shipment should have contained certain re-

strictions. One was that the company should be held harmless from any injury occurring to the owner or agent in charge of the stock on the trip. This, of course, under the principles announced by the supreme court of the United States in *Railroad Co. v. Lockwood*, 17 Wall. 357, could not exempt the company from liability for an injury occurring through the negligence of its agents. That was the case of a drover traveling in charge of cattle on a train, who had been required to sign an agreement to attend to the loading, transporting, and unloading of them, and to take the risk of injury to them, and personal injury to himself. He traveled on what was called a "drover's pass," declaring on its face that its acceptance was to be considered as a release of the company from all liability for damages and injuries received on the train. The limitation of liability was held void. In the case at bar the same limitation is relied upon by the company. It is void. An attempt to limit the authority of an agent by requiring that he shall impose such a limitation in every contract of shipment must be equally nugatory. Moreover, even if a case were made showing that the agent had such a limited authority, it would not affect a person dealing with him as a representative of the company, without notice of such a limitation. It is part of the duty of the railroad company, as a common carrier, to ship stock. *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727-734, 8 Sup. Ct. 266; *Stock-Yards Co. v. Keith*, 139 U. S. 128-133, 11 Sup. Ct. 461. And a station or freight agent in charge of a station and freight depot at any place where stock is likely to be shipped may be presumed to have authority necessary for the purpose.

Finally, reliance is had upon a receipt of McLaughlin Bros. as a settlement with the plaintiff for his personal injury. We regard this defense as frivolous. The receipt, on its face, expressly states that it is for two horses, and makes no reference whatever to the personal injury of McLaughlin. The firm asserted no right to recover for these personal injuries. Such right was in McLaughlin himself, as an individual; and the release of the firm claim could not, by any possibility, include a claim by one member of the firm for such a tort. The judgment of the court below is affirmed, with costs.

JOHNSON v. GARBER et al.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 372.

PRACTICE—TIME FOR TAKING EXCEPTIONS.

Exceptions to the rulings of a court in the progress of a trial cannot be considered by an appellate court, upon writ of error, if the same were not taken at the trial, and before the verdict was rendered, though the omission to do so was in conformity to a practice prevailing in the trial court, but not embodied in a rule, by which exceptions were permitted to be taken after the close of the trial, and included in the bill of exceptions as if taken at the proper time.

In Error. to the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

This is a writ of error to a judgment of the circuit court of the Western division of the Western district of Tennessee in a suit brought to recover upon an attachment bond for the malicious prosecution of an attachment suit against the property of the plaintiff, Edwin L. Johnson. After the hearing of the evidence, upon direction of the court, the jury returned a verdict for nominal damages in the sum of one dollar, upon which the court entered judgment. The only errors assigned are to the charge of the court, and they are based on exceptions the manner of taking which is recited in the bill of exceptions allowed by the trial judge as follows:

"No specific objections were made, at the time of the giving of the charge, by the plaintiff, but the judge who tried this cause now states in respect to this matter that it has always been the invariable practice of the court, well known, and acted upon by counsel, though no formal rule to this effect has been adopted by the court, not to require such specific objections to be so taken; but counsel on either side is understood always to have taken the objection to any instruction, or any part of the charge, so that, in subsequently making up the bill of exceptions, he may take any objection as if the rule of taking it at the time had been fully complied with. There was no request on either side for any departure from this practice, and this bill of exceptions is accordingly allowed under the practice here mentioned. The plaintiff's counsel acted upon the expectation, no doubt, of being allowed this privilege. There was no agreement to this practice by counsel for defendant in this case. Nothing was said about it on either side. The defendants object, and except to the above action of the court for the reason that the court has never adopted any rule such as is stated to be the practice; and, further, for the reason that no rule of the court or practice of the court authorizes the signing of a bill of exceptions at a term subsequent to the term at which the matters excepted to occurred, especially when there was no agreement between the parties to that effect, and there was no such agreement here. But the court overruled the objection, and the defendants objected, and here note their exception. Plaintiff's counsel, who tried this case, now state that they did not, at the time, formally present exceptions to the charge, as they understood such course was unnecessary and improper, under the practice of the court. The defendants object, and except to the foregoing statement, because neither they nor their counsel agreed to such practice; further, because it is the mere voluntary statement of counsel for plaintiff, made many months after the trial of the cause, and after the judgment had been rendered, and therefore not proper matter for a bill of exceptions; further, because counsel were bound to know there was no rule of this court making it the practice of the court, and therefore they were bound to follow the regular practice, and should have excepted at the time. The court overruled the objections, and defendants excepted, and now note their said exception. The plaintiff, in the manner before stated, excepted to the following portions of the charge delivered to the jury: [Then are set out the exceptions, which it is not necessary to state, in view of the decision of the court.]"

Frazer & Heath, for plaintiff in error.

Wm. M. Randolph, George Randolph and Edward Randolph, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. The exceptions to the charge set forth in the bill of exceptions cannot be considered by this court upon a writ of error, because they were not taken at the trial and before the verdict was rendered. The rule is peremptory, and without variation, that a court of error cannot consider an exception which was

not tendered at the time of the ruling of the trial court complained of. This has been the uniform construction of the statute of Westminster II. (13 Edw. I. c. 31; 2 Inst. 427), whence came the modern practice in respect to bills of exceptions, and has always been understood to be the rule of law prevailing in appellate proceedings under the common law (Tidd, Prac. *863). In *Wright v. Sharp*, 1 Salk. 288, a corporation book was offered in evidence at the assizes to prove a member of the corporation not in possession, and refused. No bill of exceptions was then tendered, nor were the exceptions reduced to writing. So the trial proceeded, and a verdict was given for the plaintiff. Next term the court was moved for a bill of exceptions, and it was stirred and debated in court. Chief Justice Holt, in ruling on the question, said:

"The statute, indeed, appoints no time; but the nature and reason of the thing requires the exception should be reduced to writing, when taken and disallowed, like a special verdict, or a demurrer to evidence. Not that they need be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record. So the motion is denied."

The same view has been taken by the supreme court since its earliest decisions. In *Walton v. U. S.*, 9 Wheat. 651-657, Mr. Justice Duvall said:

"It is a settled principle that no bill of exceptions is valid which is not for matter excepted to at the trial. We do not mean to say that it is necessary (and, in point of practice, we know it to be otherwise) that the bill of exceptions should be formally drawn and signed, before the trial is at an end. It will be sufficient if the exceptions be taken at the trial, and noted by the court, with the requisite certainty; and it may afterwards, during the term, according to the rules of the court, be reduced to form and signed by the judge; and so, in fact, is the general practice."

See *Ex parte Bradstreet*, 4 Pet. 102-107; *Brown v. Clarke*, 4 How. 4-15; *Sheppard v. Wilson*, 6 How. 260-275.

In *Phelps v. Mayer*, 15 How. 160, it was sought, upon a writ of error, to raise the question of the correctness of the action of the court below in delivering certain instructions to the jury, and in refusing to deliver others. No exception was taken to the action of the trial court while the jury remained at the bar. The day after the verdict was rendered, the losing party came in and filed his exceptions. There was nothing in the certificate from which it could be observed that the exception was reserved during the pending of the trial. The supreme court held that the exceptions were not before them for review. Mr. Justice Taney, delivering the opinion of the court, said:

"It has been repeatedly decided by this court that it must appear, by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminster II., which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and, if it is not done, the charge of the court or its refusal to charge as requested forms no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form, and signed, before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken. Nor

is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For if it is brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury. And if the exception is to evidence, the opposite party might be able to remove it by further testimony, if apprised of it in time."

In *Turner v. Yates*, 16 How. 14-29, Mr. Justice Curtis, speaking for the supreme court, said:

"The record must show that the exception was taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held. The convenient dispatch of business, in most cases, does not allow the preparation and signature of bills of exception during the progress of the trial."

In *U. S. v. Breitling*, 20 How. 252, Mr. Chief Justice Taney said:

"The attention of this court has, upon several occasions, been called to this subject, and the rule established by its decisions will be found to be this: The exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form, and sealed by the judge, afterwards."

See, also, *Dredge v. Forsyth*, 2 Black, 563-568; *Kellogg v. Forsyth*, Id. 571-573; *Simpson v. Dall*, 3 Wall. 460-473.

In *Stanton v. Embrey*, 93 U. S. 548-555, Mr. Justice Clifford said:

"Unless the exceptions to the rulings of the court in the progress of the trial, or to the instructions of the court given to the jury, are signed by the judge, or sealed with his seal, it is not a bill of exceptions, within the meaning of the statute authorizing such proceeding, nor does it become a part of the record. Instead of that, the established rule is that the exception must show that it was taken and reserved by the party at the trial; but it may be drawn out in form, and signed or sealed by the judge, at a later period."

See, also, *Hunnicut v. Peyton*, 102 U. S. 333-358.

In *U. S. v. Carey*, 110 U. S. 51, 52, 3 Sup. Ct. 424, Mr. Chief Justice Waite used this language:

"The rule is well established and of long standing that an exception, to be of any avail, must be taken at the trial. It may be reduced to form, and signed, afterwards; but the fact that it was seasonably taken must appear affirmatively in the record, by a bill of exceptions duly allowed or otherwise. * * * This, clearly, is not such a case. There is nothing whatever to indicate that any exception was taken to the rejection of the evidence complained of until the next term, after the trial was over, and the judgment rendered, though not signed. * * * The language here implies an exception only at the time of tendering the bill of exceptions to be signed, which was not only long after the trial, but at a subsequent term of the court. It follows that the errors assigned are not such as we can consider."

See, also, *Bank v. Eldred*, 143 U. S. 293-298, 12 Sup. Ct. 450; *Thiede v. Utah Territory*, 159 U. S. 510-522, 16 Sup. Ct. 62.

The same conclusion must be reached in the case at bar. It is expressly stated that, not only was no exception taken, but no objection was made to the charge by the court at the time it was delivered. The trial judge states it to be the invariable practice of the court below, well known and acted upon by counsel, though no formal rule to this effect has been adopted by the court, not to require such specific objections to be so taken, but counsel on either side is understood always to have taken the objection to any instruction,

or any part of the charge, so that, in subsequently making up the bill of exceptions, he may take any objection as if the rule of taking it at the time had been fully complied with. In view of the proper practice defined in the decisions already referred to, the practice of the court below was improper; and the fact that such practice obtained cannot give this court power to consider an exception which was not reserved at the only time when, under the law, it could have been reserved, namely, at the trial, and while the jury were at the bar. It does not appear that the defendant's counsel made any agreement by which the exceptions reserved at the time of tendering the bill of exceptions should be considered as having been made at the time of the trial. If such an agreement had been made, it might possibly have been the duty of the court below to enforce it by making the bill of exceptions show that the exceptions were reserved at the time of the trial, on the ground that any other bill of exceptions would be a fraud upon the party misled by such agreement. Whether this be true or not, there was no such agreement here, and the defendant could not be bound by the practice, which was improper, and which it was beyond the power of the court to adopt.

The judgment of the court below is affirmed.

In re HALL & STILSON CO.

(Circuit Court, S. D. California. April 8, 1896.)

No. 647.

1. COMITY—COURTS OF CONCURRENT JURISDICTION—SEIZURE OF PROPERTY.

The rule of comity which forbids the seizure of property, subject to the jurisdiction of one court, by another court of concurrent jurisdiction, applies only where there is actual or constructive possession of the property by the former court.

2. ATTACHMENT OF REAL PROPERTY—EFFECT—POSSESSION OF COURT.

The levy of an attachment upon real estate gives to the court from which the process issues neither actual nor constructive possession of the property, but only creates a lien thereon in favor of the attachment creditor.

3. RECEIVERSHIP—LEAVE TO SELL UNDER EXECUTION.

Where real property, under attachment upon process from a state court, is taken into the possession of a receiver of a federal court, leave should not be granted by the latter court to sell such property under execution in the attachment suit, if the property is not ample to meet all claims upon it, or if the condition of the title is such that the property would be likely to be sacrificed if sold before the title is cleared up by a decree.

Paris & Allison, E. B. Stanton, and Hatch, Miller & Brown, for petitioner.

Anderson & Anderson and Gardiner, Harris & Rodman, for interveners Wood and others.

H. C. Dillon, for receiver.

Allen & Flint, for complainant.

Clarence A. Miller, William Chambers, W. J. Hunsaker, and Miller, Wynne & Miller, for defendants.

WELLBORN, District Judge. This is a petition by the Hall & Stilson Company, a corporation, for an order authorizing the sheriff of the county of San Bernardino, state of California, to levy an execution upon certain real estate, and 38 ounces of amalgam, in said petition described and mentioned, and being the property of said Vanderbilt Mining & Milling Company. The pertinent facts are that on the 23d day of February, 1895, petitioner, the Hall & Stilson Company, commenced an action in the superior court of said county against the Vanderbilt Mining & Milling Company, a corporation, on an indebtedness of \$5,165.83, besides interest, and that on said day a writ of attachment was issued out of said superior court, which, on the same day, was levied upon said real estate and amalgam, the latter being taken into the custody of the sheriff; that afterwards, on the 13th day of June, 1895, judgment was recovered by the plaintiff in said action for the amount above named; that on or about the 18th day of June, 1895, in a suit pending in the United States circuit court for the Southern district of California, wherein Henry King Whittle is plaintiff, and the said Vanderbilt Mining & Milling Company and others are defendants, W. N. Crandall was appointed receiver of all the property of the said Vanderbilt Mining & Milling Company; that said Crandall, as such receiver, took, and now holds, possession of said real estate, while said sheriff has possession of the amalgam. Petitioner asks for an order permitting the levy of its execution upon said property.

The amalgam being personalty, and possession of the same having been taken by the sheriff under state process, this court cannot, through its receiver, or in any other manner, rightfully interfere with said property while such possession continues. *Hagan v. Lucas*, 10 Pet. 400; *Taylor v. Carryl*, 20 How. 583; *Freeman v. Howe*, 24 How. 450; *Ableman v. Booth*, 21 How. 506; *Ex parte Dorr*, 3 How. 104; *Peck v. Jenness*, 7 How. 624; *Slocum v. Mayberry*, 2 Wheat. 1; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355. With reference to the other property the question to be determined is whether or not, having been attached as real estate, under process from the state court, it could thereafter be lawfully seized by the receiver of this court. This question involves two others: First. What relation, according to the rule of comity, must one court sustain to property in order to preclude lawful seizure of the property by another court of concurrent jurisdiction; or, more specifically, is possession of the property by the former court an essential constituent of the rule? Second. Does a state court in California, by attachment of real estate, acquire possession, actual or constructive, of the property, or does the levy of the attachment merely impose a lien upon the property attached? With reference to the first of these two questions, the supreme court of the United States has enunciated the controlling principle, as follows:

"That principle is that, whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its legal control for the time being; and that no other court has a right to interfere with that possession unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdic-

tion in the premises. This is the principle upon which the decision of this court rested in *Taylor v. Carryl*, 20 How. 583, and *Hagan v. Lucas*, 10 Pet. 400, both of which assert substantially the same doctrine. A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source. But how much more disastrous would be the consequences of such a course in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit. This principle, however, has its limitations; or, rather, its just definition is to be attended to. It is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions." *Buck v. Colbath*, 3 Wall. 334.

The above quotation not only implies, but expressly declares, that the rule of comity forbids the seizure of property by a competent court only when the property is in the possession, actual or constructive, of another court of concurrent jurisdiction. Again, in the case largely relied on by petitioner, the court enunciates the rule of comity, as follows:

"Property thus levied on by attachment or taken in execution is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim and color of that authority, without respect to the ultimate right, to be asserted otherwise or elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other jurisdiction that attempts to dispossess him." *Covell v. Heyman*, 111 U. S. 179, 4 Sup. Ct. 355.

Here, again, is an emphatic declaration that possession is an essential, and the main, constituent of the rule of comity. In still another case the reason of the rule is thus stated:

"Since, then, property in the hands of an officer of a court under legal process is to be considered as in the custody of the court, the officer would clearly have no right to surrender it without the order of the court to whom he owes obedience; and therefore an attempt of an officer of an alien jurisdiction to take the property out of the possession of the officer holding it must, inevitably, either prove futile, or lead to a forcible collision. Would the officer in possession be justified in surrendering the property at the mandate of a court foreign to him, and without any power whatever to give him protection against the orders of his own court? Would it not be his duty to resist by force the attempt of an officer of a different jurisdiction to take the property from his custody? Can the officer in possession be required to determine for himself, in advance of the judgment of his own court, and of the court from which the writ of replevin issues, the right of the plaintiff suing out a replevin from an alien jurisdiction to the property in dispute, and the authority of the officer serving the writ of replevin to seize and take the property? And can an officer be adjudged in contempt, and punished for his disobedience to the process of an alien jurisdiction, while acting in obedience to the command of his own court, in refusing to deliver up property which he holds as the mere custodian of that court?" *Senior v. Pierce*, 31 Fed. 629, 630.

The reasoning of this extract unanswerably sustains what has already been said in reference to the matter of possession. Petitioner, however, insists, that the distinguishing feature of the rule of comity is, not the possession of the property by the court, but the jurisdiction of the court over the property. Probably there can be found in some of the cases isolated expressions, which give countenance to this contention, but it will not bear the test of careful investigation. Wherever, in such cases, the word "jurisdiction" is employed in this connection, the context, I think, will disclose that it is used synonymously with "possession." The authority invoked by the petitioner on this point is *Cooper v. Reynolds*, 10 Wall. 308-321. In that case it is to be observed that the principle of comity was not in any way involved, nor even remotely considered, and that the only question before or decided by the court was that, under the laws of Tennessee, an attachment of real estate, without personal service upon the defendant, furnishes sufficient ground of jurisdiction to authorize a judgment binding upon the attached property. This rule of law, however, is very different from petitioner's contention that, under the laws of California, real estate, when attached by one court, cannot, without a violation of the rule of comity, be seized under process from any other court. A court may, without personal service on the owner, acquire such jurisdiction over specific property as will support a judgment against the same, and yet not obtain that possession, actual or constructive, of the property, which would preclude its seizure by another court. This situation may arise in a suit to foreclose a mechanic's or other statutory lien, or a mortgage; and that in the latter case jurisdiction may exist without possession is fully confirmed by the fact that the law provides that the court may, in certain exigencies, and through the instrumentality of a receiver, take the mortgaged property into its custody and possession. So, too, as is the case here, there may be jurisdiction without possession, where an attachment is levied upon real estate. In this connection it is perhaps proper to say that I have not overlooked the rule that, "when two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced is entitled to retain it." This rule, with its exceptions and qualifications, is fully discussed in *Sharon v. Terry*, 36 Fed. 337. No such point, however, is involved here. The litigation in this court is a suit in equity to determine conflicting claims and liens to and upon the property, while the litigation in the state court was not only between different parties, but simply an action to recover judgment on a money demand. So that the rule above stated, which rests upon prior jurisdiction, has no relevancy whatever to the pending application.

As to the first of the two questions above stated, my conclusion is that the rule of comity applies only where there is actual or constructive possession by the court of the property involved; or, adopting the definition of Justice Miller, in *Buck v. Colbath*, *supra*:

"It is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts."

This brings me to the second question stated in the outset of this opinion, namely, whether or not the levy of an attachment upon real estate in California gives to the court from which the process issues possession, actual or constructive, of the property. My attention has not been called to any express adjudication of this question by the supreme court of California. Pertinent decisions, however, by the highest courts of other states are numerous, and generally, if not uniformly, to the effect that by an attachment of real estate a lien thereon is secured, but that no sort of possession is acquired by the officer serving the writ. In New Hampshire it has been held that:

"Where real estate is attached, the officer serving the writ gains no right of property in or possession of the real estate by the attachment." *Scott v. Print Works*, 44 N. H. 507.

And, again, that:

"By the operation of the attachment thus provided for and regulated, if lands were attached, the debtor or other person in possession is not disturbed in his possession until the levy of the execution; but the attachment fastens itself, as a charge or incumbrance, upon the land, from the time it is made; so that any subsequent purchaser, even before a levy, can only take subject to the incumbrance of the attachment, nor can any other creditor, by a levy of an execution, avoid the operation of this charge or incumbrance. The plaintiff in the action gains a priority of right, from the date of his attachment, to have satisfaction of his claim out of the estate attached, in case he shall obtain a judgment. In an attachment of personal estate, the sheriff, upon the service of the writ, takes the possession of the goods, and acquires thereby a special property in them for the purpose of enforcing and protecting the attachment, and the rights of all concerned in the attachment and in the goods. He is then accountable, both to the plaintiff and to the defendant, for the disposition of them. If the plaintiff obtains a judgment, they are seized and sold upon the execution. If he fails, they are returned to the debtor. Some person may become accountable for them, and they may thus go back into the hands of the debtor, and the attachment be dissolved; the sheriff having, by means of a receipt for them, the security of some third person, which is in that case to be made available to the creditor. But if the attachment is not dissolved it fastens itself upon the goods as a charge or incumbrance, like the attachment upon real estate, and the avails of them are first to be applied to the satisfaction of the judgment when recovered. Subsequent attachments may be made upon them by the same sheriff, and where there are several attachments the attaching creditors have a right to priority of satisfaction, so far as those goods are concerned; not by priority of judgment, but by that of the attachment. *Poole v. Symonds*, 1 N. H. 292, 294; *Bissell v. Huntington*, 2 N. H. 142; *Hackett v. Pickering*, 5 N. H. 24; *Kittredge v. Bellows*, 7 N. H. 428; *Clark v. Morse*, 10 N. H. 238. Subsequent attachments may also be made of real estate, by the same or any other officer, with a like result as to priority of satisfaction." *Kittredge v. Warren*, 14 N. H. 522.

Now, if the levy of an attachment on real estate brought the property into the possession of the officer serving the writ, that possession would be exclusive, and no other officer could interfere with the property; yet, as above stated, subsequent attachments may be levied by different officers. From this it unavoidably results that an attachment of real estate does not bring the property into the custody or possession of the officer, but merely imposes a lien thereon.

The supreme court of Missouri uses the following language.

"It is now contended by the plaintiff that the agreement to take judgments on the attachment suits and stay execution thereon had the effect of postponing the liens in those cases, and giving his judgment the priority. The attachment suits here operated on real estate, and the liens dated from the time of the levy. The levy was made on all the real estate owned by the defendant in the suits, and the voluntary withdrawal of the pleas in abatement simply allowed the judgments to be taken by default, and did not interrupt the continuity of the lien. Nor do we think the agreement for a stay of execution had the effect of postponing the lien, and giving a preference to the plaintiff's judgments. Had the subject of the levy been personal property, a different principle would govern, for it is held that where, in the case of personal property, a plaintiff directs an officer to hold up his execution, and not to sell or proceed to make the money until he shall give further orders, and until he shall find younger executions crowding in, such acts render the execution dormant and fraudulent as to subsequent executions. *Field v. Liverman*, 17 Mo. 218. But the distinction between liens in cases of real estate and personalty is palpable and well defined. In the one case the judgment confers a lien; in the other it arises out of the execution. Where an execution is levied on personal property, the property is thenceforth in the custody of the officer, and other parties are precluded from taking or intermeddling with it. If the plaintiff sees proper to direct the officer to hold it up, and not to proceed to satisfy the writ, junior judgment creditors may be kept out of their rights and retarded in their collections indefinitely. This would work a fraud which the law will not sanction. But in the case of real estate there can be no such hindrance. A junior judgment creditor, by the provisions of the statute, can levy his execution, and proceed to sell lands at any time; the sale being made subject to the prior lien." *Ens-worth v. King*, 50 Mo. 482.

In Vermont, the distinction between attachments of real and personal property is thus stated:

"In the attachment of personal estate the officer acquires a special property, and the right to its custody and possession. For any injury to it the right of action is in the officer, as, in any termination of the case, he is accountable for the property either to the creditor or debtor. That special property the officer may release, so as to destroy any lien upon the property created by the attachment. He may permit the possession of the property to remain with the debtor, in which case it can be held by a subsequent attachment, or a subsequent purchaser, free from any lien or claim of the officer upon it. His right over that property is independent of the creditor or debtor, as, in a given event, he is responsible for it to the debtor, and in another event to the creditor; and that right exists so long as that special property continues in him. But we apprehend a different rule applies in the attachment of real estate. When such attachment is made, the officer acquires no special property in the land. He is not required or authorized to take the possession of it, nor, in any event, is he accountable for the property, or for its rents, incomes, or profits. This agency and authority is terminated whenever his duties are performed, for which the process was put into his hands. The lien created by the attachment, whatever may be its character, is in the creditor, and he only can release or discharge it." *Brale v. French*, 28 Vt. 552.

To the same effect, the supreme court of Massachusetts declares:

"The analogy between the attachment on mesne process of real and personal property, though designated by the same term, is very slight. The early history of attachments of personal property in this commonwealth, as a security for a debt to be recovered, and the original connection, or perhaps identity, of this process with the writ of distringas at common law, and the rules applicable to the latter process, can go very little way in aiding us to a right construction of the rules affecting an attachment of real estate. We must, therefore, be governed in the construction of these rules by usage and statute, the nature of the process, and the reasons upon which it is allowed.

The object of this process, as it is now regulated by usage and by statute, is to give to the creditor, upon the commencement of his suit, a lien upon the real estate of his debtor. It is a branch of that system of policy which charges the real estate of a debtor with the payment of his debts both during his life and at his decease. By the attachment, no estate passes, no interest vests in the creditor; neither the interest nor the possession of the debtor is divested; nor does the officer or creditor acquire any right to take the issues or profits. It constitutes a real lien which can be made available to the creditor only upon a compliance with various conditions, namely, that he shall recover a judgment in that suit, that he shall obtain no other satisfaction than by levying on the real estate, and that he shall make such levy within a limited time, and conform to the rules of law. In almost all these respects this process is distinguishable from an attachment of personal property, or distringas. In the latter the officer must take the goods into his own custody, otherwise the security would not be effectual. He must keep possession, because he is to stand responsible to the creditor if he recovers judgment, otherwise to the debtor. He has a special property, because this is necessary to enable him to defend his possession, and perform the duties which the law imposes on him. Most of these distinctions are founded on the locality, and consequently fixed and immutable character, of real estate. The acts of seisin and possession, therefore, necessary to give effect to an attachment of personal property, are wholly unnecessary in regard to real estate, and "ad impossibilia seu vana lex non cogit." Taylor v. Mixer, 11 Pick. 346.

More strongly in point than any of the cases yet noticed is that of *Oldham v. Scrivener*, 3 B. Mon. 579. From the opinion in this case I extract the following:

"Oldham sued out an attachment in chancery on a bill filed under the statute of 1838 (Acts Assem. 1837-38, p. 212), and had it levied on a tract of land as the property of Scrivener. Also two other bills had been filed by other creditors to subject the tract to the satisfaction of their demands about the same time. Afterwards, and while those proceedings were depending, Oldham obtained a judgment at law for his debt, and sued out execution thereon, and had it levied on the land, and purchased it, and procured the sheriff's deed for the same. On the motion of Scrivener, the circuit court quashed the levy, sale, and sheriff's deed upon the sole ground that the proceeding was unauthorized and illegal because of the prior levy and pendency of the proceedings in chancery. We think the court erred in this order. Upon the levy of an attachment or execution on personal goods the officer seizes them and holds them in his custody, and they cannot be levied on, seized, or taken into possession by another officer. To allow this to be done would be to encourage conflicts and controversies between different officers, each contending for the possession of the property. * * * But real estate stands upon different ground. The officer has no right, upon the levy, to take possession of land, or to oust the occupant of his possession; nor has he the right to deliver the possession to a purchaser under his sale. * * *

See, also, *Saunders v. Insurance Co.*, 43 Miss. 593; 1 Wade, Attachm. §§ 164-251; *Drake*, Attachm. §§ 239, 240.

Upon the foregoing authorities there can be no doubt but that the levy of an attachment on realty simply creates a lien, and does not give to the officer levying the writ possession, actual or constructive, of the property. And such, I am satisfied, is the rule in California. Code Civ. Proc. Cal. § 537, is as follows:

"The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered unless the defendant give security to pay such judgment," etc.

This language shows clearly that the object of the attachment law is to provide the plaintiff means whereby he may obtain security for his debt. Section 542 of said Code prescribes the manner in which a writ of attachment shall be executed, and is as follows:

"Sec. 542. The sheriff to whom the writ is directed and delivered, must execute the same without delay, * * * as follows: (1) Real property standing upon the records of the county in the name of the defendant, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached. * * * (3) Personal property, capable of manual delivery, must be attached by taking it into custody. * * *"

Thus it will be seen that, in levying an attachment upon real estate, the officer does not take the property into his custody. The possession of the occupant is in no way disturbed by the levy. Such occupant retains the actual and exclusive possession of the property. Under these circumstances it is impossible for constructive possession to be in the officer making the levy, for, if this were so, the officer would necessarily hold in antagonism to the occupant, and thus there would be presented the anomalous and illogical situation of one person in actual possession, and another, claiming adversely, in constructive possession, of the same property, at the same time. Such a solecism cannot exist in law. Since, then, the idea of constructive possession in the officer levying an attachment upon real estate is wholly inconsistent with the unquestioned fact of the actual, uninterrupted possession of the occupant of the premises, it necessarily follows that the only acceptable theory as to the effect of an attachment of real estate is that the attachment simply imposes a statutory lien, just as a mortgage imposes a contractual lien. Again, where personal service is obtained on the defendant, as was done in the present case, the attachment is simply auxiliary to the main action, and in no wise necessary to the jurisdiction of the court. No order whatever is made by the court concerning the attached property, unless it be perishable; nor does the final judgment refer to it in any way, but the judgment, in form and substance, is the same as in cases where there is no attachment. This is also true of the execution. Furthermore, any number of attachments, all issued by different courts, may be levied by different officers upon the same real property, and no one of them will interfere with the others, for the obvious reason that each only creates a lien, and under none of them does the officer take possession of the property. Furthermore, when attached real property has been sold under execution on a money judgment, and deed made by the sheriff, the court cannot, in that suit, without some statutory provision for a writ of assistance, put the purchaser in possession, but resort must be had to another and separate action. Freem. Judgm. art. 350. This shows conclusively that the court has no custody of the property, for otherwise it would simply transfer its possession to the purchaser, and a separate action to recover possession would neither be necessary nor maintain-

able. The following cases from the supreme court of the United States are confirmatory of the conclusions reached in this opinion, viz. *State of Georgia v. Jesup*, 106 U. S. 458-464, 1 Sup. Ct. 363, and *Wiswall v. Sampson*, 14 How. 52. In the former case the state of Georgia had levied executions for taxes on certain real property of the Atlantic & Gulf Railroad Company, which property was afterwards taken possession of by a receiver appointed in a foreclosure suit in the United States circuit court against said company, wherein Jesup, surviving trustee, was plaintiff. The state of Georgia petitioned the circuit court for leave to proceed with said executions, which petition was refused, and the order of the court made therein as follows:

"The state of Georgia having petitioned for leave to proceed with certain executions for taxes, after argument and consideration it is ordered and decreed that the said petition of the state of Georgia be denied, and the same is hereby dismissed."

The supreme court, on appeal, affirmed the order, mainly on the ground that the state had not made itself a party to the suit; but in the opinion occurs the following language:

"If, by law, the levies in behalf of the state were valid to the extent of creating a prior lien in its favor for taxes, or for the penalties or interest thereon,—as to which questions we express no opinion,—that priority was not affected or displaced by the subsequent possession of the property by the receivers in the foreclosure suit. In no legal sense has the state been injured by the order dismissing its petition. It may not, therefore, claim, as a matter of right, that this court shall, upon this appeal, review the action of the court below in declining to surrender possession of the property covered by the levies under the executions for taxes."

The syllabus of the case is as follows:

"In a foreclosure suit pending in the circuit court, the mortgaged property being in possession of its receivers, the state of Georgia presented a petition, in which, declining to become a party to the suit, it asked that the receivers be required to withdraw from the possession of a part of the property in their hands, upon some of which executions for state taxes had been levied prior to their attachment. The petition was denied and dismissed. *Held*, that the action of the court could not be reviewed upon the appeal of the state for the reason, if there are no others, that the order did not conclude any right it had in virtue of the execution, or of the levies made thereunder."

Here was a direct holding of the United States circuit court, undisturbed on appeal to the supreme court, that the levy by a sheriff of an execution issued under state authority, and for taxes, did not preclude a subsequent seizure of the property by a receiver of said court.

In the other of the two cases last cited—*Wiswall v. Sampson*—the supreme court held that, where an execution issued out of the United States circuit court had been levied upon real property by the marshal, and subsequently thereto the same property was taken into the possession of a receiver appointed by a state court, and during the continuance of such possession sold by the marshal under said execution, the sale was absolutely null and void. The court says:

"The right of the petitioner, therefore, under his title, to the possession of the property as against the right of Wiswall under the proceedings in equity

and the decree in his favor would seem to be a question directly involved. The court so understood the issue, and passed upon it, holding, as we hold in this case, that the sale was illegal and void, having been made while the estate was in the possession and safe-keeping of the court of chancery."

This language implies, and the whole opinion seems to proceed upon the theory, that the possession of the receiver was rightful; or, in other words, that the prior levy of the execution by the marshal did not so bring the property into the custody of the law as to prevent its sequestration afterwards through the agency of the receiver.

The supreme court, discussing, in a later case, the question of actual possession as an element of the rule of comity, makes the following reference to *Wiswall v. Sampson*, supra:

"In this aspect the case is directly within the rule of decision established in *Wiswall v. Sampson*, 14 How. 52. That was a controversy as to the title to real estate, one party claiming under a sale upon execution issued on judgments rendered in the circuit court of the United States, the property being at the time of this sale in the possession of a receiver of a state court, under whose subsequent decree and sale the defendant claimed title. It is a significant fact in that case that at the time of the appointment of the receiver by the state court the executions upon the judgments had been issued and levied, and were a subsisting lien upon the premises." *Heidritter v. Oil-Cloth Co.*, 5 Sup. Ct. 135.

My conclusion is that the levy of the attachment by the Hall & Stilson Company upon the real property of the Vanderbilt Mining & Milling Company did not so bring the property within the custody of the state court as to render unlawful its seizure by the receiver of this court.

It is undoubtedly true, as insisted by petitioner in its brief last filed, that the appointment of a receiver in this suit did not discharge its attachment, or displace the lien thereby acquired. On the contrary, in the administration of the property, this lien will be recognized and protected, according to its priority. It is also, doubtless, within the power of this court to grant to petitioner leave to proceed with the sale of the property under its execution; but I do not believe that, in view of the existing conditions, it would be right or proper for such leave to be now granted. The power and the duty of the court are indicated in the following quotation from *Wiswall v. Sampson*, supra:

"Neither do we doubt but that it is competent, and might, in some cases, be fit and proper, for the court, where the property in dispute is ample, and the litigation protracted, to permit the execution to issue, and compel the prosecuting creditor to pay off the judgment. 3 Beav. 428. But it is manifest that these proceedings in behalf of the prior incumbrancer should be under the control of the discretion of the court, as the condition of the title to the property may frequently be so complicated and embarrassed that, unless the sale was withheld until the title was cleared up by the judgment of the court, great sacrifice must necessarily ensue to the parties interested."

Two, at least, of these prerequisite conditions of leave to a judgment creditor to proceed under his execution, are wanting in the present case: First, that the property is ample to meet all the claims against it; second, that there are no complications or embarrassments as to the title which would prevent the full value of

the property being now realized at a forced sale. So far from these conditions being shown in the present case, it is doubtful whether the first exists, while, certainly, the latter does not; that is to say, it is questionable if the property, at forced sale, would bring enough to pay off all the creditors, while, unquestionably, the condition of the title is so complicated and embarrassed that, unless the sale be withheld until the title is cleared up by the decree, great sacrifice would necessarily ensue to the parties interested.

The petition will be allowed as to the amalgam and denied as to the other property.

NEW YORK SECURITY & TRUST CO. et al. v. LOMBARD INV. CO. OF KANSAS et al.

(Circuit Court, W. D. Missouri, W. D. March 10, 1896.)

No. 1,923.

1. CORPORATIONS—INSOLVENT INVESTMENT COMPANY—RECEIVERS—GUARANTIES.

Receivers were appointed for an insolvent investment company, incorporated under the laws of Missouri, whose liabilities consisted mainly of guaranties, in various forms, indorsed on bonds, secured by real estate mortgages, executed by borrowers to the company, and subsequently sold and transferred by it to investors with the guaranties mentioned. *Held*, that the rights of such investors were governed by the state statute relating to assignments for benefit of creditors, which provides that the assignment shall be "for all the creditors of the assignor in proportion of their respective claims" (Rev. St. Mo. 1889, § 424); that, in the distribution of the property of such company, all claims should be allowed which, at the time of the appointment of the receivers, (1) furnished a present cause of action against the guarantor, or (2) constituted direct obligations on its part, whether due or to become due, or (3) which, though not then matured, or not constituting direct obligations, thereafter matured or would mature, or become direct obligations, before any order of distribution was made; and that all claims should be rejected (1) which arose on guaranties of collection, as distinguished from guaranties of payment, where no proceedings had been taken by the holder to collect from the maker or from the mortgaged premises, or (2) which were not matured, and in respect to which there had been no default of interest, or (3) in which, by agreement between the holder and maker, without the assent of the guarantor, the time of payment of the principal obligation had been extended.

2. GUARANTY—DEBT MATURING ON DEFAULT IN INTEREST.

A claim against a guarantor of payment matures, so as to become a direct obligation, not only on the date the guarantied debt becomes due, but on default in payment of interest or other preliminary obligation, when, by the terms of the contract, such default is made to precipitate maturity of the debt.

3. INTEREST—APPOINTMENT OF RECEIVERS.

Interest on claims against an insolvent corporation in the hands of a receiver is to be calculated only to the date of the appointment of the receiver.

4. INSOLVENT CORPORATION—RECEIVERS—CLAIMS SECURED BY COLLATERAL.

The fact that a creditor's claim is secured by mortgage or otherwise does not affect his right to prove for the full amount of the claim, nor does the fact that he has realized part thereof out of the collateral, since the date of the receivership; but in the latter case he is entitled to dividends only until the balance of his debt is satisfied.

5. GUARANTY—INSOLVENT INVESTMENT COMPANY—RECEIVERS.

Receivers were appointed for an insolvent investment company, which had sold and transferred obligations secured by mortgage, with guaranties of payment thereof, but with a provision that, in case of default, it should have two years within which to collect and pay over the amount of the debt. *Held*, that claims arising on these guaranties were provable against the receivers where default had occurred and the two years had expired, whether these two events had occurred both before the appointment of the receivers, or one before and one after such appointment, or both after the appointment; and, further, that such claims were provable after default, although the two years should not expire before the order of distribution.

6. SAME.

A guaranty of collection of an obligation secured by mortgage which is transferred by the guarantor is an undertaking to pay the debt on condition that the person to whom the guaranty is given shall diligently proceed against the principal debtor and the mortgage security, and, in default of such diligence, the guarantor is released.

7. SAME—GUARANTIES OF PAYMENT AND COLLECTION—INTERPRETATION.

An investment company selling and transferring an obligation secured by mortgage agreed, by indorsement thereon—"First, to guaranty the payment of the coupons attached hereto at the maturity thereof; second, to collect at its own expense, and to pay over, the principal hereof at maturity, provided the same is paid by the maker; third, in event of default being made by the maker, to collect at its own expense, and to pay over, the principal hereof, within two years from maturity of the same," with interest at 6 per cent. per annum. *Held*, that this was a guaranty, not of collection merely, but of payment.

This was a bill by the New York Security & Trust Company, Maria H. Hotchkiss, and George Burnham, suing in behalf of creditors and stockholders, against the Lombard Investment Company of Kansas, the Lombard Investment Company of Missouri, the Valley Loan & Trust Company, the Alliance Trust Company, and the City Real Estate Company. The Concordia Loan & Trust Company has also been made a party defendant. The bill alleged, among other things, that the defendant companies were insolvent, and prayed for the appointment of receivers, the winding up of their affairs, and the distribution of their assets.

The Lombard Investment Company of Kansas was organized about the 1st of January, 1882, under the laws of the state of Kansas, with a capital stock which was increased at various times until it amounted to \$1,875,000, all fully paid up. The company was engaged in the business of loaning money on real estate and all other kinds of securities; buying, selling, improving, and leasing real estate and all other kinds of property; issuing its own obligations of different kinds; buying and selling bonds, mortgages, and securities; and, generally, conducting any business incidental to or connected with the above-mentioned purposes, including a general trust and investment business. One of its main lines of business was dealing in farm property and city real estate in the South and West, loaning money on similar property, negotiating bonds and mortgages given for such loans, with its own guaranty in some form annexed thereto, and in buying and selling various kinds of securities, including the sale of debenture bonds made by the company itself. In the course of this business, it became the owner and holder of large quantities

of real estate in Western and Southern states and in the territories. The debenture bonds executed by the company itself were secured by a deposit of bonds, securities, and other property, as collateral, with trustees, under various trust agreements. This Kansas company continued in active business, in its own name and on its own behalf, meeting its obligations and fulfilling its guaranties, until about August 1, 1890, when it sold and conveyed its entire property and interests of all kinds to the defendant the Lombard Investment Company of Missouri. The latter company was organized under the laws of Missouri, with its chief place of business at Kansas City, and has a paid up capital stock of \$4,000,000. It acquired and now owns and holds all the stock of the said Kansas company, and assumed all of its obligations of whatever kind, with the same force and effect as if it had originally, on its own behalf, entered into the said obligations. The Missouri corporation was formed for substantially the same purposes as the Kansas company, and continued the business of the latter. Under trust agreements of the same general character as those made by the Kansas company, the Missouri corporation issued its own debenture bonds in large sums, and deposited securities and properties with the trustees. It also loaned money upon notes secured by real-estate mortgages, and sold such notes with guaranties requiring it, under certain conditions, to pay principal and interest in case of default by the borrower. Its business of various kinds became of vast extent, and at the time of the filing of the bill herein, there were outstanding, in loans guarantied, either by the Missouri company or the Kansas company, about \$34,000,000. The defendants the Valley Loan & Trust Company, the Alliance Trust Company, and the City Real Estate Company, were organized for the purpose of aiding in the business of the Lombard Investment Company of Missouri, which subscribed and paid up their stock in full. The defendant the Investor's Company was another auxiliary company, though not originally organized by the Missouri corporation. All of the defendant companies, except the Investor's Company, were insolvent at the time the bill was filed. In accordance with the prayer of the bill receivers were appointed as receivers for each and all of the defendant companies, and, under ancillary bills, were also appointed in the various judicial districts of the Eighth circuit. On May 18, 1895, a final decree was entered referring the cause to Edward H. Stiles, standing master in chancery, who, among other things, was directed, by the eighth paragraph of the decree, to examine the claims of all creditors and stockholders, and, as soon as practicable, "make such a report as shall fully show the respective rights of the different claimants."

The master accordingly made the following report, dated January 23, 1896:

Report of Edward H. Stiles, Master in Chancery, upon the Classifications of Claims.

The undersigned master in chancery, in the performance of the duties imposed upon him by the final decree herein, respectfully begs

leave to submit to the court the following report upon the classification of the numerous claims, of various character, which have been presented to him for allowance:

The claims against the Lombard Company arise on direct obligations of the Lombard Investment Company in the shape of debenture bonds, and upon the guaranty of said company indorsed on bonds secured by real-estate mortgages, executed by borrowers to said company, and by the company subsequently sold and transferred to investors with the guaranty referred to. A portion of the bonds thus indorsed by the Lombard Company were executed by some one of the auxiliary companies named among the insolvent defendants, and then indorsed with guaranty, and sold by the Lombard Company. This was brought about by the title to certain properties sold under foreclosure proceedings of the Lombard Company being taken in the name of such auxiliary company, after which the auxiliary company would execute its bond, and mortgage securing it, to the Lombard Company, who would sell the same on the market to some investor. In these cases the holder of such obligation would have a claim against the assets of both companies, or, in case the claim for any reason was not a provable one against the Lombard Company, it would nevertheless constitute a good claim against the assets of the auxiliary company executing the bond, and provable as such. Of the entire obligations, aggregating some \$40,000,000, there have been, up to the present time, presented to the master for allowance, claims aggregating about \$20,000,000.

In accordance with the suggestions contained in the eighth paragraph of the master's report accompanying the first draft of the final decree, he has permitted everybody claiming to be a creditor, in the first instance, to present his claim and proofs, reserving the right to and with the purpose of subsequently classifying the claims and passing upon their validity and the respective rights of the different claimants. For this purpose, and as preliminary to the order of distribution and the final report of the master, showing the individual claims allowed, and the respective amounts allowed to each person, he has, as contemplated by the eighth paragraph of the final decree, prepared and now presents the following report showing the different kinds of claims, the classification thereof, and what in his opinion are, and what are not, claims entitled to distribution. In this way it can be definitely determined in advance, as is necessary to be done, as to how distribution shall be made, and upon what character of claims, according to the classification made. If the determination of the master upon any particular class is not satisfactory to any of the claimants embraced therein, they, or any one of them, may file with him exceptions to this report in respect thereto within 30 days from the date hereof, and afterwards renew the same in court according to the practice in that behalf. Should exceptions thus filed be sustained, the classification herein made will be amended accordingly, and, if overruled, that recommended herein would stand. So that, in either case, through this mode, a comparatively early determination of the validity of each class of claims can be had, without waiting until after all the claims are in,

after which the respective claims allowed, and the amount thereof, and the persons entitled thereto, will be designated and reported, and distribution ordered accordingly.

As before suggested, the great bulk of the claims arise upon the guaranties hereinbefore mentioned. And these guaranties are so various in form as to give rise to variant questions respecting the liability of the Lombard Investment Company thereon, and as to whether certain claims arising thereunder are or are not entitled to allowance and distribution. Some of them are guaranties of collection, some of payment, some at maturity, and some within two years thereafter, some under extension agreements, some merely guarantying title,—that the mortgage securing the bond sold and assigned is a first lien; that the company will cause the property to be kept insured, and look after and see that the taxes are paid,—some in one form, some in another. These guaranties are 10 in number and in the following form:

Guaranty No. 1, Beginning Nov. 24, 1882, Loan 01.

For value received, the Lombard Investment Company hereby guaranties—First, the collection of the principal of the within note; second, the prompt payment of the coupons attached thereto. In witness whereof, the Lombard Investment Company has signed and delivered these presents by its ——— president this ——— day of ———, 188—.

—————, President.

Guaranty No. 2.

For value received, the Lombard Investment Company hereby assigns this bond to ———, or order, and guaranties—First, the prompt payment of the coupons attached hereto; second, the collection of the principal of the within bond. In witness whereof, the Lombard Investment Company has signed and delivered these presents by its ——— president this ——— day of ———, 188—.

—————, President.

Guaranty No. 3, from about Sept. 1, 1886, to March 7, 1889, Ending with Loans 032,336 and 025,866.

For value received, the Lombard Investment Company hereby assigns this bond or note to ———, or order, and agrees—First, to guaranty the payment of the coupons attached hereto at the maturity thereof; second, to collect at its own expense and to pay over the principal hereof at maturity, provided the same is paid by the maker; third, in event of default being made by the maker, to collect at its own expense, and to pay over the principal hereof, within two years from the maturity of the same, and to pay interest at the rate of six per cent. per annum, payable semiannually, until the principal is paid. In witness whereof, the said Lombard Investment Company has caused its corporate seal to be hereunto affixed, duly attested. Dated this ——— day of ———, in the year of our Lord one thousand eight hundred and eighty——.

Lombard Investment Company, by ———.

Guaranty No. 4, from March 8th, 1889. This Guaranty Used on Utah and Tennessee Loans up to Jan. 7th, 1892.

For value received, the Lombard Investment Company hereby assigns this bond or note to ———, or order, and guaranties the payment of the coupons attached hereto at maturity. It also guaranties the payment of the principal hereof within two years after the same becomes due, and to pay interest thereon semiannually, after maturity, at the rate of six per cent. per annum until paid. The Lombard Investment Company reserves the right, when necessary, to redeem this note at any time before maturity, at par and accrued interest. In testimony whereof, the said Lombard Investment Com-

pany has caused its corporate seal to be hereunto affixed, duly attested under the hand of its — president, this — day of —, in the year of our Lord one thousand eight hundred and —.

Lombard Investment Company, by —, President.

Guaranty No. 5, Used with No. 4, for States Other than Utah and Tennessee, to Jan. 6, 1892.

For value received, the Lombard Investment Company hereby assigns a certain bond, made by —, for \$—, dated the — day of —, 18—, and due — day of —, 18—, and numbered —, to —, or order and guaranties the payment of the coupons attached hereto at maturity. It also guaranties the payment of the principal hereof within two years after the same becomes due, and to pay interest thereon semiannually after maturity at the rate of six per cent. per annum until paid. The Lombard Investment Company reserves the right, when necessary, to redeem this note, at any time before maturity, at par and accrued interest. In testimony whereof, the said Lombard Investment Company has caused its corporate seal to be hereunto affixed, duly attested under the hand of its — president this — day of —, in the year of our Lord one thousand eight hundred and —.

Lombard Investment Company, by —.

Title Guaranty No. 6, Used on Unguaranteed Loans, Beginning Nov. 1, 1891, Loan No. 11,520.

For value received, the Lombard Investment Company assigns to —, or order, without recourse, a certain bond or note, made by —, for \$—, No. —, and guaranties to the holder hereof: First. (a) That the title to the real estate described in the mortgage or deed of trust securing the loan is perfect. (b) That the mortgage or deed of trust securing the same is a first lien on the property described therein. (c) That the said property has been personally examined by a salaried examiner in the employ of this company, and that the amount of this loan is not over 40 per cent. of said examiner's valuation of the property. Second. (a) That this company will, until this loan is paid, cause said property to be kept insured for the amount stipulated in the mortgage or deed of trust, as additional security for the holder hereof. (b) That it will look after the taxes levied upon the property therein, and, if necessary, will purchase said property at tax sale for the benefit of the holder hereof. Third. That it will promptly attend to the collection of interest and principal of this loan for the owner hereof free of charge. In testimony whereof, the Lombard Investment Company has caused its corporate seal to be hereunto affixed, duly attested under the hands of its — president this — day of —, in the year of our Lord one thousand eight hundred and —.

Lombard Investment Company, by —, President.

Guaranty No. 7, Beginning Jan. 7, 1892, Loans 045,589 and 051,999.

For value received, the Lombard Investment Company hereby assigns a certain bond, made by —, for \$—, — day of —, 18—, and due on the — day of —, 18—, and numbered —, to — or order, and guaranties the payment of the coupons attached hereto at maturity. It also guaranties the payment of the principal hereof two years after the same becomes due, and to pay interest thereon semiannually after maturity at the rate of six per cent. per annum until paid. The Lombard Investment Company reserves the right, when necessary, to redeem this note, at any time before maturity, at par and accrued interest. In testimony whereof, the Lombard Investment Company has caused its corporate seal to be hereunto affixed, duly attested under the hand of its — president, this — day of —, in the year of our Lord, one thousand eight hundred and ninety—.

Lombard Investment Company, by —, President.

Guaranty No. 8, Feb. 1, 1892, Extension of Loans.

The Lombard Investment Company hereby consents to the extension of loan No. — for \$—, made by —, negotiated by the Lombard Investment Company, for a period of — years, and in consideration of such extension hereby agrees that its guaranty, executed on the back of said bond,

shall remain in full force and effect until said loan is paid. The Lombard Investment Company reserves the right, when necessary, to redeem this note, at any time before maturity, at par and accrued interest. In witness whereof, the said Lombard Investment Company has caused its corporate seal to be hereunto affixed, and duly attested under the hand of its _____ president, this _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

Lombard Investment Company, by _____, President.

Guaranty No. 9, Used on Loans Extended, Commencing July 19th, 1892.

The Lombard Investment Company hereby consents to the extension of loan No. _____ for \$_____, made by _____, negotiated by the Lombard Investment Company for a period of _____ years, and in consideration of such extension hereby guaranties the payment of the principal of said loan two years after same becomes due, and agrees to pay the interest thereon semi-annually at the rate of six per cent. per annum from _____ until paid. The Lombard Investment Company reserves the right, when necessary, to redeem this note, at any time before maturity, at par and accrued interest. In witness whereof, the said Lombard Investment Company has caused its corporate seal to be hereunto affixed, and duly attested under the hands of its _____ president this _____ day of _____, in the year of our Lord one thousand eight hundred and ninety_____.

Lombard Investment Company, by _____, President.

Guaranty No. 10, for All Paper Sent E. L. I. Co. under New Agreement.

Bond No. _____, dated _____ day of _____, 18____, made by _____, for \$_____, with interest at _____ per cent. per annum, due _____. For value received, the Lombard Investment Company, a corporation of the state of Missouri, hereby guaranties to the holder of the within-described bond, and his assigns, the payment of the principal and interest of said bond according to its tenor. In witness whereof, the Lombard Investment Company has caused these presents to be signed by its president or vice president, and its corporate seal to be hereunto affixed, this _____ day of _____, 18____.

_____, President.

The questions arising under these different forms of guaranty, and the several questions arising out of the situation respecting the validity and provability of claims, I think, after pretty mature consideration, should be disposed of as shown by the following classification and principles:

I. Claims Which should be Allowed.

Class No. 1 embraces claims which, at the time of the appointment of the receivers, furnished a present cause of action against the guarantor.

Class No. 2 embraces all direct obligations of the company at the date of said appointment, whether due or to become due at some time in the future.

Class No. 3 embraces all claims, though not matured, or which did not, at the time of the appointment of the receivers, constitute a direct obligation, but which have since matured, or will have matured, or constitute such obligation, before any order of distribution is made.

Class No. 4 embraces claims against any of the auxiliary companies, based on bonds executed by such companies, as stated on the first page of this report. These claims are good as against both the assets of the Lombard Company and the auxiliary company executing the bond. If for any reason invalid against the Lom-

bard Company, they are still valid against such auxiliary company.

Class No. 5 embraces certificates issued by the Subcompany Land Trust. These stand as audited claims by virtue of the eighth paragraph of the final decree.

II. Claims Which should be Rejected.

All other claims should be rejected. Among those rejected should be included: (1) Those arising on guaranties of collection, as distinguished from guaranties of payment, where no foreclosure proceedings or action against the maker has been commenced, and where the holder has not shown proper diligence in efforts to collect his claim from the maker of the note or bond, or out of the mortgaged premises, securing the same. (2) Those not matured, and in respect to which there has been no default, in payment of interest or of any kind. (3) Where extensions of the principal obligation have been made by agreement between the holder and the maker, without the assent of the Lombard Company or the receivers.

III. Other Rules Governing.

(1) Claims should be held to have matured, not only on their due date, but on default in payment of interest or other preliminary obligation, when, by the terms of the contract, such default is made to precipitate the maturity of the debt. (2) The date to which the interest on claims be calculated should be that of appointment of the receiver, September 18, 1893. (3) Collateral security, by mortgage or otherwise, held by the claimant, does not affect the claimant's right to prove up for the full amount of his claim, nor does the fact that he has realized a part of his claim from the subjection of such collateral since the date of the receivership; but he is entitled, in such case, to receive distribution or dividends from the general estate until such dividends, added to the amount realized from his collaterals, are equal to, or sufficient to satisfy, his debt.

The reasons upon which these classifications and conclusions are based, briefly stated as practicable under the circumstances, are as follows:

I. In Respect to Claims That should be Allowed.

Class No. 1. Those claims which, at the date of the receivership, furnished a present cause of action against the guarantor. This proposition is self-evident, and needs no argument to enforce it.

Class No. 2. Those constituting direct obligations of the company at the date of the receivership, whether then due or to become due in the future. This proposition is also too plain to require argument.

Class No. 3. Those not fully matured, or which, at the time of the appointment of the receivers, did not then constitute a present right of action, or a direct obligation, but which have since matured, or will have so matured, or constitute such obligation, before any order of distribution. In respect to this proposition, there is more

difficulty of determination. Much may be said on either side. Against it, it has been urged, on the one hand, by counsel invited to present their views, that considerations of convenience, and legal principles to be derived from certain adjudications called to my attention, are alike opposed to it; that no claim should be allowed, or receive distributions, which did not, at the date of the receivership, constitute either a present right of action, or a direct and certain obligation, and that all claims since matured, or becoming such obligations, should be unconditionally rejected. On the other hand, it has been urged with equal vigor that all claims, whether matured or unmatured, and whether constituting a direct obligation or a mere contingent liability of the future, should be admitted to proof and allowed, the court reserving, in the case of an obligation purely contingent, sufficient of the proceeds of the sale to apply on such obligation in case it should in the end become certain; or else that a valuation should be made of the contingent liability, and the same allowed as a claim. Between these two extremes, in my judgment, the middle course should be pursued in the present case, pointed out in classification No. 3 of claims that should be allowed, and classification No. 2 of claims that should be rejected, as hereinbefore specified.

Upon the exact point involved, whether a claim maturing or an obligation arising after the date of the receivership, and before any order of distribution, should be allowed, there is (independent of those arising under the bankrupt acts and which are claimed not to apply) a sparseness of decisions hardly to be expected. But very few cases are to be found directly in point. As opposed to the allowance of such claims the case of *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372, has been vigorously pressed upon my attention. But a careful examination of that case will show that the only question involved, and the only one decided, was that a person holding collateral security, or who has made collections therefrom, was, notwithstanding, and regardless of that, entitled to prove up for the full amount of his claim, and to receive dividends thereon until the dividends so received, when added to the amount realized from the collaterals, were sufficient to satisfy the claim, and the incidental one that interest on the claim should be calculated and allowed to the date of the receivership only. That decision in respect to both of those principles has been followed by me in the present case, as shown by rules 2 and 3 of the rules governing proof of claims hereinbefore set out.

But while these were the only points involved or decided, it is nevertheless energetically claimed that the logic of that decision is to the effect that the provability and right of allowance of a claim arising on a guaranty must be determined by its exact status at the date of the receivership. In other words, if mature or actionable, or constituting a direct obligation the day before the receivers were appointed, it is provable; if it become so the next day or the next week afterwards, it is not. The theory on which this claimed deduction is based is that, on the very moment of declared insolvency, the assets, in the eye of the law, all belong to the creditors

pro rata, and that only those are to be deemed owners whose claims are at that time matured or actionable. Conceding the correctness of the theory that the creditors became the pro rata owners of the assets upon the declaration of insolvency, I am nevertheless of the opinion, after a careful consideration of that case in respect to the questions involved and decided, that it does not justify the deduction above claimed in respect to the present question, nor, as I have already said, was this question either decided or involved. Considerable has been said by counsel about the inconvenience of any other rule, and in that connection reference has been made to the remarks of the court on that subject in the case referred to. But it will at once be seen that the remarks referred to have no bearing whatever on the question at issue here. What the court did say in that respect, and in reference to what considerations, is shown by the following quotation from the opinion:

"The next question is, shall creditors of an insolvent national bank, in proving their claims, be allowed any credit for collections from collateral made subsequent to the declared insolvency and before proof of claim? If so, shall the claims as proven be also subsequently reduced by collections from collateral made after proof and before dividends are declared, thus varying the basis of distribution from dividend to dividend? * * * There is one authority, and only one, that upholds the view that a creditor who has once proved his claim shall reduce that claim by all collections made before the declaration of each dividend, on the theory that he is entitled to a ratable distribution on his debt as it is at the time of distribution, and the collections made after proof of claim and before each dividend must reduce the debt pro tanto. The argument *ab inconvenienti* would weigh strongly against following this case. The rule it lays down would require a readjustment of the basis of distribution at the time of declaring every dividend, and would involve endless labor and confusion."

It is hardly necessary to say that these remarks and this doctrine have no application to this question, for the reason that they were made for the purpose of upholding the decision of the court to the effect that collections upon collateral made subsequent to the declared insolvency should not be taken into consideration for the purpose of reducing the claim,—the very doctrine of this report, as I have before pointed out. Nor are they applicable for the further reason that no inconvenience or delay will accrue from the operation of the rule embraced in class No. 3 of claims recommended to be allowed, and which we are considering, viz.: That claims, though not matured, or which did not, at the time of the appointment of the receiver, constitute a direct obligation, but which have since matured, or will have matured, or constitute such obligation, before any order of distribution is made, should be allowed. If a series of dividends were to be declared, and the proofs and allowance of claims were to be kept open until after the order of distribution, and until the close thereof, the case would be radically different, and such a rule could not be sustained, if for no other reason than that of *ab inconvenienti*, as it would involve the endless confusion and labor pointed out in the *Chemical Nat. Bank* case *supra*. But no inconvenience, delay, or embarrassment to the estate can arise from the application of the rule embraced in the classification referred to. This being the case, and as it is clear that a

more perfect equity will be reached by refusing to make any arbitrary distinction between the rights of creditors whose claims matured yesterday or to-day, provided they are sufficiently matured before any order of distribution is made, it is my judgment that the classification made in that behalf is the proper one to be made. *Hoyle v. Scudder*, 32 Mo. App. 372; *Hussey v. Crawford*, 152 Mass. 596, 26 N. E. 424.

It has been suggested, and I think correctly, that the question as to what are and are not provable claims, must be governed by the law of Missouri on that subject. And in this connection section 2513 of the Revised Statutes of Missouri, with which I am familiar, has been called to my attention. It provides that:

"Upon the dissolution of any corporation already created, or which may hereafter be created by the laws of this state, the president and directors or managers of the affairs of said corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of such corporation, with full powers to settle the affairs, collect the outstanding debts and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them; to sue for and recover such debts and property by the name of the trustees of such corporation, describing it by its corporate name, and may be sued by the same, and such trustees shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands."

It is claimed, under the doctrine of *Association v. Kellogg*, 52 Mo. 583, that bankruptcy is equivalent to dissolution, and that the appointment of the receivers in this case operated as such. And upon this it is suggested that, under the section of the statute above quoted, the assets are to be distributed, in the language thereof, among "the debts due and owing by the corporation at the time of its dissolution." The point is made that all claims, of whatever character, not then absolutely due and owing, are not entitled to recognition. I am of the opinion that, considered alone, this statute will not bear that construction. If this be not so, then the directors who are made trustees might properly pay over to the stockholders all moneys left in their hands after paying the claims already matured, notwithstanding there were other and perhaps the most important of all its obligations still outstanding, and which only the mere lapse of time was wanting to make an absolute obligation. It would seem that such a doctrine would constitute a standing inducement to dishonest stockholders and directors to work a dissolution by insolvency or ceasing to do business, when the bulk of the corporate indebtedness was not yet mature. But when this statute is taken along with the one relating to assignments for the benefit of creditors, which, I take it, is the one that controls the present case, the matter is placed beyond question. This statute (section 424, Rev. St. Mo. 1889) provides that the assignment shall be "for all the creditors of the assignor in proportion to their respective claims." And under this section it is expressly held by the court of appeals, in the case of *Hoyle v. Scudder*, 32 Mo. App. 372, that:

"A claim of unliquidated damages for breach by a lessee of his covenant to deliver up the premises at the end of the term 'in as good condition and order as the same are now in' may be proved and allowed before the lessee's general assignee as the demand of a creditor, if the lease was made before the assignment, and the damages have matured in time for adjustment and allowance without prejudice to the winding up of the estate."

The opinion was delivered by Judge Seymour D. Thompson, not only a distinguished jurist, but one of the very ablest legal authors of the time. In the course of it he gives the following reasons for his conclusion:

"The statute relating to assignments nowhere defines or limits the demands which shall be provable before the assignee. It merely recites (Rev. St. § 442) that the assignee shall, at a stated time and place, 'proceed publicly to adjust and allow demands against the estate and effects of the assignor.' By the next section, he shall 'commence the adjustment and allowance of demands against the trust fund' at a given hour, and continue the same a stated length of time, and in the same section there is a proviso saving the rights of 'any creditor who shall fail to lay his claim before said assignee during said term, on account of sickness,' etc. The next section empowers the assignee to examine witnesses on oath touching any claim exhibited to him for allowance. In other sections the words 'demand' and 'claim' are used indifferently to describe the debts which the assignee shall allow. Section 424, defining the purposes of voluntary assignments for the benefit of creditors, provides that they shall be 'for the benefit of all the creditors of the assignor in proportion to their respective claims.' A strict and technical construction of the statute would probably result in the contention, which has been ably urged on behalf of the assignee in this case, that a demand which does not exist at the time when the assignment is made, in any acknowledged or liquidated form, and which depends upon a contingency which may never happen, and which, when it does happen, presents itself in the form of an unliquidated demand, is not within the terms of the statute. We have been cited to two cases in other jurisdictions which uphold this view. In *re Church* (R. L.) 14 Atl. 874; In *re Adams*, 67 How. Prac. 284. It is not denied by the learned counsel for the appellant that the statute embraces debts which were contracted by the assignor prior to the assignment, but which were by the terms of the contract payable at a date subsequent thereto; in other words, debts which fall within the descriptive words used by the civilians,—*"debitum in presenti, solvendum in futuro."* But, although the demand preferred in this case arose out of the breach of a contract which the assignor had entered into before the date of the assignment, which contract might possibly not be broken at all, and because, when broken, it gave rise to a cause of action sounding in damages, and not to a liquidated demand, it is supposed that it is not within the statute. Moreover, it is forcibly argued that, when the assignment is made, the assigned property is, by the force of the statute, impressed with a trust for the benefit of those who are creditors at that time, and not for the benefit of those who, by some subsequent breach of contract, wholly contingent and conjectural at the time of the assignment, become, in a sense, creditors of the assignor thereafter. We do not seek to disparage the force of this reasoning, but we are nevertheless of the opinion that a claim of this nature comes within the equity of the statute. Why should it be excluded? It is, in point of justice and conscience, confessedly, a meritorious claim, provided the damages which the claimants contend for have been made good by their evidence. The reason given by the court of common pleas of the city of New York in *Re Adams*, supra, for disallowing a somewhat analogous claim, was that the allowance of claims of such a nature, maturing upon future contingencies, would have the effect of keeping the administration of the assigned estate open for an indefinite length of time. This argument can have no force, when applied to a claim, such as the present, which matured and was presented to the assignee for allowance in time to be allowed and paid out of the assets without in any wise delaying the administration. We agree that

the possibility of claims of the present kind maturing at some indefinite period subsequent to the assignment ought not to operate to delay the administration of the assigned estate, but where, as in this case, they do mature in time to be presented to the assignee, to be proved up before him, and to receive their ratable share of the proceeds of the sale of the assigned property, without delaying the administration, we see no reason, growing out of the language or policy of the statute, why they should not be allowed and paid."

It seems to me that this decision, with the reasonings upon which it is based, construing the very statute which must govern the provability and allowance of claims against an insolvent estate, absolutely disposes of the question respecting the correctness of classification No. 3 of claims to be allowed. A difficulty arises, however, in relation to the application of this classification to some of the guaranties of payment, qualified by what we will call the "two-years provision" contained in guaranties Nos. 3, 4, 5, 7, 8, and 9, hereinbefore set out. (1) In respect to some of these guaranties, no default has occurred in the principal obligation. (2) In respect to some, default in the principal obligation had occurred, and the two years had expired before the receivers were appointed. (3) In respect to others, default occurred before, but the two years did not expire until after, the appointment of the receivers. (4) In respect to some others, both default and the expiration of the two years have occurred since such appointment. (5) And in respect to still others, the default has occurred since the appointment, but the two years have not fully expired. This condition of affairs calls for a construction of the guaranty referred to as applied to each of the particular facts stated.

As preliminary to this consideration, it may properly be remarked that these contracts, in whatever form phrased, were made by the Lombard Company for its own benefit. It was organized to do that kind of business, and the vast amount of securities it was able to dispose of was to a very great extent, if not almost entirely, due to the influence of the company's guaranty, the ordinary investor doubtless believing that the company was absolutely held to the extent of its assets to pay all of its obligations. The money paid by the investor went into the company's treasury for its own benefit. In this respect it differs from the ordinary obligation of a guarantor, which is generally executed as an accommodation to and for the benefit of the maker. It is rather one that comes within the principle laid down by Daniel on Negotiable Instruments (section 1763), where it is said:

"There are cases in which the guaranty is really to answer for one's own debt, though having the appearance of a promise to answer for another."

In view of these facts and principles, we will now consider the guaranty in question as applied to the different state of facts above stated: First, as to those where no default of any kind has occurred in respect to the principal obligation, it is clear to my mind that claims of this kind should not be allowed. They are purely contingent. No default has occurred, and, under the circumstances, it is not likely there will be. I have accordingly classed these claims

as nonprovable ones in classification No. 2 of claims which should be rejected. Second, as to those in respect to which default either in the payment of the interest or principal had occurred, and the two years had expired, before the receivers were appointed. These, to my mind, are clearly provable claims, and they are designed to be embraced in class No. 1 of claims that should be allowed. Third, as to those where the default occurred before, but the two years did not expire until after, the appointment of the receivers. In accordance with the reasonings and conclusions hereinbefore contained, I am of the opinion that these claims are provable, and I have accordingly embraced them in class No. 3 of claims which should be allowed. Fourth, as to those where both the default and the expiration of the two years have occurred since the appointment of the receivers. Upon the same reasoning, it is my judgment that these should be regarded as provable claims, and they are accordingly embraced in said class No. 3 of claims which should be allowed. Fifth, as to those where the default has occurred since the appointment of the receivers, but the two years have not fully expired. It is upon this class of claims, arising under said guaranty of payment, that the greatest difficulty, to my mind, arises. If these claims remain purely contingent, then, in my judgment, they are not entitled to allowance. On the other hand, if the obligation of the guarantor became direct and absolute on the failure of the maker to pay at maturity, and the legal effect of the two-years stipulation was merely to defer the time of actual payment until the expiration of that period, then the obligation ceased to be contingent and became direct and absolute.

A brief reference to authorities with regard to the character and office of the guaranty, when executed by the payee of an obligation, will throw some light on the inquiry: Daniel, Neg. Inst. § 1762, says:

"There are cases in which the guaranty is really to answer for one's own debt. * * * Where one who sells a note guaranties its payment, the guaranty is an original undertaking, and need not even be in writing."

Again, and upon the same subject, the same author says (section 1761):

"Where the payee or holder of a note transfers it and guaranties the payment of it, the consideration moves directly to him for his own benefit. It is really his own debt that he promises to pay in a particular way, and not the debt of another. And the clause of the statute respecting the promise or engagement to pay a debt of another has no application to it."

Again (section 1769):

"If A. guaranties expressly to pay the note of B. to C., he becomes absolutely liable for its payment upon B.'s default."

Dickerson v. Derrickson, 39 Ill. 575; Allen v. Rightmere, 20 Johns. 365.

In Gage v. Bank, 79 Ill. 62, the makers of a promissory note transferred it by the following indorsement: "For value received we guaranty the payment of the within note at maturity." Held that

each was absolutely liable as a principal, and not entitled to any notice. The court says:

"It was a joint and several undertaking to pay the note at maturity. They were both principals, and both and each bound to pay the note. As between them and the maker of the note, the holder was under no obligation to demand payment of the maker, and, on his default, to notify the guarantors, for they undertook to pay at all hazards. It was their duty, and of each of them, on its maturity, to go to the holder and take it up. The holder was under no legal or moral obligation to hunt them and make demand. * * * This is not a case of principal and surety, but it is a primary, positive undertaking that they will pay the note at maturity."

In *Allen v. Rightmere*, 20 Johns. 365, the indorsement by the payee of the note was in the following form: "For value received I sell, assign, and guaranty the payment of the within note," etc. The chief justice, in delivering the opinion of the court, said:

"Proof of demand and notice of nonpayment were not necessary. The defendant's engagement is, in effect, that Toan should pay the note or that he would pay it. It is the duty of the debtor to seek the creditor, and pay his debt on the very day it becomes due. As regards the maker of the note, and to render him liable, no demand is necessary. A demand of payment is necessary only to fix an indorser or surety, whose undertaking is conditional. An indorser does not absolutely engage to pay. It is a conditional undertaking to pay, if the maker of the note does not, upon being required to do so, when the note falls due, and upon the further condition that the indorser shall be notified of such default. The defendant insists that he stands in the situation of an indorser merely, but such is not the fact. The undertaking here is not conditional. It is absolute that the maker shall pay the note when due, or that the defendant will himself pay it."

"A guaranty of payment of a note is an absolute, unconditional undertaking on the part of the guarantor that the maker will pay the note when due, or that the guarantor will pay the debt at maturity if the maker does not; and the contract of the guarantor is broken upon the failure of the maker to meet this obligation." Baylies, Sur. p. 17, subtit. "Guaranties of Payment and of Collection."

Allen v. Rightmere, 20 Johns. 365; *Day v. Elmore*, 4 Wis. 190; *Evans v. Bell*, 45 Tex. 553; *Gage v. Bank*, 79 Ill. 62; *Lent v. Padelford*, 10 Mass. 230; *Peck v. Frink*, 10 Iowa, 193; *Heaton v. Hulbert*, 3 Scam. 489.

In view of the doctrine thus laid down, and under the facts of this case, it is my opinion that, upon default of the maker, the obligation of the company, as guarantor, to pay, ceased to be collateral and contingent, and became direct and absolute, with the right reserved that it should not be compelled to pay until the two years had expired, but with the privilege that it might pay at any time within that period. In other words, the guaranty should be construed, in legal effect, the same as if reading: The company guaranties the payment of the principal on the following conditions: (1) That the maker fail to pay at maturity; and (2) that the company, in case of default of the maker to pay at maturity, shall not be compelled to pay until the expiration of two years thereafter, but have the privilege of paying at any time it desires to within that period. For these reasons I think these claims, viz.: Those where default has been made by the maker, but the two years has not fully expired, should be treated as direct obligations, with deferred time

of payment, and be embraced in class No. 3 of claims to be allowed. The case of *Manufacturing Co. v. Gittings*, 3 C. C. A. 422, 53 Fed. 45, is cited as opposed to this view. The point presented and decided in that case was that a claim arising on a guaranty was not provable against the estate of the insolvent guarantor where it appeared that the principal obligation would not fall due for many years, and that no default in payment of interest coupons or of any kind had occurred. The court held that the claim was purely contingent, and so I have held in reference to just such claims, and embraced them in class 2 of claims that should be rejected. The arguendo statement in the opinion, that there must not only be a cause of action, but a right of action, and that claims not due have no standing, cannot, it seems to me, be taken in a literal sense,—certainly not as applied to the insolvent laws of this state, which I take it, control the rights of the parties in the present case. For, if so, then obligations of the highest and most meritorious character would be excluded, if not fully matured. I do not understand that such a doctrine is contended for in this case. If it prevailed, it would exclude the larger part of the debenture bonds, and all of the unmatured direct obligations of the company. I think the true rule is that, if the cause is either actionable or capable of liquidation, it is sufficient.

Class No. 4. Claims based on bonds executed by any of the auxiliary companies. For the reasons pointed out on the first page of this report, these claims are clearly allowable as hereinbefore specified.

Class No. 5. Claims embraced in Subcompany Land Trust. The proving of these claims is provided for by the eighth paragraph of the final decree.

II. Claims That should be Rejected.

Class No. 1. Those arising on guaranties of collection,—as distinguished from guaranties of payment,—where no foreclosure proceedings or action against the maker has been commenced, and where the holder has not shown proper diligence in efforts to collect his claim from the maker of the note, or out of the mortgaged premises securing it. It is clear to my mind, under the authorities, that claims of this character are not entitled to allowance. Between guaranties of collection and guaranties of payment a broad distinction is taken. "A guaranty of payment of a note is an absolute, unconditional undertaking, on the part of the guarantor, that the maker will pay the note when due, or that the guarantor will pay the debt at maturity if the maker does not, and the contract of the guarantor is broken upon the failure of the maker to meet his obligation. A guaranty of collection is an entirely different contract. It is sometimes defined as an undertaking to pay a debt on condition that the person to whom the guaranty is given shall diligently prosecute the principal debtor without avail, or that the debt will be paid if the principal be prosecuted with reasonable diligence, or that the debt is collectible by due course of law." Baylies, Sur. pp. 17, 18, tit. "Guaranties of Payment and Collection"; Voorhies

v. Atlee, 29 Iowa, 49; Dewey v. Investment Co. (Minn.) 50 N. W. 1032; Durand v. Bowen (Iowa) 35 N. W. 644; Bouche v. Louttit, 104 Cal. 230, 37 Pac. 902; Crane v. Wheeler (Minn.) 50 N. W. 1033; Barman v. Carhartt, 10 Mich. 340; McMurray v. Noyes, 72 N. Y. 523; Insurance Co. v. Wright, 76 N. Y. 445; Allison v. Waldham, 24 Ill. 132. "A guaranty of collection only guaranties the collectibility or goodness of the note, and does not amount to an absolute guaranty of payment, but only that the guarantor will pay it in the event that the holder shall test the collectibility or goodness by regular prosecution of a suit against the maker, and shall be unable by reasonable diligence to enforce its payment. He is only deemed a conditional guarantor of payment." Daniel, Neg. Inst. § 1769. "In some states, the commencement of an action against the maker of a promissory note, and its prosecution to judgment and execution without avail, are conditions precedent to the right to maintain an action against one who has guarantied its collection, without regard to the question of the maker's solvency. In all, or nearly all, of the other states, a suit against the maker of the note is not required before proceeding against the guarantor, if the maker of the note is, at its maturity, wholly and clearly insolvent, so that an action against him would be a mere idle ceremony. But nothing but such insolvency will, in any state, excuse a failure to proceed against the principal debtor before action against a guarantor of collection." Baylies, Sur. p. 139, and the authorities above cited. A fortiori would the rule apply where the guarantied obligation is secured by mortgage. The collateral would have to be exhausted. Nothing can be better settled than these principles. They are embraced in said class No. 1 of claims that should be rejected. The guaranties of collection are embraced in guaranties Nos. 1 and 2. Guaranty No. 3, which seems to be a hybrid of a guaranty of collection and of payment, I hold to be, in legal effect, a guaranty of payment.

Class No. 2. Those not matured, and in respect to which there has been no default in payment of interest or of any kind. Claims of this character are too purely contingent for allowance. This, as we have already seen, was the very point decided in *Manufacturing Co. v. Gittings*, 3 C. C. A. 422, 53 Fed. 45.

Class No. 3. Those in respect to which extension of time of payment of the principal obligation has been made by a new and valid agreement between the holder and the debtor. No argument is needed to enforce this proposition. The contract has been changed, and the guarantor is discharged.

III. Other Rules Governing.

Rule 1. Claims should be held to have matured, not only on their due date, but on default of the maker in payment of interest or other preliminary obligation, when, by the terms of the contract, such default is made to precipitate the maturity of the debt. I submit that this proposition is correct, and should be applied in the present case. See copy of bonds containing the provision referred to at close of report.

Rule 2. The date up to which the interest on claims should be calculated should be that of the appointment of the receivers on September 18, 1893. This rule is based both upon reason and authority. If the rule were otherwise, the claimant who delayed until the last to file his claim would have his negligence rewarded by the increased interest which he would receive. Interest does not run, as against the estate, after the assignment or declared insolvency, unless there are funds sufficient on hand to pay all of the demands and accrued interest; otherwise, interest is to be allowed up to the time of the declared insolvency only. *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372; *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686; *Richmond v. Irons*, 121 U. S. 27, 64, 7 Sup. Ct. 788; *National Bank of Com. v. Mechanics*, etc., Bank, 94 U. S. 437; *Bank v. Peirce*, 156 Mass. 307, 31 N. E. 483.

Rule 3. Collateral security, by mortgage or otherwise, held by the claimant, does not affect the claimant's right to prove up for the full amount of his claim; nor does the fact that he has realized a part of his claim from the subjection of such collateral, since the date of the receivership; but he is entitled in such case to receive distributions or dividends from the general estate, until such dividends, added to the amount realized from the collateral, are equal to or sufficient to satisfy his debt. Upon this proposition there is some conflict of authorities, but the great volume of them is in its support. This was the exact point decided in the elaborately considered case of *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372, in which all of the authorities on the subject are collated and shown by the overwhelming weight to sustain the doctrine therein announced. To the same effect see *Tod v. Land Co.*, 57 Fed. 47; *Lewis v. U. S.*, 92 U. S. 618; *People v. E. Remington & Sons*, 121 N. Y. 328, 24 N. E. 793; *Fifth Nat. Bank v. Clinton Circuit Judge*, (Mich.) 58 N. W. 648; *Bank v. Haug*, 82 Mich. 607, 47 N. W. 33; *In re Bates*, 118 Ill. 524, 9 N. E. 257; *Kellogg v. Miller*, 22 Or. 406, 30 Pac. 229; *Bank v. Byles*, 67 Mich. 296, 34 N. W. 702; *Walker v. Baxter*, 26 Vt. 710; *Allen v. Danielson*, 15 R. I. 480, 8 Atl. 705; *Miller's Appeal*, 35 Pa. St. 481; *In re Miller's Estate*, 82 Pa. St. 113; *Bank v. Kendrick* (Tenn.) 21 S. W. 1070. It seems to me that the doctrine is so overwhelmingly settled by the authorities as not to be open to serious question.

All of which is respectfully submitted.

Addenda.

The following copy of one of the bonds will show the provision relating to the precipitation of the maturity of the obligation arising from nonpayment of interest, hereinbefore referred to:

Real-Estate First Mortgage.	
No.....	{ Negotiated by the Lombard Investment Company, 13 Sears Building, Boston, Mass. Western Office, Kansas City, Mo. } \$.....
Security	Fidelity

Coupon Bond.

On the first day of ——— eighteen hundred and ——— for value received, ——— promise to pay to the order of the Lombard Investment Company, the

principal sum of ——— dollars, with interest thereon at the rate of ——— per cent. per annum from date until paid, said interest being payable ——— annually according to the tenor of ——— interest coupon notes, one being for ——— dollars and ——— each for ——— dollars, bearing even date herewith; both principal and interest coupons payable at the western office of the Lombard Investment Company, Kansas City, Missouri. And if default be made in the payment of any interest coupons or any part thereof at the time and place aforesaid, then said principal sum shall at once become due and payable. This bond and the interest coupons thereto attached are secured on real estate by a deed of trust of even date herewith, duly recorded in the county of ——— and state of Missouri.

This bond shall bear interest at the rate of ten per cent. per annum, payable semiannually from maturity, or after default of any of the conditions mentioned herein, and in the deed of trust securing the same until paid

.....
Dated at Kansas City, Missouri, on the ——— day of ———, 18—.

The following is a specimen of one of the debenture bonds referred to on page 1:

No. ———

Series ———

United States of America.

Six per Cent. Ten-Year Debenture.

Capital \$4,000,000.

The Lombard Investment Company, for value received, hereby promises to pay to bearer, or, in case of registration, to the registered holder hereof, the sum of two hundred dollars, on the first day of September, 1900, with interest thereon at the rate of six per cent. per annum, payable semiannually, on the first days of March and September, in each year, on the presentation and surrender of the interest coupons hereto attached, both interest and principal payable at the office of the Lombard Investment Company, in Boston, Massachusetts, New York, N. Y., or Philadelphia, Pennsylvania.

The said Lombard Investment Company reserves the right to redeem this debenture at the maturity of any coupon on or after September 1st, 1895.

This debenture is No. ——— of series ——— of similar debentures numbered from fifty-five hundred and sixty-one to fifty-seven hundred and fifty, inclusive, of various denominations, amounting in the aggregate to one hundred thousand dollars.

To secure the payment of these debentures, the Lombard Investment Company has deposited with B. Lombard, Jr., James L. Lombard and H. W. L. Russell, Trustees, certain collaterals, amounting in the aggregate to one hundred and five thousand dollars; said collaterals being held by said trustees as a guaranty fund for the payment of these bonds, and are subject to the inspection of the holders of the same at all reasonable times.

This debenture is the direct obligation of the Lombard Investment Company, and is not negotiable until the certificate on the reverse hereof has been signed by the said trustees.

In testimony whereof, the Lombard Investment Company has caused these presents to be executed by its president this first day of September, 1890, with the seal of the company affixed.

_____, Assistant Treasurer. _____, President.

CALDWELL, Circuit Judge. Now, on this day, this cause comes on to be heard on the exceptions filed to the report of the master on the classification of claims herein, the parties appearing by their

respective counsel, and further time for the renewal of exceptions and the lying of the report on file having been properly waived by counsel, and said exceptions to said report having been argued, submitted, and duly considered, the same are overruled, and the said report of the master on the classification of claims is hereby in all respects approved and confirmed.

HARTON et al. v. McKEE et al.

(Circuit Court, N. D. Georgia. January 24, 1896.)

EQUITY—SPOILIATION OF DOCUMENTS—ESTOPPEL.

In a suit for the specific performance of a contract for the sale of lands, which the defendant had given the plaintiff an option to purchase, it appeared from all the evidence, except as affected by two letters offered by the plaintiff, that the plaintiff had abandoned the option early in 1894. The two letters, purporting to be dated in October and November, 1894, tended to show that negotiations about the option were then pending between plaintiff and defendant, but such letters bore upon their face plain indication that their dates had been changed from 1893 to 1894, and the circumstances tended to show that they were written in 1893, which defendant contended was the fact. *Held* that, if it were found as a fact that the dates of the letters had been changed by the plaintiff to make a case for himself, he would be thereby barred from all relief, but that, in any event, upon the facts, the letters not having actually been written in 1894, the defendant was entitled to judgment.

Mayson & Hill and L. E. Parsons, Jr., for complainants.
Glenn & Rountree and Eb. T. Williams, for defendants.

NEWMAN, District Judge. This is a bill for specific performance of the contract of sale of lands. The case has now come on for final hearing and determination. In September, 1883, McKee gave to Harton an option in writing to purchase certain lands in Dodge, Ware, Echols, and Clinch counties, in this state. On the 24th of October thereafter, the option was extended until McKee could furnish Harton with an abstract of title to the lands, and Harton should have reasonable time to examine the same. McKee lived in Dawsonville, in this district, and Harton resided in Birmingham, Ala. There was some correspondence during the fall and winter of 1893 and the early part of 1894 in reference to these lands, and to the trade, furnishing the abstract, etc. This is conceded by both sides. It is claimed on the part of the defendants, that in March, 1894, the correspondence was dropped, and that there was no further correspondence until December, 1894, when Harton wrote to McKee on the subject of the lands. There is a question made as to whether this letter was a continuance of the old matter of a trade under the option in reference to the lands in question, or whether it was written by Harton in reference to other lands, concerning which he claims he had some negotiations with McKee. The language of this letter is such that, if it refers to the lands as to which Harton held an option, it would favor very strongly the view that all rights under the option had been previously abandoned, and that Harton desired to renew the negotiations, in order

to make some new contract of purchase. There are two letters in evidence, which, as they stand now, are dated October 24, 1894, and November 16, 1894. One of the main contentions in the case is that the dates of these letters have been changed; that the first has been changed from some other date in October to the 24th, and from 1893 to 1894; that the second has been changed from November 16, 1893, to November 16, 1894. The use made of these letters by Harton is that they would tend, if written upon the dates they now bear, to support his claim that he never abandoned his contract under the option. He claims that the correspondence was continuous on this subject, and that the letters which are in evidence, and others which he is unable to produce or to get from McKee, were written, and will show this to be the fact. The contrary contention for the defendants is that the dates of these letters were changed by Harton to be used for the purpose indicated. On January 15, 1895, Harton and McKee were both in Atlanta. Harton was accompanied by the other complainant, J. H. Parsons. Harton, having had some correspondence and a personal interview with McKee, brought Parsons to Atlanta. McKee was accompanied by Mr. Latner, his friend and lawyer. Harton and Parsons met McKee on the morning of January 15th, about 10 o'clock, and they were to meet subsequently during the day. When they met again, McKee informed them that he had sold the lands to defendant Moore. There has been much discussion as to the real purpose of Harton's and Parsons' visit to Atlanta at this time,—as to whether they desired to carry out the terms of the option contract which Harton had obtained in 1893, or whether they were seeking to make some new and different contract in reference to the land. Both of them have testified that they were in Atlanta, ready and prepared to comply fully with the terms of the option; the defendants contending that all the facts and circumstances show that this is not true. By the terms of the option from McKee to Harton, he would have received for his lands \$15,000 in cash, and a mortgage on property worth double the amount for \$15,000 more; making \$30,000 in all. McKee sold the lands to Moore and his associates for \$18,000. There can be no doubt of this, under the evidence.

Just at this point it may be mentioned that there is a question as to whether Moore bought from McKee with notice of Harton's option. As to this there has been considerable evidence, and there has been much discussion. Under the view I take of the case it will be unnecessary to determine this matter of notice. Unless the two letters referred to are genuine as of the date which they now bear, in the opinion of the court, the complainants have no case which entitles them to relief here. An examination of these letters shows unquestionably, as to the one of October 24th, that a figure in the year date has been changed by writing the figure 4 over the figure 3, with an ink blot over the figure 3. It is so apparent, there is no denial by the complainants that this is true. In the month date of the same letter the figure 4 has evidently been changed from some other date. The figure 2 in the month date has not been changed at all, but the figure 4 unquestionably has been

changed; and the evidence on the subject, and its appearance, would seem to indicate that it was changed from the figure 2 to 4, so as to make it appear of date October 24th, instead of the 22d. As to the letter of November 16th, in the year date there has clearly been an erasure with a knife or some other sharp instrument, and the figure 4 written over the erased spot, so as to make the date November 16, 1894. Contemporaneous facts and circumstances are in evidence for the purpose of throwing light on the genuineness of these dates. These facts and circumstances strengthen the view that these two letters were really written in 1893. In the letter of November 16th, allusion is made to the sickness of the writer, McKee; and in another letter, conceded to be genuine, of December 15, 1893, he refers to his sickness, which he says has continued ever since October. The evidence shows pretty clearly that McKee did have a spell of sickness in the fall of 1893, and that he was not sick in the fall of 1894. Also the letters, taken in connection with the preceding and succeeding letters and circumstances, do not fit into the year 1894, but do fit into the correspondence of the preceding year. It is unnecessary to determine here as to whether or not these changes were fraudulent to the extent contended for by the defendants; but certainly, if the changes were fraudulent in the way which has been indicated above, for the purpose of making a case for complainants, no court of equity would grant the complainants any relief. They must come into a court of equity with clean hands; and if they come with papers forged for the purpose of making a case, certainly they would have no standing in court. But, independently of this, with these letters out of the case as of the dates they now bear, the evidence is overwhelming to my mind that there was an abandonment of the option on these lands by Harton in the early part of 1894, and in December, 1894, his desire is, evidenced by his letter of that date, to reopen the negotiations with McKee; not on the old option, but in order to make some new contract with him; not to buy the lands himself either, but rather to make a sale of the lands for McKee to another party. It is unnecessary, in this view of the matter, to discuss further the facts of this case, except to say that it is not denied that in September, 1894, McKee made a new option on the lands for \$25,000 to one E. T. Williams, in connection with whom Moore was acting in the purchase of the lands in 1895. It could hardly be that McKee, if he thought his option to Harton for the sale of these lands was of any force still, would have made an agreement to sell to Moore for \$25,000. Indeed, in January subsequently he sold the lands to Moore and his associates for \$18,000, when Harton claims that he was present on the ground, ready to pay him \$30,000. It is contended on behalf of complainants, as a matter of law, that, even if there was an apparent abandonment by Harton of his rights under the option from McKee, Harton was entitled to notice from McKee that he considered the option and the trade as at an end before he, McKee, would have the right to sell the lands to any one else. While this might be true in some cases, I am satisfied that it is not applicable to the facts here. I think that, leaving the two con-

tested letters out of the case as of the dates the complainants desire to use them, there is such clear abandonment by Harton of all rights under his option as would render it unnecessary for McKee to give him any notice whatever.

Many questions have been raised and discussed in this case, which have not been referred to, and which it is deemed unnecessary to mention in the view taken of the case. My conclusion is that complainants are not entitled to any relief, and that the bill must be dismissed, with costs.

CLEVELAND v. SPENCER et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 128.

1. TAXATION OF RAILROADS—LEASE OF ROAD—LIABILITY OF LESSEE.

The acquisition by one railroad company of the control and operation of the road and property of another under a lease, after the expiration of seven months of the current fiscal year, and after an assessment and levy, which subjects such property to a lien for taxes from the beginning of such fiscal year, does not of itself render the former company primarily liable, as a debtor of the state, for the amount of such tax.

2. SAME—CONSTRUCTION OF LEASE.

A covenant by the lessee in a railroad lease that it "will pay, as operating expenses, all taxes and assessments * * * which may be lawfully levied or assessed" upon the demised property, is not an assumption of liability for taxes already assessed and levied, and constituting a lien from the beginning of the fiscal year in which the lease is made.

3. SAME—IMPLIED CONTRACT.

If there is any contract implied by law whereby one railroad company, acquiring the control of the property, income, etc., of another, becomes directly liable for taxes already due, and constituting a lien thereon, for the fiscal year then current, such liability is only in proportion to the part of the fiscal year remaining after assumption of such control.

4. JUDGMENT—ESTOPPEL.

The estoppel arising from the results of litigation does not apply in a subsequent suit in which some of the parties are different.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This was a bill by the Richmond & Danville Railroad Company against J. R. Blake, W. D. Mann, and others, county treasurers, for an injunction restraining the collection of a certain tax alleged to have been based upon an unlawful assessment. There was a decree for complainant. 49 Fed. 905. Subsequently the complainant was ordered to pay the balance of the taxes due on certain lines of road leased or otherwise controlled in the state of South Carolina, not including the Port Royal & Western Carolina and another road, which by admission had passed beyond the control of the complainant. Samuel Spencer and others having been appointed receivers of the complainant, the Richmond & Danville Railroad Company, June 15, 1892, the cause came up on the petitions of the receiver of the Port Royal & Western Carolina Railway Company and another, praying that the receivers of the Richmond & Danville Railroad Company be directed to pay the remainder of the taxes due for the fiscal

year ending October 31, 1891. The prayer of the petition was dismissed September 14, 1894, by the circuit court, the following opinion having been filed (Simonton, Circuit Judge):

This case now comes up upon the petitions above stated. The receiver of the Port Royal & Western Carolina Railway prays that the receivers of the Richmond & Danville Railroad Company be directed to pay an unpaid remainder of taxes due on that railway for the fiscal year 1890-91. The Asheville & Spartanburg Railway Company prays that the same receivers pay the taxes on the property of the petitioner's railroad which accrued during the control over it of the said receivers. There is perhaps an irregularity in joining these claims in one petition; but as it is preferred in a suit pending in this court which the receivers have taken under their charge, for the sake of convenience the irregularity, if any exists, is overlooked. The claims do not proceed upon precisely the same grounds, and they will be considered separately.

The Port Royal & Western Carolina.

This corporation was created under the laws of the state of South Carolina. It was subsequently recognized and incorporated under the laws of the state of Georgia. The Central Railroad & Banking Company, a corporation of the last-named state, was very much interested in its incorporation and construction, and became the owner of nearly all its bonds and of a great portion of its stock. The bonds had a voting power, and by reason of this, without, as far as it appears, any lease or contract, the Central controlled the Port Royal & Western Carolina. So complete was this control that the Central selected its board of directors, practically appointed its agents, fixed its rates, and managed its business. The Port Royal & Western Carolina became to all intents and purposes an integral part of the system of the Central, was dominated by it, was treated as one of its divisions; and, when the Central Railroad & Banking Company was placed by the circuit court of the United States for the Southern district of Georgia in the hands of a receiver, that receiver was made receiver of the Port Royal & Western Carolina as a part of the Central. In 1891 (June 1st), the Central Railroad & Banking Company of Georgia executed to the Georgia Pacific Railway Company a lease of its whole system, drawing with it this Port Royal & Western Carolina Railway. The lease lets all the roads and property owned by the Central, assigns all the leases of railroads and other property held under lease by the Central, and puts within the control of the lessee all the stocks and bonds, whereby control of connecting lines had been obtained by and was held by the Central. In this last class was the Port Royal & Western Carolina by name. The twentieth article of this lease, the one bearing on the question under consideration, is as follows: "Article Twentieth. The said Pacific Company, for itself, its successors and assigns, further covenants and agrees to pay and discharge all expenses, costs, damages, and claims, and demands whatsoever which shall or may arise out of the management and operation of said railroads and other property hereby demised, or any part thereof, and will and shall at all times save and keep harmless and indemnify the said Central Company therefrom, and will defend, at its own expense, all such actions and suits which shall or may be brought against the said Central Company, and will pay, as operating expenses, all taxes and assessments, ordinary or extraordinary, of whatsoever kind and nature, which may be lawfully levied or assessed upon the property hereby demised, including said leased lines, or any of them, or against the said Central Company because of its interest therein." The Georgia Pacific Company, the lessee, was a part of the great system of the Richmond & Danville Railroad Company. In what way this lease, or the privilege created by it, came into the hands of the Richmond & Danville Railroad Company, whether by express contract or not, does not appear. It may well be concluded that, the Georgia Pacific being under the domination and control of the Richmond & Danville, this latter company also took control of the Central, with all its owned, leased, and controlled lines. This being so, the Richmond & Danville assumed, with all the privileges of this control, its responsibility also, and these responsibilities are measured by this lease. On 4th March, 1892, this lease was surrendered and canceled, and the Central, with its entire system, was placed in the

charge of receivers appointed by the circuit court of the United States for the Southern district of Georgia. On 7th March, 1892, the Richmond & Danville Railroad Company filed its bill against J. R. Blake et al., the main cause in which this petition is brought. This bill sought relief against what was alleged to be illegal assessment of railroad property in its hands and under its control, liable to taxation. It sought an injunction against the levy for the tax under this assessment. Having been required to pay so much of said tax as was admitted to be lawfully due, a temporary injunction was issued as to the alleged illegal assessment. See 49 Fed. 905. Among the properties whose taxes were involved in this issue and set out with the bill was the Port Royal & Western Carolina Railway. The amount of taxes on this road in dispute, and not paid, was \$—; this being a part of the tax for the fiscal year 1890-91. Pending this suit, to wit, on the 15th June, 1892, a suit was instituted in the circuit court of the United States for the Eastern district of Virginia, by Clyde and others, stockholders and creditors, against the Richmond & Danville Railroad Company. Under this suit, Ruben Foster and F. W. Huidekoper were appointed receivers of the Richmond & Danville system. By auxiliary proceedings in this court, this appointment was recognized and affirmed. These receivers, finding the suit against Blake and others pending, took charge of the litigation, and represented so much of the property as was in their charge. Before argument on the merits of the case, and before testimony was taken thereon, the counsel representing these receivers called the attention of the court to the cancellation of the lease of the Central Railroad system, and thereafter disclaimed any authority to represent any part of that system in that case. After full testimony and argument, the suit against Blake and others was dismissed, and the injunction dissolved. The Richmond & Danville Railroad was a vast system, embracing many lines of railroad, some owned, others leased, and some only controlled. All of these roads were held by the Richmond & Danville, subject to their several mortgages, a first lien on them severally. And there was also a mortgage, perhaps more than one, on the entire system.

There are two questions involved in this issue. First. Is the Richmond & Danville Railroad Company liable for this amount of tax unpaid for the fiscal year 1890-91? Second. Are these receivers, as receivers, responsible therefor? That is to say, if it shall appear that this is a debt due by the Richmond & Danville Railroad Company, is it within that class of debts which take priority in the disbursement of funds derived by the receivers from the entire system? And, if so, how can this priority be secured?

Is this a debt of the Richmond & Danville Railroad Company? The sum claimed is a part of the tax levied for the fiscal year 1890-91. Its lien attached at the beginning of the fiscal year, November 1, 1890. Gen. St. S. C. § 170; Pub. Laws, § 217. The return under which it was levied was required by law to be made between 1st January and 20th February, 1891 (Gen. St. S. C. § 180; Pub. Laws, § 231), and by the president and secretary of the company (Id.). The assessment complained of was made 19th May, 1891. The lease of the Central and its system to the Georgia Pacific was executed 1st June, 1891. Then only did any rights and corresponding responsibilities of the Richmond & Danville begin. Manifestly, from these dates the tax was not primarily a debt of the Richmond & Danville. Nor could any return of the property have lawfully been made by this company, for it had no interest or control whatever over it when the law required its return, and when the assessment was made. When the lien was about to be enforced (February, 1892), the property was perhaps in the qualified ownership—certainly under the control—of the Richmond & Danville. It had come into its hands subject to the paramount lien of the tax. The enforcement of the tax would disturb its possession and its rights. Therefore, very properly, it tested the legality of the assessment.

The tax thus not being primarily the debt of the Richmond & Danville Railroad Company, did that company assume its payment? This it may have done either under an express contract, the lease, or under an implied contract arising from its operation of the road, controlling it, and receiving its entire income, enjoying all its incidental advantages. For the purposes of this case, we assume that the Richmond & Danville Railroad Company was to all intents and purposes the lessee of the Central and its system, bound by the terms of the

lease. Without dwelling upon the language of the lease, which provides for the payment of taxes on the property thereby demised, including leased lines, or any of them, or against the Central Company, because of its interest therein; that is to say, property demised, including leased lines, or taxes charged against the Central Company, because of its interest therein, and so perhaps excluding all other property, such as property in which, as in the present case, the Central Railroad Company was only interested as a stockholder in the company owning it,—it will be noted that this article is in the future tense. It does not provide for past obligations, only for future liabilities. It does not assume a debt already incurred, nor a tax already fixed. The tax in question practically took effect from the first day of the fiscal year. When the property got within the control of the Richmond & Danville, it was already burdened with the tax, a tax chargeable against the property, and a debt of the person owning it when it should have been returned. Gen. St. S. C. §§ 216, 217.

This tax, therefore, not being a debt primarily of the Richmond & Danville Railroad Company, nor one assumed by it by express contract, is it liable for the tax by contract implied by law, arising from its possession and control of the property, its receipt of the income, and its enjoyment of all advantages incident thereto? The tax in question was for the whole fiscal year 1890-91, from November 1, 1890, to October 31, 1891. The Richmond & Danville Railroad Company, at the earliest, took possession of it 1st June, 1891, after seven months of the fiscal year had elapsed, and held it for the remaining five months. It has already, under the orders of this court, paid 67 per cent. of the entire tax for the whole fiscal year, more than its proportion, admitting the full force of this implied contract. This prayer of the petition is dismissed.

The Asheville & Spartanburg Railroad Company.

In the absence of any evidence of the terms under which the Richmond & Danville Railroad Company got control of this road, it is impossible to decide upon its liability. Let so much of the petition as relates to this matter be referred to a special master, or, if counsel agree, be submitted on a statement of facts.

John B. Cleveland, receiver of the Port Royal & Western Carolina Railway Company, prosecutes this appeal.

S. J. Simpson, for appellant.

George G. Wells, of Cothran, Wells, Ansel & Cothran, for appellees.

Before HUGHES and SEYMOUR, District Judges.

HUGHES, District Judge. This court fully concurs in the decision of the circuit court in this case, and agrees with the reasons assigned in the opinion of the court for its decision. The only question raised on appeal not embraced in the opinion of the circuit court is that of estoppel. But the parties in the suit which was before the circuit court, and which it decided, were not the same as those in the previous suit, and estoppel does not apply. Decree or order of the circuit court affirmed, with costs.

CENTRAL TRUST CO. OF NEW YORK v. EVANS et al.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 340.

1. EQUITY PRACTICE—INJUNCTION—RESTRAINING ENFORCEMENT OF DECREE.

While a decree of the circuit court, made in pursuance of the mandate of the circuit court of appeals, stands, such circuit court cannot entertain a proceeding to avoid the effect of such decree by enjoining its enforcement.

2. SAME.

One E. secured a judgment against a railroad company whose property was subject to two mortgages. Upon the return of an execution unsatisfied, he instituted a creditor's suit in a state court against the mortgagor railroad company, the trustee of the mortgages, and another railroad company, seeking to have his judgment declared a lien superior to the mortgages, and to set aside a sale of the road to such other railroad company as in fraud of creditors. In this suit an attachment was issued, and levied on the railroad within the state, and on some of the rolling stock. Thereupon the trustee of the mortgages, and other interested parties, caused this property to be replevied, and gave bonds, with sureties, to return the property or pay the debt, if the court should adjudge the property subject to the debt. This suit was removed to a federal court, and ultimately to the circuit court of appeals, in which it was adjudged that the property was subject to the attachments, though the lien of the judgment was not superior to that of the mortgages, and that the obligors in the replevin bonds should either restore the property, by delivering it into the custody of the clerk, or pay its value. Pursuant to a mandate, a decree to that effect was entered in the circuit court. Thereupon the trustee under the mortgages, which in the meantime had commenced a foreclosure suit in the federal court, in which a receiver of the railroad had been appointed, presented a petition in that suit, praying that E. might be restrained from enforcing the decree for the return of the property, and required to come in and present his claim in the foreclosure suit. *Held*, that the court could not entertain such an application to review its decree and prevent enforcement thereof by injunction, and that the possession of the property by the court's receiver did not present a reason for doing so, since his possession was solely for the purposes of the foreclosure suit, and not at all for, or in the interest of, the obligors in the replevin bonds.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

Henry B. Tompkins, for appellant.

Chas. R. Evans and Brown & Spurlock, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge. This is an appeal taken by the Central Trust Company of New York from a decretal order made by the court below upon a petition (therein stated to be in the nature of an amended and supplemental bill) filed in the case of The Central Trust Company of New York v. The Chattanooga, Rome & Columbus Railroad Company and The Savannah & Western Railroad Company; a suit then pending in said court, and which was instituted for the foreclosure of certain mortgages hereinafter mentioned, executed by the Chattanooga, Rome & Columbus Railroad Company. This petition named H. Clay Evans and James and Kratzenstein, who had joined with him, as creditors of the Chattanooga, Rome & Columbus Railroad Company, and Sloan, Lyerly, and Barr & McAdoo, the sureties in certain replevin bonds, as defendants therein, and prayed for an injunction against the issuing of execution upon the decree in favor of H. Clay Evans et al. entered in the court below upon the coming down of the mandate from this court in the case of Railroad Co. v. Evans, reported in 14 C. C. A. 116, 66 Fed. 809. The circuit court denied the petition for the injunction prayed, and the petitioner has brought the case here on appeal.

The facts in the main case, upon which the decision of this court was rendered, were stated by Judge Lurton, who delivered the opinion of the court filed therein. It is only necessary to give a synopsis of them here: The Chattanooga, Rome & Columbus Railroad Company, on the 1st day of September, 1887, having a railroad extending from Carrollton, in the state of Georgia, to Chattanooga, in the state of Tennessee, executed a mortgage to the Central Trust Company of New York, as trustee, upon the entire road and its equipment, to secure its bonds in the sum of \$2,240,000, and on the following day executed to the same party, as trustee, a like mortgage to secure another issue of bonds in the sum of \$1,400,000. All the bonds above mentioned were issued and negotiated. In that state of things, the company became indebted to H. Clay Evans, one of the appellees in this proceeding, for materials furnished and work done in his machine shops upon locomotives, and for railroad supplies of different kinds. Evans brought suit on these liabilities in one of the chancery courts of Tennessee, under the peculiar statutory jurisdiction of those courts in that state, and, in due course, duly obtained judgment against the Chattanooga, Rome & Columbus Railroad Company for the sum of \$4,311.09. Upon the return unsatisfied of an execution issued to collect that judgment, Evans, on January 16, 1892, filed a general creditor's bill in the state court in chancery against the Chattanooga, Rome & Columbus Railroad Company, the Central Trust Company of New York, the Savannah & Western Railroad Company, the Central Railroad & Banking Company of Georgia, and the Richmond & Danville Railroad Company. Subsequently, James and Kratzenstein, other creditors of the Chattanooga, Rome & Columbus Railroad Company, joined as complainants. The object of Evans' bill was to obtain a decree establishing a lien for his debt which would be prior to the mortgages, and declaring null, as against creditors, a sale which his debtor had made to the Savannah & Western Railroad Company, upon grounds one of which was that the sale was made to defraud creditors; and the bill prayed for the subjection of the railroad property in Tennessee to the payment of his debt. Upon the filing of this bill an attachment was sued out under the laws of the state in that behalf, and was levied upon that part of the line of the railroad lying in Tennessee, some locomotive engines, some coaches, machinery, tools, fixtures, etc. The Central Trust Company, and certain railroad companies which were concerned in the affairs of the Chattanooga, Rome & Columbus Railroad Company, replevied the attached property by giving bonds with A. N. Sloan, C. A. Lyerly, and Barr & McAdoo as sureties, and thereupon the property was released. The condition of the bond was:

"Now, if said principal obligors herein shall pay the debt, interests, and costs of the complainant, if the court shall adjudge the same against them, or either of them, or shall adjudge the property attached and herein replevied is subject to the payment of same, they shall either pay said debt, interests, and costs, or return said property, then this obligation to be void and of no effect."

A like attachment and replevy of the property upon a bond with Lyerly as surety were made upon the coming into the suit of the

other creditors as above mentioned. The case was subsequently removed into the circuit court of the United States, where, upon the final hearing, a general decree was rendered for complainants; and it was further ordered and decreed that the obligors in the replevy bonds should pay the debts of the attaching creditors, respectively, with no alternative. All the defendants appealed to this court, where it was held: First, that the claim of priority by Evans over the mortgages held by the Central Trust Company of New York could not be sustained; but, secondly, that the sale of the road and other assets by the Chattanooga, Rome & Columbus Railroad Company to the Savannah & Western Railroad Company in May, 1891, was fraudulent and void as to Evans and the other creditors, complainants, who therefore had the right to seize the property upon attachments. In respect to that part of the decree below relating to the obligors in the replevy bonds, this court held, upon consideration of the Tennessee statute in relation to such bonds, and its construction by the supreme court of Tennessee, that the decree should have given the obligors in the bonds the privilege of the alternative of returning the attached property, or paying the value thereof. A mandate was accordingly sent down to modify the decree in that regard by decreeing that the property might be returned and placed in the custody and possession of the circuit court within 30 days, or otherwise that the obligors should pay one-half of the penalty of the bond, which was assumed to be the value of the property, and should thereupon be discharged. Upon the receipt of the mandate by the circuit court, that court entered its decree, and, in respect to the matter of the bond, ordered that within 30 days after the entry of the decree the defendants might place in the custody and possession of the court all of the property replevied and described in the bond, and in that event H. O. Ewing, deputy clerk of the court, was appointed special commissioner to receive, take charge of, and hold the same to await the further order of the court; and, further, that in case all the property attached and replevied should not be restored to the control and possession of the court, as above provided, at the end of 30 days, then execution might issue for the sum of \$4,500,—that being one-half the penalty of the bond,—with interest from the 20th day of January, 1892, amounting to the sum of \$894.85. Other directions about costs are not material to the present controversy. This decree was entered on the 16th day of May, 1895. On the 5th day of June, following, the complainant, the Central Trust Company of New York, filed in its original case, in the office of the clerk of the circuit court, as above stated, this petition, praying that an injunction should issue against Evans and the other creditors, restraining them from enforcing the said order for the return of the property to the custody and possession of H. O. Ewing as special commissioner; and asking that they be required to show cause why they should not be required to come into the cause and present their claims against the Chattanooga, Rome & Columbus Railroad Company in the proceedings pending for the foreclosure of the mortgage against the Chattanooga, Rome & Columbus Railroad Company and another, and have all their rights,

as against the property, and among themselves, there adjudicated; and praying for a temporary restraining order. This petition stated, as its substantial ground, that all the property covered by the replevy bonds was then in the possession of Eugene E. Jones, as receiver, under the order of the circuit courts of the United States for the Northern district of Georgia and the Eastern district of Tennessee, made in the case of the Central Trust Company of New York against the Chattanooga, Rome & Columbus Railroad Company and the Savannah & Western Railroad Company, instituted on the 15th day of December, 1893, for the purpose of foreclosing the mortgages hereinbefore mentioned, and that, therefore, the said property was not subject to the control of the obligors in the replevy bonds, but was subject to the order and control of the court, which had authority to make such order respecting the same as the rights and interests of the parties might require. The motion for a preliminary injunction on this petition was brought on for hearing, and was denied by an order made June 15, 1895. From that order the Central Trust Company of New York has prosecuted this appeal, under the provisions of the recent act of congress authorizing an appeal to be taken from an order of the court refusing an injunction. 28 Stat. 666.

It must be noted, in the outset, that the appeal we are now considering is not an appeal from the decree which was made by the circuit court, which stands without any proceeding to reverse or change it in any way, but it is based on the subsequent order of the court denying the appellant's petition. No ground appears for the assumption that while that decree stands the circuit court would have authority to entertain this proceeding, taken for the purpose of defeating its substantial purpose and effect. Here was a decree affording to the complainants, Evans and others, in that suit, distinct and unconditional relief, viz. that of having the attached property brought into court and subjected to the complainant's demands, or, in the alternative of that, the payment into court, for the same purpose, of the value thereof. The enjoining of the complainants from taking the usual remedies for the enforcement of the decree would amount to a nullification of the decree itself, *pro tanto*. The right of the complainants, Evans and the creditors who joined him in this suit, as against the obligors on these bonds, was fully considered by this court on the appeal in the former case, and definitely ascertained and determined by the decree which it directed to be entered. The decree of the court below was, in substance and effect, that which this court ordered and directed. Its conformity to the mandate of the court is not disputed by any proper challenge, and no reason is perceived for doubting that it was authorized by the opinion and mandate of this court. The suggestion that that decree may be defeated in this way cannot be entertained. Upon the entry of it, the complainants in the suit were entitled to a direct and immediate performance of it. It did not leave them in a position where it would be necessary, in order to realize the benefits of it, for them to institute some new proceeding in that court, or any other; nor were they under any liability to be brought into a fur-

ther controversy, at the instance of any party to that suit, for the purpose of having their rights in respect to the subject-matter of the decree overhauled and readjudicated. There would be no finality in the judgment and decrees of courts, if, when the rights of parties are settled by express adjudication, they can be thus re-examined, modified, or made conditional upon further litigation. As will be seen upon reference to the opinion of this court in the case of *Railroad Co. v. Evans*, 14 C. C. A. 116, 66 Fed. 809, Judge Lurton, in delivering the opinion of the court, examined and considered the legal character and effect of the replevy bonds under the statutes and decisions in Tennessee, and, quoting the cases of *Kuhn v. Spellacy*, 3 Lea, 278; *Ward v. Kent*, 6 Lea, 131; *Green v. Lanier*, 5 Heisk. 662; *Barry v. Frayser*, 10 Heisk. 217,—expressly declared (page 826, 66 Fed., and page 116, 14 C. C. A.):

"We hold that this bond must be regarded as a bond of the second class, and that its penalty is for double the value of the property attached. The proper decree is for the penalty of the bond, to be discharged upon the delivery of the property replevied. Inasmuch as the value is not specifically stated in the bond, it may, as was done in *Kuhn v. Spellacy*, supra (no reference having been asked below), be assumed that the value was one-half the penalty of the bond, or \$4,500. By the payment of that sum, with interest from the date of the bond, the decree may be discharged."

And further:

"It was intimated in *Kuhn v. Spellacy*, supra, that it was perhaps unnecessary to recite in the decree that it might be satisfied by a return of the property, as the right accrues under the statute itself. However this might be if this proceeding was in the state court, it is clearly right that the decree should be so modified as to permit the appellants to satisfy the decree by returning the property replevied. This they may do, provided the property shall be placed in the custody and possession of the circuit court within thirty days after that court shall modify the decree as hereby directed."

And the decree of the court below was subsequently modified accordingly, and the rights of the parties became thereby fixed, and it was not competent to take any action in the circuit court which would contravene or further modify them. This has always been the rule in the supreme court of the United States, and has always been acted upon, not only in that court, but in the United States circuit courts of appeals, which have succeeded to a part of the jurisdiction of the supreme court. See, among other cases, *Humphrey v. Baker*, 103 U. S. 736; *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611; *Railway Co. v. Anderson*, 149 U. S. 237, 13 Sup. Ct. 843. Many of the cases are collected in the opinion of this court delivered by Judge Lurton on the second appeal of a case (*Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co. of Grand Rapids*, 72 Fed. 545), where the rule was held to apply to the case of a mandate sent down to the circuit court upon the affirmance of an interlocutory decree for an injunction.

But it is contended that the court below having the property which had been replevied in the *Evans Case* already in its possession and control, by virtue of its authority over the receiver in the foreclosure case brought by the Central Trust Company of New York, the obligation of the replevy bond was substantially per-

formed, for that, in effect, the property was so situated that it could be transferred by mere direction of the court. But this proposition is wholly unsound. The possession of the property which the court's receiver had in the Central Trust Company's Case was a possession for the purposes and objects of that suit. It had been seized by virtue of the lien of the mortgages, and the possession which had been taken was for the purpose of enforcing the lien; and so long as that possession is maintained, and for such purpose, it is a fallacy to say that it has been returned and exposed to an execution on Evans' judgment. No action whatever has been taken by the court, or moved by any party, for the purpose of turning the property over; but, on the contrary, it is claimed and insisted by the receiver in the foreclosure case, who undoubtedly represents the interest of the Central Trust Company in this respect, that this replevied property now in his possession is indispensably necessary to the operations of the road, with which he is charged, and that an irreparable injury would be caused if he were to be dispossessed of that property. It comes to this: that the replevied property has not been returned into the custody and possession of the court for the purposes of the Evans suit, and for the satisfaction of his decree; that no attempt has been made to bring this about, and there is plainly no purpose to do it. Under the statute of Tennessee describing the character of replevy bonds in attachment cases, as construed by the supreme court of the state, the obligors are bound to surrender the property itself, and are not in a position to say, when called upon to do so, that the property was, at the time of the giving of the bond, subject to a lien in their own favor, in virtue of which they have since seized, and will now hold, it. In order to assert the rights which they had by way of lien, they must resort to other remedies than that of giving a replevy bond. Having taken this course, they must abide their obligation. It has been distinctly held that they cannot set up in answer to their obligation a right to the property in some third person, or in themselves (*Smyth v. Barbee*, 9 Lea, 173; *Cheatham v. Galloway*, 7 Heisk. 678; *Stephens v. Iron Co.*, 11 Heisk. 712); and the stipulation in these bonds could not be satisfied by the tender of a mere right of redemption, which has, in substance and effect, already expired, or ceased to be of any value. It is unnecessary to pursue the subject further. The order of the court denying the injunction was clearly right, and it must be affirmed. It is so ordered.

JONES v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 347.

1. RAILROAD MORTGAGES—PAYMENTS TO PRESERVE PROPERTY—PRIORITIES.

When third parties, at the request and for the benefit of the trustee in a railroad mortgage, have entered into obligations for the purpose of preserving the mortgaged property for the benefit of the bondholders, and keeping it a going concern, and are subjected to a liability arising out of

such obligations, such liability may properly be discharged out of the income or corpus of the mortgaged property for the benefit of which it was incurred.

2. SAME.

Certain property of a railroad company, which was covered by mortgages, was attached by a creditor who had secured a judgment against the company. Thereupon, in order to preserve the unity of the property, and keep the railroad a going concern, the trustee in the mortgages caused such property to be replevied, and bonds to be given, with sureties, for the return of the property, or for the payment of its value, if adjudged to be subject to the attachment. The property was ultimately adjudged to be so subject, but, in consequence of its having been taken into possession by a receiver appointed in a foreclosure suit instituted by the trustee, it was impossible for the sureties on the replevin bonds to return the property, and executions were directed to issue against them for its value. *Held* that, under these circumstances, the receiver in the foreclosure suit was properly directed to pay, out of the property in his hands, the claim of the creditor who had issued the attachment, and for whose benefit the decree against the sureties on the replevin bonds was made, although such creditor's claim was not, in itself, superior to the mortgage.

3. COURTS—JURISDICTION—ORIGINAL AND ANCILLARY.

Where a railroad foreclosure suit is pending in a United States circuit court in one district, as ancillary to a similar suit in another, the former court should not remit to the court of primary jurisdiction an incidental motion relating to transactions which took place within its own district, and to other related litigations arising there, and of which it had already taken jurisdiction.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

This is an appeal from an order made by the court below directing the appellant, as receiver, to pay off and discharge the decrees entered by the same court in favor of H. Clay Evans and other creditors, complainants, against the Chattanooga, Rome & Columbus Railroad Company, and other parties, who were obligors in the replevy bonds mentioned in case No. 340,—that of Trust Co. v. Evans (in this court, which has just been decided) 73 Fed. 562; this being another litigation upon a branch of the same subject-matter. The present case was argued and submitted at the same time with No. 340, and by mutual stipulations in both the appeals the record in each is treated as part of the record in the other. In addition to the facts showing the groundwork of the controversy in the other case, it is only necessary, for the present purpose, to state that a short time previous to June 15, 1895, when the court below made the order refusing an injunction, from which the appeal in that case was taken, it ordered, upon the application of Lyerly, Sloan, and Barr & McAdoo, the sureties in the replevy bonds, that Jones, the appellant, as receiver, should show cause why he should not pay the decrees against said sureties; and, upon the coming in of the answer of the receiver, the court, on the 18th day of July, 1895, entered an order "that the said Eugene E. Jones, receiver as aforesaid, out of any money available in his hands, should pay off and discharge such judgment, or, if not in funds for such purpose, that he should, in a reasonable time, report to this court his inability to do so, and a suggestion as to the best method of raising funds for such purpose." And thereupon the receiver appealed.

Alex. C. King, for appellant.

J. H. Barr, for A. N. Sloan, C. A. Lyerly, and Barr & McAdoo.

Chas. R. Evans and Brown & Spurlock, for H. C. Evans and others.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The burden of the complaint made by the receiver against the order of the court below directing him to pay off the decrees in favor of Evans, James, and Kratzenstein, in exoneration of the sureties, is that to do so would be to appropriate the assets in his hands, which are subject to the lien of the mortgages held by the Central Trust Company of New York, to the payment of the debts of general creditors, whose claims are, and have already been adjudged to be, subordinate to the mortgage lien. He further contends that the circuit court for the Eastern district of Tennessee, for the reason that it had jurisdiction of the foreclosure case merely as ancillary to the primary jurisdiction of the United States circuit court for the Northern district of Georgia, should have refused to entertain the application of the sureties, and should have remitted them, for redress, to the court of primary jurisdiction in Georgia. In respect to the main subject,—the question upon the merits,—it is contended that inasmuch as the claims of the creditors covered by the decree of the court below in the case of Evans et al. v. The Chattanooga, Rome & Columbus Railroad Company, and who were the obligees in the replevy bonds given to release the property of the last-named railroad company from attachment, were claims at large, without lien, and the sureties, upon satisfying the decrees, would, as it is assumed, stand simply in the place of the creditors, they would stand with claims subordinate to the lien of the mortgages given by the Chattanooga, Rome & Columbus Railroad Company to the Central Trust Company of New York, and therefore would not be entitled to have the assets covered by the mortgage diverted to the satisfaction of their claims. But the application of the sureties stands upon no such ground. Their claim is of a different character from that of the creditors whose decrees they are required to satisfy. Upon the levy of the attachment in the Evans Case, the mortgaged property was seized for the satisfaction of the debts of the Chattanooga, Rome & Columbus Railroad Company, the mortgagor. The mortgagee, with others who claimed to have interests to be protected, found it necessary to their interests to relieve the property from the attachment, and to continue its employment in the business of the road. It appears from the statements of the receiver, and indeed, is admitted on all hands, that the retention of the property under the attachment would have caused serious inconvenience in the operation of the road, and irreparable loss of revenues. The Central Trust Company of New York, in its petition in the other case, heard with this (*Trust Co. v. Evans*, 73 Fed. 562), for an injunction, alleges "that said property could not be taken out of the possession of the said Jones, as receiver, and put into the possession of Ewing [clerk of the court], without irreparable damage to the property and interests of the bondholders." The same reasons that now exist for the possession of the property by the receiver existed and operated with equal force at the time when the property was replevied. For those reasons the mortgage trustee and the other parties (the rail-

road companies having similar interests) gave their bonds, with Lysterly, Sloan, and Barr & McAdoo, as sureties. Thereby they obtained the restoration of the property to the corpus of the assets, and all became subject to the obligation of the bond to return the property, or to pay the value of it if the complainants in that case should obtain a decree to that effect. This result has happened. The principals in the bond cannot, or, at least, do not, return the property, nor do they satisfy the decree by payment, but seem willing that their sureties should be compelled to do that which they, as principals, obligated themselves to do. It is true that the trust company did not join as an obligor in the bond to release the attachment of James and Kratzenstein; but it was a defendant in that suit, and the bond was given in its interest. In equity, it was subject to a similar obligation to the sureties to that which it assumed in reference to Evans' claim. From what has been stated, it is obvious that this liability of the sureties was incurred for the purpose of preserving the fund which will ultimately be appropriated to the payment of the mortgage debt. It is not the case of an equity arising, as in many cases has happened, from the diversion of current income from the payment of ordinary current operating expenses to the payment of the mortgage; but it is the case of an equity arising from the saving, in a case of necessity, of the mortgaged property itself, and that upon call of the trustee, by persons who exposed themselves to liability solely for the accommodation and benefit of the beneficiaries under the mortgage,—the sureties having, so far as appears, no interest of their own to protect. The Chattanooga, Rome & Columbus Railroad Company has long been hopelessly insolvent, and we are assured by the receiver that the mortgaged property will not produce sufficient funds to pay the first of the two mortgages which the Central Trust Company of New York represents. No case has been referred to, nor are we aware of any, where the equity of a third person thus coming in and assuming a liability merely for the benefit and protection of a beneficiary, and at his solicitation, rests upon stronger ground. The rule adopted and applied in the case of *Trust Co. v. Morrison*, 125 U. S. 591, 8 Sup. Ct. 1004, is a sufficient support for the order here appealed from. In that case Morrison became surety upon a bond filed in an injunction suit brought to restrain a threatened levy of execution upon some of the rolling stock of a railroad which was subject to a mortgage. By the bond he was bound to pay the debt in case the injunction should not be sustained. The injunction suit failed, and judgment was rendered against Morrison upon his bond. While the injunction suit was pending the railroad company gave Morrison a chattel mortgage upon some of its rolling stock to indemnify him against liability on his bond. This rolling stock was, however, already covered by the railroad mortgage, and Morrison never enforced it. The mortgage upon the railroad was foreclosed, and, after the decree, Morrison intervened, and asked to be protected by the payment of the judgment against him out of the proceeds of the property. During the pendency of the foreclosure proceedings the court had authorized the receiver to protect such sureties as had afforded protec-

tion to the property and assets of the company by the giving of such bonds, and for that purpose to use any net income that might be in his hands. The receiver, not having any such funds, did nothing to protect the sureties. The court below ordered that the judgment which Morrison had given his bond to pay should be paid out of the proceeds of the sale of the mortgaged property, and that order was sustained upon appeal to the supreme court of the United States. Mr. Justice Bradley, delivering the opinion of the court, said:

"The ground of the claim is that a portion of the property covered by the mortgage, being in peril of abstraction and loss, was rescued and saved to the mortgage by the act of the petitioner. It is denied that the property was in any peril, because, as contended by the respondents, it could not have been taken in execution, by reason of the prior lien of the mortgage. But it must be conceded that, until the mortgage was enforced by entry or judicial claim, the personal property of the railroad company was subject to its disposal in the ordinary course of business, and, as such, was liable to be seized and taken in execution for its debts. * * * Even if it would have been subject to the mortgage when taken on execution, nevertheless it could have been taken; and this would necessarily have disturbed, and perhaps interrupted, the operations of the railroad, by separating the property seized from the corpus of the estate. The trustees of the mortgage might have prevented such a catastrophe, it is true, by filing a bill of foreclosure, and for an injunction and receiver; but they did not choose to take this course until nearly three years afterwards. On the contrary, they allowed the railroad company to continue to use the property, and to take care of it for them, and stood by and saw Morrison (who had no interest in the matter) put his hands in the fire and rescue the rolling stock, of which they were to receive the benefit,—both directly, by receiving the property itself, without contest or controversy, and indirectly, by keeping up the railroad as a going concern. Morrison's money, or the fruits of it, has gone into their pockets."

Referring to the circumstance that the railroad company had given Morrison the mortgage to secure him, it was further observed:

"He did not attempt to enforce this mortgage, it is true, and did not have it renewed, but followed out the original idea of preserving the stock entire, and keeping up the property as a going concern. Instead of giving this mortgage, the company might, with perfect propriety, have placed funds in the hands of the sureties to enable them to protect themselves, and the transaction would not have been questioned. By not doing so, the receipts and revenues which would have been required for this purpose went, in the end, to the benefit of the bondholders."

And the case was distinguished from those where the claim was for operating expenses only, by referring to the fact that the claim then under consideration was based upon a bona fide effort made by the intervener to preserve the fund itself from waste; and the case was further distinguished from the case of the claim of an intervener to be subrogated to the lien of the judgment which was subject to the lien of the mortgage, and, after stating that the court did not understand that the claim was presented as one upon subrogation, it was said:

"The Holbrook judgment and execution could have greatly deranged the business of the company as a going concern. The rolling stock could have been seized and removed. Whether such seizure could, or could not, have been prevented by the mortgagees, is a different question. It would, at all events, have required legal proceedings, and probably serious litigation. And

this the mortgagees did not see fit to undertake. 'To save the property from being taken, to prevent the catastrophe which its taking would have caused, and the serious questions which would have arisen had it actually been sold, the intervener gave his bond to obtain an injunction. It was not done for the purpose of being subrogated to the questionable rights of Holbrook under his judgment; but to prevent the certain injury to the property itself which the attempted enforcement of these rights would have involved."

Another fact of much importance exists in this case which was not present in the case just cited. There the surety went upon the bond for the relief of the railroad property at the solicitation of the railroad company itself, and the mortgagee had nothing to do with the transaction. It simply had knowledge of it. Here the mortgagee intervened for the protection of its interests, and brought these sureties to the rescue of the mortgaged property,—a circumstance which manifestly makes firmer the position of the sureties in the present case. The case of *Trust Co. v. Morrison* was subsequently cited in the case of *St. Louis, etc., R. Co. v. Cleveland, etc., R. Co.*, 125 U. S. 658, 8 Sup. Ct. 1011, with the cases of *Fosdick v. Schall*, 99 U. S. 235; *Miltenberger v. Railway Co.*, 106 U. S. 286, 1 Sup. Ct. 140; *Trust Co. v. Souther*, 107 U. S. 591, 2 Sup. Ct. 295; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809; *Dow v. Railroad Co.*, 124 U. S. 652, 8 Sup. Ct. 673; *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887,—as illustrations and instances where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation, otherwise unsecured, by which they are entitled to outrank, in priority of payment, even on a distribution of the proceeds of the sale of the property, those who are secured by prior mortgage liens. And, indeed, the doctrine applied in *Trust Co. v. Morrison* rests upon the same foundation as that which has been applied in affording relief to unsecured creditors who have contributed to the payment of operating expenses which of right should have been paid out of current income, but which income has been applied in the payment of the mortgage debt; the substantial ground and reason for the rule being that the mortgaged property has been conserved or augmented at the expense of others acting in good faith, and whose interests have been sacrificed for that purpose.

But there is another ground upon which the right of these sureties to the relief they seek may be well supported. The Central Trust Company of New York was a principal in the bond to Evans, and was one of the defendants to the bill in which James and Kratzenstein became co-complainants. For reasons hereinbefore stated, it stood in the same equitable relation to the sureties, in reference to the claims of James and Kratzenstein, that it did in relation to that of Evans. As to it, the sureties were such in respect of all the claims. It is bound to exonerate its sureties. The rule is that each of the principals is individually bound to protect the sureties. *Apgar's Adm'rs v. Hiler*, 24 N. J. Law, 812; *West v. Bank of Rutland*, 19 Vt. 403; *Riddle v. Bowman*, 27 N. H. 236; *Dickie v. Rogers*, 7 Mart. (La.) 588. Nor is the surety obliged to wait until after he has paid the debt, but he may proceed in equity to compel the prin-

cipal to pay it. *Antrobus v. Davidson*, 3 Mer. 569; *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Irick v. Black*, 17 N. J. Eq. 189; *Thigpen v. Price*, Phil. Eq. 146; *Taylor v. Miller*, Id. 365. And this doctrine has been recognized and affirmed in Tennessee. *Greene v. Starnes*, 1 Heisk. 582; *Saylors v. Saylors*, 3 Heisk. 525; *Miller v. Speed*, 9 Heisk. 196; *Howell v. Cobb*, 2 Cold. 104. And here the Central Trust Company would, upon such proceedings, be compelled to relieve the sureties by paying the debt. Inasmuch as the bona fides of the trustee in taking the action which has involved the sureties is not questioned, and, indeed, is apparent, what the trustee would so pay would be chargeable upon the mortgaged property, as expenses in the administration of the trust. Equity, for the purpose of avoiding circuitry of action, may appropriately lay hold of the ultimate fund and appropriate it to the satisfaction of this debt for which the sureties are liable.

The contention that the court below should have turned these parties over to the United States court in Georgia for relief cannot be sustained. All the transactions out of which this controversy has grown took place in Tennessee. The creditors' suit of Evans and others was prosecuted and ripened into judgment there. The attached property was found and seized in Tennessee. The bonds given to release it were to be discharged by payment in that state. The court had already taken jurisdiction of the subject-matter. The Central Trust Company of New York was a party to the proceeding, and both the main suits were pending in that court. In that situation of affairs, the circuit court in Tennessee would not have been justified in refusing to continue to exercise its jurisdiction to complete relief.

We think the court below committed no error in proceeding for the relief of the sureties, by requiring the receiver to pay these debts. The order of the circuit court is therefore affirmed.

BALDWIN v. NATIONAL HEDGE & WIRE-FENCE CO.

(Circuit Court of Appeals, Third Circuit. February 28, 1896.)

1. REFORMATION OF DEEDS—MISTAKE—CHARACTER OF PROOFS.

Mistake, though arising from the carelessness of the parties themselves, and not of a scrivener, in drawing and signing the deed, may be proved for the purposes of a reformation. If the proofs of mistake are entirely plain, and satisfactory to the court, the relief will be granted, though the mistake is denied and there is a conflict of testimony.

2. SAME—INADEQUACY OF PRICE.

Inadequacy of price, while not of itself sufficient ground for reformation, as between parties standing on an equality, is yet a material fact, which, in connection with other facts, may amount to proof of fraud or mistake such as will warrant a reformation.

3. COMPETENCY OF WITNESSES—ATTORNEY AND CLIENT.

There is no rule of law that will prevent counsel from giving testimony in behalf of their client, and in corroboration of his statements, as to admissions made prior to the suit, and in the course of an interview sought by the client for the purpose of ascertaining defendant's view of the transaction giving rise to the suit.

4. REFORMATION OF DEEDS—ASSIGNMENT OF PATENT.

An unconditional assignment of an entire patent *held* to have been intended only as a license for a single county, and reformation granted accordingly, where, in the opinion of the majority of the court, not only the parol evidence, but every incident and circumstance attending the sale, both before and after execution of the deed, showed that the parties negotiated for the sale of the county alone, and there was no evidence outside of the deed of any other agreement or understanding. 67 Fed. 853, reversed. Butler, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by William Baldwin against the National Hedge & Wire-Fence Company for the reformation of a deed purporting to assign all of complainant's rights in a patent for an invention. The circuit court dismissed the bill after final hearing on the merits (67 Fed. 853), and complainant has appealed.

F. Carroll Brewster, for appellant.

John G. Johnson, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

WALES, District Judge. This was a suit to reform a deed, for the purpose of correcting an alleged mistake, and to make the instrument conform with the intended agreement of the parties before and at the time of its execution. The deed is in these words:

"Plashed Fences, William Baldwin.

"York, Penna., March 4th, 1889.

"Know all men by these presents, that I, William Baldwin, of Marion, Indiana, for one dollar to me in hand paid, and other valuable considerations, the receipt whereof is hereby acknowledged, I do hereby assign, transfer, and set over all my title and interest in patent No. 274,895, date April 3, 1888,—being the sole owner and patentee,—to the National Hedge and Wire-Fence Company, of York, Penna.

William Baldwin. [Seal.]

"Witness:

"E. H. Neiman.

"S. B. Gleason.

"J. Jessup."

The material averments of the bill are that prior to the 4th of March, 1889, the complainant was the inventor and patentee of a useful and novel invention, for which letters patent No. 274,895, dated April 3, 1888, had been issued to him, and that he was the sole owner thereof; that said patent was for an improvement on two former patents for his inventions, dated, respectively, February 28, 1882, and August 22, 1882, and numbered 254,187 and 263,094, all of which patents related to the plashing down of hedge fences; that the defendant desired to purchase the right of said patent No. 274,895 for the territory of Baltimore county, Md., and so informed the complainant; thereupon negotiations were opened concerning the purchase by the defendant of the right to the said patent, and that the negotiations between the complainant and defendant related wholly and exclusively to the right for the territory aforesaid; that at the time the deed was signed by the complainant the value of his right and interest in the patent was more than \$50,000, and that the defendant was well

acquainted with the utility and value of the complainant's invention; "that it was by the mutual mistake of the parties that said instrument was so written as to assign and transfer all the right of the orator under his patent, and he did not at any time intend to make such a transfer or assignment, and the defendant did not intend that such assignment or transfer should be made, but both parties then and there meant and intended that only a right in said county of Baltimore should be assigned or transferred;" "that the defendant has had continuous possession of the deed since the date of its execution; and that the complainant was wholly ignorant that the defendant claimed any right to the patent, except the right for Baltimore county, until the 2d day of November, 1893." The present suit was begun December 8, 1893. The answer admits the prior ownership of the patent by the complainant, but avers "that said assignment was properly and correctly prepared and executed in pursuance of the agreement, and that the same in no way was executed by mistake." The bill was dismissed by the circuit court, and the complainant has taken this appeal. The ground for dismissal of the bill appears from the following specification of error: "The learned court erred in finding that the proof of mistake was not clear and satisfactory, and that the mistake is not free from doubt and uncertainty."

The question before us is largely, if not wholly, one of fact, namely, are the proofs in the case sufficient to satisfy the conscience of the court that a mutual mistake was committed by the parties to the deed of March 4, 1889, as alleged in the bill? William Baldwin, the complainant, was, at the time of executing the deed, a resident of Marion, Ind., aged about 45 years, and by occupation a farmer and nurseryman. He had been quite extensively engaged in business, and was the owner of the three patents already referred to. The testimony of the complainant is to this effect: As the result of a previous correspondence by letter with Dr. Neiman, who was a director and general manager of the defendant company, the complainant went to York, Pa., on the 3d of March, 1889, for the purpose of negotiating for the sale of one or more of his patents. On Monday, the 4th, he met Dr. Neiman and Mr. Gleason (the latter since dead), who represented the defendant, and was asked what he would sell them Baltimore county for. They said they were expecting to organize a hedge company in Baltimore county, and had been threatened by the Fred-erick Hedge Company for infringement; that the latter company was using the patent of Wesley Young, who was a rival of the complainant, and had caused the latter some trouble, by unsuccessful suits against him for infringement. And for this reason the complainant was induced to say:

"If it's anything to help defeat Wesley Young, I'll let you have the county very cheap. * * * I'll make you the county for \$25. That'll be enough to pay my expenses for the trip from Marion to York and return."

The conversation was had in Dr. Neiman's office. In the evening, Neiman, Gleason, and complainant met at the office of the defendant company, where Mr. Jessup, the secretary of the defendant, joined them. "Jessup asked if we had come to any terms," to which complainant replied that he "had agreed to let them have Baltimore

county for the small sum of \$25, to help them out of their trouble that they were expecting. * * * Gleason slipped the deed over to me, and says, "Here's a deed prepared for Baltimore county, Maryland." I picked up a pen, and signed, and slipped it back to him." Jessup handed the complainant \$25, and the latter afterwards discovered that his hotel bill had been paid. The complainant neither read the paper which he had signed, nor was it read over to him,—the reason being that he was busy talking with Jessup and Neiman; was giving them the county for a small sum; "thought everything was all right, and had all confidence in the National people." The complainant left York on the morning of the 5th. In April, 1889, complainant received a letter from Dr. Neiman,—which he has been unable to find,—the substance of which was to know for what complainant would sell his patents for several counties in Eastern Pennsylvania, "and if I would take the same per county that I sold them Baltimore county," with the request that he should come to York and consider about the matter. Complainant's answer was that he would not take less than \$50 per county, and that he would be in York about the last of May or first of June, about which time he was contemplating a trip abroad. He arrived in York on the 5th or 6th of June, having been detained three or four days on the way by the Johnstown flood, and there met Neiman, Gleason, Krider, and Gallatin. (Gleason was a general manager, Krider was the president, and Gallatin was a salesman, of the company, as appears from other parts of the proofs.) The parties not being able to agree upon terms of sale, it was proposed by Gleason that the complainant should join the National people, put his patents in with theirs, and increase the capital stock,—the complainant to take stock for his patents, and manage the company's business in the West,—but no arrangement was concluded. Complainant returned from abroad on August 28, 1889, and on his way to Marion stopped at York, and had another interview with the persons just named, at which the proposed combination was again discussed, without reaching any definite conclusion. Again, in October or November, 1889, complainant went to York, at the request of Neiman, and again met the same representatives of the defendant as before, who desired to know for what price he would sell his patent rights for the eastern half of Pennsylvania. He asked \$4,000. After a brief conference this offer was declined. They said they might buy later on. All of these conversations included patent No. 274,895. "They said that was the patent they wanted, if any." The complainant first discovered or heard of the mistake in the deed on November 3, 1893, through Samuel Brightbill, to whom and John L. Gallatin he had sold and assigned patent No. 274,895, for the state of New York, for the sum of \$34,000, in the latter part of 1892. Brightbill came to the complainant's home, and said, "You had no right to sell me the patent which you had already assigned to the National Hedge Company." He demanded a return of his share of the purchase money, and, on complainant's refusal, brought suit against him for \$20,000, which is still pending. Complainant at once employed counsel, and went to Washington, where they found a record of the deed of March 4th in the pat-

ent office. Going thence to York, they called on Mr. Jessup, and what took place is told by the witness as follows:

"A. I met Mr. Jessup, shook hands with him, and introduced Mr. Oliver to him: I told him I was there in a hurry, and had stopped on some important business. I told him 'I was down to Washington City to-day, and I found on record there that the National Hedge & Wire-Fence Company has a deed for all my patent,—the territory of my patent for the United States.' I asked him how that came. 'Well,' he says, 'I don't know.' I says, 'You remember what territory you bought of me on the 4th of March, 1889?' He says, 'Yes, we bought Baltimore county, Maryland.' I said, 'Do you remember what you paid me for it?' He says, 'Yes; we paid you \$25.' I says, 'Do you remember what money you paid me in?' He says, 'No, I don't.' I says, 'You paid me in paper money,—in one and two dollar bills.' I asked him if he remembered anything else besides the \$25. He says, 'Yes, we paid your hotel bill.' I asked him how it came that they had such a deed. 'Well,' he says, 'I don't know. I'm ignorant of that. I never knew anything of the contents of that deed until here, recently.' I asked him, 'How long ago?' He said, 'Well, probably six weeks.' I said 'Mr. Brightbill, the party that I have sold New York to, went to put his deed on record, and he found out that the National Hedge & Wire-Fence Company had a deed for the entire United States.' He said that was the first knowledge ever he had. It was Mr. Jonathan Jessup that said that. Q. Did Mr. Jessup say whether he had read the deed? A. He says: 'I didn't read the deed ever. I didn't know the contents that it contained.' He said, 'All we negotiated for was for Baltimore county, Maryland.' Q. Did you call for the deed? A. I says, 'Mr. Jessup, I'd like to see that deed;' and he said, 'The deed isn't in the office now.' I says, 'Where is it?' and he says, 'The deed is at my house.'"

Mr. Jessup promised to call a meeting of the directors of the defendant company, to have the matter made right.

Mr. Henderson Oliver, who was with the complainant, as counsel, gives this account of the interviews with Jessup and with the directors:

At Jessup's office, "Mr. Baldwin and himself shook hands, and he introduced him to me. Mr. Baldwin didn't wait but a moment until he broached the subject with reference to the amount of territory that was covered by that instrument of writing. I cannot give the thing in the same language, or in the same words, but I will state it substantially as I understood it: Mr. Baldwin asked him if he remembered the amount of territory that he sold him on the 4th of March, 1889, and he answered that he did. Mr. Jessup was very busy. It was an evening upon which he was taking in dues for some building and loan association there, and he would have to talk to us at intervals, as he would be interrupted by persons coming in. I think the conversation that I will now detail was about all thrown in together. When he asked him the question if he knew the amount of territory that this company had purchased on the 4th of March, 1889, Mr. Jessup answered him that he did; that they had purchased Baltimore county, Maryland, for that patent. Mr. Baldwin asked him if he remembered what he paid him for it, and he said that he remembered that he paid him \$25. We then went on to talk about the deed covering the whole United States, and Mr. Jessup remarked that he never knew until quite recently—some five or six weeks ago—what that deed contained. At that juncture I asked Mr. Jessup where that deed had been kept, and who kept it. He remarked that he had kept it all the time himself; that it had been in his possession. Then I asked him the question, 'Who had it recorded?' and he says, 'I did.' Says he, 'I sent it, and it was returned to me.' I asked him if he had ever read the deed. He said, 'No;' that he had never read it, and didn't know its contents."

Mr. Jessup refused to talk further, and said nothing could be done until the board of directors met. This meeting was also at Jessup's office; the counsel of the defendant, Mr. Kell, being pres-

ent. Mr. Krider, the president of the company, was absent from York when the deed was made, and knew nothing about the transaction. Mr. Jessup said that he was willing to have the matter adjusted right and proper.

"That wasn't his exact language, but it was substantially what he said about it."

The conference with the directors was a fruitless one.

"I think Mr. Kell asked me what propositions, if any, we had to submit. I think Mr. Jessup went and got a sheet of paper, and laid it down upon the table, and, says he, 'Block out,'—no, Mr. Kell, I think, made that remark—to block out whatever propositions we had to make. I said to them: 'Gentlemen, we've no propositions to make. We want this territory deeded back. That's what we are here for, and for no other purpose. We have heard what you have had to say about it. You're unwilling to accede to our terms, and we'll bid you good evening.' That is substantially what occurred there."

Meade D. Detweiler, in company with Lancaster D. Baldwin, of Marion, went to York in the latter part of November or the beginning of December, 1893. This witness is one of complainant's counsel, and testifies to certain admissions made by Jessup in a conversation with the latter. He (Jessup) said that he had never read the deed over, and that he only learned the contents of it a few weeks before, when Mr. Brightbill, of Annville, Pa., had called to see him. "I must say," says this witness, "that I asked Mr. Jessup pretty nearly everything that could suggest itself to me, as a lawyer, and tried to get out of him all the facts, and he reluctantly admitted that all the men had intended to buy that evening was Baltimore county, and that that was his understanding of it. Then I said to him, * * * 'Do you think you ought to keep this deed?' He said, 'Mr. Detweiler, it is customary for corporations to keep all they have.'" At this point Jessup "wound up by saying: 'I'll not talk to you any more to-night. You are both lawyers, and I want to send for our counsel;' and he mentioned Mr. Kell's name. We stated that we had simply come there to talk the matter over, and to hear what he had to say about it. He said he would try to have a meeting of the board of directors the next morning." At a meeting of the board of directors which was held the next day, Mr. Kell asked "what we were willing to give to have this matter adjusted, * * * and whether we would pay \$5,000." Mr. Baldwin replied that he didn't come there to buy the patent, but wanted the mistake corrected, and the meeting was speedily terminated.

Lancaster D. Baldwin, a brother of the complainant, and a law partner of Mr. Oliver, and who was with Mr. Detweiler at the interview with Jessup and at the directors' meeting, corroborates the latter witness in every material fact stated by the former, particularly as to Jessup's admission that his understanding at the time of the purchase of the complainant's patent was that it was for Baltimore county; that he had never read the deed over, and had only learned of its contents a few weeks before, when Mr. Brightbill had called upon him and informed him that the Na-

tional Company had a deed for the whole United States on this one patent. This witness says he informed the directors, in reply to the proposition of Mr. Kell to pay \$5,000, "that we were not there to purchase our patent, but were there wanting back the property that they held and claimed, and which had undoubtedly been assigned by mistake."

Dr. Neiman, who, as manager of the defendant company, together with Gleason, his associate manager, conducted the purchase of the complainant's patent, testifies that the agreement with Baldwin was for the sale of the patent for Baltimore county alone, and such was the intention and understanding of all the parties to the transaction when the deed of March 4, 1889, was executed. But the credibility of this witness has been questioned on the ground that, having this knowledge, he was a passive, if not an active, participant in the negotiations which led to the sale of the patent for the state of Maryland to the Baltimore County Hedge & Wire-Fence Company on the 26th of June, 1889. Further exception was taken to him because he testified that the deed from Baldwin was in the handwriting of Gleason, but afterwards admitted, on having an opportunity of inspecting the paper, that it had been prepared by himself. An additional objection is that he had left the defendant company, was hostile to its interests, and was therefore biased. Jessup had, however, made a similar mistake to that of Neiman in saying that Gleason had prepared the deed. It may be fairly said that, if Neiman's testimony stood alone, it would not furnish that clear and satisfactory proof required to establish the mistake. But the complainant has a right to the value of this evidence, be it great or small, and it cannot be left out of consideration. It is consistent with the history of the case, and is in harmony with the admissions of Jessup. Gleason died in 1890 or in 1891. The complainant, Neiman, and Jessup are the only living witnesses of what occurred immediately before and at the execution of the assignment of the patent to the defendant company.

We come now to the evidence on the part of the defendant company. Their chief witness is Jonathan Jessup, the secretary of the company, who positively and directly denies that he had at any time made the admissions, with one or two unimportant exceptions, testified to by the witnesses for the complainant. His denials are absolute, unqualified, and without explanation. The testimony of the witnesses as to Jessup's admissions is so circumstantial in its details that little allowance can be made for any misunderstanding of what was said by Jessup at the different interviews with him by the complainant and his witnesses. Jessup admits the interviews with him which are testified to by the other witnesses, but, as we have seen, denies that he ever told any one of them what territory the defendant company had bought.

Returning, for a moment, to Detweiler's account of what occurred at the directors' meeting, he states that he and Mr. Kell withdrew into an adjoining room for a few minutes, when the latter in-

quired whether the complainant would give \$5,000 by way of settlement; and in this connection the following extract from the record is significant:

"X—Q. Did he not suggest to you that the only means of accomplishing what you wanted was a reconveyance by the hedge company, and suggest to you, also, that in view of the existing dispute between the parties the payment of a sum of \$5,000 would be, in his opinion, a reasonable method of settlement? A. No; that wasn't the understanding. I said to him, 'Mr. Kell, I know something about this patent business; I have had some experience; and I have heard from your Mr. Jessup that your people only intended to buy Baltimore county, and you only paid \$25 for it. Now, in view of these circumstances, it is not right for us, now that you have something wrongful and illegal, to pay such an amount.' I took that position. He went on to say, 'Well, that's a matter to be determined.' I remember distinctly that he said, 'Now, that's a matter to be determined,—that we have this wrongfully,—and you must prove it.' But he adhered firmly to his position that if we would pay this money the matter could be adjusted."

It will be remembered that this conversation between the counsel of the defendant and Mr. Detweiler was had only a few hours after the alleged admissions of Jessup in the hearing of the witness. Is it reasonable to suppose that the witness would have made the statement, "I have heard from Mr. Jessup that your people only intended to buy Baltimore county," unless it were true, when Jessup was sitting in the next room, and the two men could have been so easily confronted with each other? Mr. Kell was present at the examination of this witness.

It is also important to bear in mind that at none of the interviews which were held with Jessup, or with the representatives of the defendant, was it asserted or claimed by any one that the defendant had intended to buy any other territory than Baltimore county. The position assumed was that the mistake must be proved. Jessup did not deny this statement that he had never read the deed until Brightbill informed him of its contents, nor that he had neglected to put it on record until more than a year after its execution, and only then at the instance of the Baltimore County Hedge & Wire-Fence Company. He states that, when the parties met to execute the deed, nothing was said to indicate what were the terms of the instrument; "Nothing more than that,—that they had come to an agreement." And this remark, he says, was made by Gleason, who did not say what the agreement was. Jessup had nothing to do with making the bargain with the complainant, but trusted everything to Gleason, and it does not appear that Gleason ever reported to him what he had bought. But Jessup does throw some light on this extraordinary transaction, in which the complainant, on the face of his deed, sold, for \$25, property alleged in the bill to be worth over \$50,000, and the value of which is not denied in the answer. Referring to the purpose for which the complainant's patent was needed, he says:

"A. We were organizing a company in Baltimore county, Maryland. When Mr. Baldwin came there on that occasion, Mr. Gleason, who was at that time our field man, said, some time during the day of the 4th of March, he thought he could buy that patent of Mr. Baldwin, and that he wanted to use it down

there. He said he would like to have it,—that he wanted to use it down there in Maryland,—and he was bustling about. He had been in the office once or twice. My impression is, this was in the afternoon. I don't remember that I saw him any more after that until the evening, when he came into my office with Mr. Baldwin, and said that they had come to an agreement, and that I was to pay Mr. Baldwin \$25."

This goes far in supporting complainant's statement of what he believed and understood to be the subject of his dealings with Neiman and Gleason, and it will also be found to be consistent with other facts in the history of this case. The defendants' witnesses, Samuel C. Heird and John B. Longnecker (the former an officer, and the latter a stockholder, of the Baltimore County Hedge & Wire-Fence Company), proved beyond any question that the original negotiations between the latter company and the defendant were for the purchase of the Baldwin patent for Baltimore county only: "but" (according to Heird) "at the several meetings afterwards the state was taken in, as the territory for the Baltimore County Company." In reply to further questions about the assignment of June 26, 1889, Heird answers:

"Q. Can you recollect how long before this paper was executed the negotiations had taken the form of being for the whole state? A. I should judge it was somewhere along in March or April. Q. In March or April, 1889? A. Yes, sir. * * * Q. Did Dr. Neiman, or Mr. Gleason in Dr. Neiman's hearing, say anything to you, when they had acquired the right to the Baltimore patent? A. I do not know. I do not remember that they did, as to the time when they had acquired it. It was about, to me, the first knowledge of knowing what territory the National Company owned. It seemed that none of us knew until near about that time, and they seemed to own the United States; that is, the National Company. Q. Did they say they owned the United States? A. That was Mr. Gleason's statement."

Longnecker's testimony is substantially to the same effect as that of Heird:

"Q. For what extent of territory for the Baltimore patent were you negotiating? A. Negotiations commenced for the county of Baltimore, but it afterwards included the whole state. Q. About what time did they take the shape of negotiations for the entire state? A. I think it was in the spring of 1889. I am not sure about the date exactly."

The testimony of David W. Krider, the president of the defendant company, is unimportant. He was absent from York in the early part of March, 1889, had no personal knowledge of the terms of the agreement that was made between the complainant and the defendant, and was not present at the execution of the deed.

It is in proof that the complainant on the 21st of April, 1886, assigned all his rights in his three patents, including No. 274,895, to Garner, Shickle, and Strouse, for the state of Virginia, for the consideration of \$500, and that in November, 1892, he assigned his right and interest in the same patent to Brightbill and Gallatin, for the state of New York, for \$34,000.

We have reviewed the evidence at some length, and, after a careful examination of all the proofs, we are fully convinced that the parties to the deed of March 4, 1889, mutually committed a mistake in omitting from that instrument a most important part of

their agreement, to wit, that the use of the patent by the defendant was to be limited to the territory of Baltimore county. It is not necessary to ascertain with precision how such a serious mistake was made. It must have arisen from carelessness on both sides, or by reason of misplaced confidence on the part of the complainant, who was either the victim of a mistake or of fraud. The positive denials by Jessup cannot be allowed to outweigh the equally direct statements of the complainant and his witnesses. If Jessup spoke the truth, the others have spoken falsehoods. Jessup appears to have been a careless and indifferent officer of the defendant company, trusting everything to Gleason. He did not know the contents of this important deed, which, for a nominal sum, conveyed to his company property worth thousands of dollars, and only put it on record, at the instance of the Baltimore County Company, more than a year after its execution. It may be charitably supposed that he was also careless in his talk, forgetful of what he had said, and that he denied his admissions from failure of memory. In the view we have taken of the evidence, it is overwhelmingly in favor of the complainant. Not only the parol evidence, but every incident and circumstance attending the sale and the transfer of the patent, both before and after the execution of the deed, show that the parties were in treaty for a sale for the territory of Baltimore county; and there is not the slightest evidence, outside of the deed, that there was any other agreement or understanding. There is also an entire absence of proof of any assignable motive or reason which could have influenced the complainant to give away such a valuable patent for a mere song. Besides this, it taxes credulity to believe that he gave away more than was asked of him. In *Gillespie v. Moon*, 2 Johns. Ch. 593, where suit was brought to rectify a mistake in a deed, Chancellor Kent said, "There are circumstances, independent of the parol proof, that afford pretty strong presumptive evidence of mistake." And in the present case we think that all the circumstances point in the same direction.

Immediately on discovering the mistake, complainant employed counsel, who accompanied him to the patent office, in Washington, to examine the record of his deed, and next to York, to request the agents of the defendant company to have it corrected. He was naturally surprised and mortified to find that he had been guilty of such an oversight, and did not anticipate much difficulty in having it remedied. Disappointed in this expectation, he, without delay, sought relief in a court of equity. The jurisdiction of that court in such cases is unquestioned, and the only question in each is whether the proof of mistake comes up to the required standard. *Gillespie v. Moon* was decided in 1817, and the chancellor, in his opinion, says:

"* * * It appears to be the steady language of the English chancery for the last seventy years, and of all the compilers of the doctrines of that court, that a party may be admitted to show by parol proof a mistake, as well as fraud, in the execution of a deed or other writing."

In an earlier part of his opinion the chancellor, after stating that he had looked into most, if not all, of the cases on this branch of equity jurisdiction, says:

"The cases concur in the strictness and difficulty of proof, but still they all admit it to be competent, and the only question is, does it satisfy the mind of the court?"

In *Baltzer v. Railroad Co.*, 115 U. S. 645, 6 Sup. Ct. 216, the principle applicable to this class of cases is thus stated:

"The mistake must be clearly shown. If the proofs are doubtful and unsatisfactory, and if the mistake is not made entirely plain, equity will withhold relief."

Relief, however, is not denied because there is conflicting testimony, for that would result in a denial of justice in some of the plainest cases. *Beach, Eq. Jur. § 546.*

Presuming the complainant to be a man of fair character, of average intelligence, and ordinary business capacity, it is almost impossible to believe that he would knowingly and consciously have attempted to sell his patent on three different occasions, to as many different parties,—first for the state of Virginia, then to the defendant company for his whole interest, and lastly, to Brightbill and Gallatin, for the state of New York,—when, on a moment's reflection, he must have known that detection and exposure would certainly follow. To believe otherwise would stamp him as a cheat and a swindler. His reputation, as well as his property, is at stake. He is anxious to save both, and is therefore an interested witness, but his testimony is corroborated by that of Oliver, Detweiler, and L. D. Baldwin; and there is no rule of law that, under the facts of the present case, would exclude reputable counsel from giving testimony in favor of their client. Jessup is also an interested party, and is entitled to no higher credit than the complainant. The latter is supported by other witnesses. Jessup's disclaimers of his admissions stand alone and unsupported. According to Jessup, Gleason wanted a patent for use in Maryland, and there is not a scintilla of evidence to show that it was wanted for any other purpose. The patent contains the complainant's latest improvement. Its value was greatly in excess of the consideration named in the deed, and while inadequacy of price, however gross, is not, of itself, sufficient ground to set aside or reform a contract between parties standing on an equality, it is a material fact, and, in connection with other facts, may amount to proof of fraud or mistake. *Bigelow, Frauds, 137; Kerr, Fraud & M. 186; Story, Eq. Jur. § 246; Howard v. Edgell, 17 Vt. 9.*

We have no doubt that a mistake was made in reducing the agreement of the parties to writing. To our minds, the evidence is plain that there was no intention on the part of the complainant to sell, or on the part of the defendant to buy, the patent for more territory than Baltimore county. The decree of the circuit court is reversed, and the cause is remanded to that court, with directions to enter a decree finding and adjudging that the instrument

of March 4, 1889, by the mutual mistake of the parties thereto, was so written as to assign and transfer to the defendant all the title and interest of the complainant in and to letters patent No. 274,895, whereas, in fact, the complainant sold and the defendant bought only the right under the said patent for the county of Baltimore, in the state of Maryland, and it was not intended by either of said parties that said instrument should convey any other or greater right, and for the correction and reformation of said instrument, and for an injunction, in accordance with the prayer of the bill, with costs to the complainant; such decree to be without prejudice to any right under said patent, in and for the state of Maryland, which the Baltimore County Hedge & Wire-Fence Company, of Maryland, may have acquired by virtue of the deed executed to that company by the defendant on June 26, 1889.

BUTLER, District Judge. I am unable to concur in the foregoing opinion, for the following reasons:

The bill rests entirely on an allegation of mutual mistake; there is no suggestion of fraud; and the evidence relied upon to sustain the allegation is not direct, such as that the scrivener who wrote the deed misunderstood his instructions or fell into error in carrying them out, but is indirect, consisting of testimony respecting the intercourse between the parties before, after, and at the time of, executing the deed, inadequacy of consideration and other like circumstances.

The measure of proof required of the plaintiff is not in doubt. The alleged mutual mistake must be so proved as to preclude reasonable dispute. That the weight of the evidence may support it is insufficient; all ground for fair doubt must be removed; *Fowler v. Fowler*, 4 D. C. 250; *Baltzer v. Railroad Co.*, 115 U. S. 634, 6 Sup. Ct. 216; *Beach*, Eq. Jur. § 546. If the rule were otherwise deeds would be of little value, and titles to property might as well rest in parol.

The first of the intercourse between the parties, invoked, occurred between the plaintiff (Baldwin), Neiman and Gleason, the two latter representing the defendant, and relates to the verbal understanding which preceded the deed. Gleason is dead and we therefore have the testimony of Baldwin and Neiman alone, as to what occurred between them. They both say the sale of a license for Baltimore county only was talked of or contemplated. Jessup, the defendant's secretary and treasurer, who took the title, and under whom Gleason and Neiman acted, testifies that between him and these agents it was understood that the purchase was to be, and was, of the patent; that both of these individuals informed him at the outset that they could purchase it for a small sum, and the acquirement of a license was not suggested at any time. The effect of Jessup's testimony it must be observed is not simply to discredit Neiman; it is direct and positive evidence of Jessup's understanding of the transaction; and as he represented the defendant in taking the title it bears directly on the question of mutual mistake. If Jessup so understood the contract there could

not be mutual mistake, however Baldwin may have understood it.

At the execution of the deed Baldwin, Neiman and Jessup were present. The first two testify that the contract was talked over, and that it was fully understood that the sale was of a license for Baltimore county. Jessup denies this in positive and emphatic terms, testifying that he understood then, as before, that the verbal contract was, and that the deed was to be for a transfer of the patent; and that he did not hear a suggestion to the contrary. Baldwin further says he signed the deed without reading it, or asking to have it read; while Jessup testifies that he, Baldwin, read it over and expressed his satisfaction with its terms; and Neiman says he has no recollection whatever on the subject. If these witnesses are entitled to equal credit the testimony is pretty equally balanced. The record, however, seriously impeaches the credit of both Baldwin and Neiman. Baldwin's description of what occurred at the execution of the deed is so graphic, positive, and particular, notwithstanding four years had passed, as to excite suspicion; and when it is seen that no part of this description is corroborated, even by Neiman who was present, that all of it is denied by Jessup, and that material parts of it are otherwise proved to be untrue, it is difficult to repose confidence in anything he has said. But in addition to this, the confession of his conspiracy with Galatin to obtain money from Brightbill on this patent by means of falsehood and deception, and his prevarications when his attention was first called to this subject as a witness, prove him in my judgment to be entirely unworthy of credit where his interests are involved. As respects Neiman he had left the defendant's employment in ill humor; and his own testimony besmirches his character. He discovered the alleged mistake after a short time as he admits, but instead of seeking to have it corrected, or even mentioning it to Baldwin, he participated in selling a license under the deed for the state of Maryland. He testified when first called, with positiveness, that Gleason (who could not then be heard to the contrary) prepared the deed; and yet when subsequently confronted with the paper he was forced to admit not only that Gleason did not prepare it, but that he, Neiman, did! Of course this may have been an honest mistake, but if so it was a remarkable one; and it at least shows the witness' memory to be unreliable. He does not undertake to explain how it occurred that he who had just completed the bargain with Baldwin for a license, as he says, should have written a transfer of the patent itself, instead of such an interest under it. That such a mistake should have been made by one so familiar with the subject seems incredible. At all events it is sufficiently remarkable to have justified an attempt to explain it.

The subsequent correspondence between the parties about the purchase of licenses, or "territory," invoked by the plaintiff, if any such correspondence occurred, does not seem important. No part of it is produced, and what it was, (if any occurred) is uncertain. The defendant's theory respecting it is as reasonable as the plaintiff's. Mr. Baldwin had other hedge-fence patents to which such

correspondence might be referred; and as it must be supposed that the defendant then knew that it owned this patent, it is unreasonable to believe that the correspondence related to it. The plaintiff says the defendant knew it, and withheld the deed from record to prevent him discovering it.

As respects the alleged subsequent admissions, there is the same conflict of testimony. Jessup and Krider, who were present at the interviews during which they are said to have been made, deny them; and it seems unreasonable to believe that they should have been made in view of the fact that Jessup, to whom they are attributed, claimed that the patent rightfully belonged to the defendant. It is conceded that he desired to avoid making such admissions; and therefore, it is said, he made them "reluctantly." Why should he have made them at all under such circumstances? He appears to be an intelligent man fully able to take care of himself. His conduct is irreconcilable with the idea that he made them. As he stood firmly on the deed throughout the several interviews, it seems incredible that he should have admitted it to be valueless. The three or four attorneys for Mr. Baldwin who testify on the subject, were present to obtain admissions, and as some of them say they cross-examined Jessup sharply, and obtain what one of them denominates "reluctant admissions." I do not attach importance to such testimony. But moreover it must be borne in mind that this testimony is not admissible for any other purpose than that of discrediting Jessup. It cannot be used to support the plaintiff's case—to prove the allegation of mutual mistake. Jessup had no authority to admit away the defendant's rights. Its title could not be affected by anything he might say at the time referred to. The fact that he had taken the title for the company is unimportant in this respect.

I attach no weight whatever to the inference sought to be drawn from the alleged inadequacy of consideration. If the consideration was greatly inadequate the fact would be material. I do not believe however that it was inadequate. What reliable evidence is there that the patent was worth more than was paid for it? A majority of patents issued are valueless. The plaintiff had held this one for seven years before the transaction in question, and never realized a cent on it, unless it be the price of a license for Virginia. He alone testifies to the price of this license; and if he got it by means similar to those subsequently employed to effect a sale to Brightbill it affords no evidence whatever of value. He continued to own the patent as he supposed, if we believe his testimony, for four years longer without realizing anything on it, honestly. To cite the transaction with Brightbill as evidence of its value is wholly unjustifiable. Brightbill's money was obtained by a bald and bold fraud, according to the plaintiff's own testimony. This man was made the victim of a conspiracy to cheat, by means of false pretenses, deserving of punishment as well as of denunciation. How much of Brightbill's money the plaintiff will be able to retain cannot be known until the suit brought to recover it back is determined.

Not do I attach importance to the fact that the plaintiff offered the patent for sale after the transaction with the defendant. Supposing him to be an honest man it would be evidence that he was mistaken respecting the deed, but would not tend to show that the defendant was. In the light of the transaction with Brightbill, however, I cannot regard him as an honest man, and on that account also I would attach no weight to the fact that he made such subsequent offers.

It is not true as urged that the defendant needed only a license for Baltimore county; and the fact would be of small importance if it were. At the date of the purchase the defendant needed, as I understand the testimony, a right for the state of Maryland, to enable it to comply with the contract which was soon after carried out (in part) by executing the license before mentioned, under this deed.

It seems idle to attach importance to the defendant's delay in recording the paper. The failure to record deeds, even for land, is so common that numerous statutes have been enacted, to avoid the consequences. The suggestion that the failure to record was inspired by a desire to conceal the character of the instrument is repelled by the fact that the defendant published its character by granting the license for Maryland, (which was immediately recorded) in which the assignment is set out.

The object of this cursory review is not to show that a mistake was not made, but to show that none is proved with the clearness necessary to justify the court in setting aside the deed. If the question was one depending on the weight of evidence merely, I would entertain doubt how it should be decided. Remembering that the deed was made expressly to bear witness to the transaction, so as to exclude the necessity of relying on parol testimony; that it was prepared by Neiman who had just made the purchase and was therefore familiar with the contract, and the subject-matter to be transferred; that it seems incredible that he could have written an assignment of the patent when he knew a license under it for a small territory only was intended (the two instruments being dissimilar in form as well as in substance), I could not say that the weight of the evidence is with the plaintiff. But as the case depends not on the weight of evidence, but on the existence of such overwhelming preponderance as leaves no room for reasonable controversy or doubt, I feel no hesitation in saying that the plaintiff has not, in my judgment, succeeded, and that the bill should therefore be dismissed.

NOTE. I would not express a dissent in this case (for it is not pleasant to do so) if the judgment about to be entered was not one of reversal, which must rest on the conclusions of two judges, against the conclusions of two others (including the judge who sat originally) of equal grade. Under such circumstances it seems to me proper that the record should show that the judgment of this court is that of a majority only of the judges who sat. That important principles of law or important interests of parties, should thus be finally determined seems to me unwise and unjust. Of course the entry of such judgments cannot be avoided; it is the duty of the majority to decide; but the supreme court may afford a remedy under its discretionary authority to review

the judgments of this court, where the fact referred to is noted. Doubtless in all the circuits, as has frequently occurred in this, judgments of reversal resting on the conclusions of two of the three judges of the court of appeals are entered as if the court was unanimous, because of the natural reluctance of judges to dissent. I of course am speaking only for myself; others may view the subject differently. I believe however that if the supreme court does not afford a remedy in such cases that congress must.

CENTRAL TRUST CO. OF NEW YORK v. MARIETTA & N. G. RY. CO.
et al. (MORSE, Intervener).

(Circuit Court, N. D. Georgia. January 23, 1896.)

1. RAILROAD MORTGAGES—INTERPRETATION—EXCHANGE OF BONDS.

A provision in a mortgage executed by a railroad company after an extension of its line, authorizing the trustee to exchange bonds secured thereby for an equal amount of outstanding bonds issued before the extension, and requiring it to hold the old bonds as collateral for the new ones, until all the old bonds were surrendered, when the entire issue was to be canceled, *held* to mean that an exchange made by holders of some of the old bonds was binding on them, although the entire issue was never surrendered so as to authorize their cancellation, and that a holder of the old bonds, who had made such an exchange, was not entitled to have them back.

2. SAME.

A holder of railroad bonds exchanged them for bonds of a subsequent issue, covering an extension of the road, under a provision for that purpose contained in the mortgage securing the new bonds. Afterwards he sought to have his old bonds returned, alleging as one ground therefor that the new mortgage was invalid. When the question of his right to have his bonds returned came before the court, the new mortgage had in fact been foreclosed by the court as a valid instrument. *Held*, that the court would not thereafter declare the mortgage invalid.

Tully R. Cormick, for intervener.

Henry B. Tompkins, for Central Trust Co.

NEWMAN, District Judge. This is the final hearing on the intervening petition of George W. Morse and others in the above-entitled cause. The facts necessary to an understanding of the questions submitted are briefly these: The Marietta & North Georgia Railway ran from Marietta, Ga., to Ellijay, in Fannin county, Ga. On the 1st day of July, 1881, the Marietta & North Georgia Railway Company executed to the Boston Safe-Deposit Company two mortgages; the first mortgage to secure 720 bonds of \$1,000 each, and the second mortgage to secure 486 bonds of \$1,000 each; said mortgage being upon all the railroads then built, and thereafter to be built, by said North Georgia Railway Company in the state of Georgia. Some years after this an extension of this road was commenced by certain parties, in order to make a line to Knoxville, Tenn. An issue of bonds was made, bearing date January 1, 1887, secured by a mortgage of the same date. The first company was known as the Marietta & North Georgia Railway Company; the second, as the Marietta & North Georgia Railroad Company. The extension of this road into Tennessee was under a charter granted to a company known as the Knoxville Southern

Railway Company, which was afterwards consolidated under an arrangement between the two companies, and known as the Marietta & North Georgia Railway Company. The deed of trust or mortgage executed by the railway company in 1887 contained this provision:

"But the said trustee may issue bonds secured by these presents, and exchange for an equal amount of the existing outstanding bonds of said Marietta and North Georgia Railway Company, which bonds so received in exchange shall be held by said trustee as collateral for the bonds issued under this mortgage, until all of said bonds issued by the Marietta and North Georgia Railway Company shall have been surrendered; and, when all of said bonds shall have been surrendered, they shall be forthwith canceled by said trustee."

The petitioner in this case had bonds of the Marietta & North Georgia Railway Company, which he in 1887 exchanged for bonds of the new company. He claims in his petition, and by the argument of his counsel (the entire road having been sold), that his right is that of a holder of the original bonds of the railway company. That is to say, his contention is that the exchange of the old bonds of the railway company for the new bonds of the railroad company did not become operative until all the bonds of the first company were surrendered to the Central Trust Company, as trustee, which was never done. Only \$817,000 of the old bonds, out of an issue of \$1,206,000, were exchanged. The opposing contention by the trust company is that the old bonds so exchanged were to be held by it as collateral for the whole issue of new bonds, and that all they received on these old bonds from the proceeds of the sale of the road must be divided pro rata among all the holders of the bonds. If all the old bonds had been exchanged, they would, by the provision of the mortgage above quoted, have been canceled,—would have been out of the way,—and no such question as this could have arisen. Where only a part were surrendered, it seems to me that the sound construction of this clause, and the correct one, is that, so far as they were exchanged, the exchange was good, and they were to be held as collateral for the new issue of bonds. The holders of old bonds, who made this exchange, had the benefit of the new bonds on the extended line of the road not covered by the old bonds, and also the benefit of the old bonds as collateral for themselves and other holders of new bonds. I do not believe that it was the intention of this clause that the failure of holders of the entire issue of old bonds to make an exchange should void the entire transaction and the exchange, and entitle them to have the old bonds back. As stated, I think the other view is the correct one.

2. It is also claimed that the petitioner has the right, for an additional reason, to have his old bonds returned to him, and all the rights which full ownership and control of the same would give him, returning, of course, to the trust company the new bonds. He says he was of the opinion, and was induced by the officers of the company to believe, that the new mortgage on the Tennessee end of the road was a valid and perfect mortgage, but contends that the same was invalid and created no lien. The fact is that this mortgage has been foreclosed in this court, and in Tennessee, as a mortgage of the date it bears, and with all the rights which a mortgage lien of that

date on the property covered by it could have. The court will certainly not hold the mortgage to be invalid after it has foreclosed the same, and that foreclosure has been concurred in by the circuit court in Tennessee, and has been entered there. It has been treated as a valid instrument of the full character it purports to bear, and this is all that the intervener had any right to expect it to be. Entertaining this view of the intervener's second contention, it is unnecessary to discuss, or to go more fully into the question of, the validity or the invalidity of the mortgage on this road in Tennessee. The conclusion is that the intervener is not entitled to relief upon either of the grounds stated, and therefore his intervention must be dismissed.

TEFFT et al. v. STERN.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 348.

1. FRAUDULENT CONVEYANCES—INNOCENT PARTIES.

A mortgage made to a trustee to secure several distinct debts owing to different creditors is not rendered void, as to such of the creditors holding valid claims as are without notice or knowledge of any fraudulent purpose in the making of the mortgage, by the fact that there was such fraudulent purpose on the part of the mortgagors, participated in by the remaining creditors.

2. SAME—PRO RATA SHARES.

Where a mortgage is made for the security of several creditors, the claims of some of whom are invalid, the remaining creditors are not entitled only to the pro rata share which would have gone to them, respectively, if all the claims had been valid, but are entitled to their shares of the whole of the mortgaged property, up to full amount of their respective claims.

3. PRACTICE—GARNISHEE'S COSTS—MICHIGAN STATUTE.

The statute of Michigan, permitting the allowance of costs and expenses to a garnishee (How. Ann. St. § 8098), does not include cases where an issue is made between a creditor and a garnishee, and a trial is had thereon.

Error to the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

Hiram A. Fletcher, and George P. Wanty, for plaintiffs in error.

Howard & Roos and Boudeman & Adams, for defendant in error.

Before HAMMOND, J., and BARR and SEVERENS, District Judges.

BARR, District Judge. This was a proceeding by the plaintiffs in error against the defendant in error, under a writ of garnishment, under a Michigan statute, to make the garnishee liable to the plaintiffs' judgment for the sum of \$3,728.19, upon the theory that a chattel mortgage, executed on the 18th of September, 1893, by Charles Livingston and Henry Block, partners, under the firm name of Livingston & Block, to the defendant in error, Henry Stern, was fraudulent and void. The issue was tried before Judge Lurton and a jury, and a verdict found, under his instructions, for the defendant in error. A judgment was rendered upon that verdict against the

plaintiffs in error for the usual legal costs; but subsequently, on motion of the defendant in error, Stern, this judgment for costs was amended, and he was allowed his attorney's fees, together with his personal expenses arising out of this litigation, amounting to \$1,201.50. Plaintiffs in error have filed many assignments of errors which are unnecessary to consider, as the real questions involved are whether or not the trial judge was correct in instructing the jury peremptorily to find for the defendant in error, Stern, and whether the judgment for costs should have been amended so as to allow him his attorney's fees, expenses, and costs.

This chattel mortgage was in the usual form, and there is nothing on the face of it which makes it a void instrument. It was given to Henry Stern, trustee, to secure certain debts, which were evidenced by notes and all of which were valid debts, so far as the record shows. These debts are as follows: One to the Michigan National Bank, Kalamazoo, for \$7,500; one to the Kalamazoo National Bank for \$2,500; one to Caroline Nathanson, who was a sister of Charles Livingston, for \$3,000; one to Daniel Goldstein for \$1,500; one to Benno Desenberg for \$3,114; one to Aaron Livingston, brother of Charles Livingston, for \$2,620.18; one to Sigmund Livingston for \$100; one to Herman Goldstein for \$1,500; one to R. Livingston, brother of Charles Livingston, for \$1,971.71; and also to secure the liability of B. N. Desenberg for \$3,000 on said debt to the Michigan National Bank, and S. Stern on same debt for \$1,000, Herman Stern on said debt for \$1,000, and Jacob Levy on said debt for \$2,000; and Herman Goldstein, as surety on note to the Kalamazoo National Bank, for \$2,500.

After a careful consideration of the evidence presented to the jury, we concur with the trial judge that there was no evidence which tended to prove that the trustee, Stern, had any knowledge of, or participated in, any intended fraud, if there was such an intention upon the part of the mortgagors, Livingston & Block, in making said mortgage, or any knowledge of or participancy in any conduct of said Livingston & Block, previous to the making of said mortgage, which would indicate a fraudulent intent upon their part, either in buying an excessive amount of goods, or in secretly selling or shipping goods to their creditors or others before the execution of said chattel mortgage; and that there was no evidence, sufficient to go to the jury, which proved or tended to prove that the officers of the Michigan National Bank, or the officers of the Kalamazoo National Bank, or Benno Desenberg, or Caroline Nathanson, or Herman Goldstein, or S. Livingston had any knowledge of, or participated in any way in, the fraudulent acts or purposes, if there were such, of Livingston & Block, Daniel Goldstein, Aaron Livingston, or Resiel Livingston. We think it may be fairly assumed, as was assumed in the charge by the trial court, that there was sufficient evidence to go to the jury upon the question of whether or not these three creditors, Aaron Livingston, Resiel Livingston, and Daniel Goldstein, and Livingston & Block, had a fraudulent purpose in paying part of said creditor's debts by secretly shipping to them goods out of their stock of goods a short time prior to the execution of

said chattel mortgage, and to determine whether or not, as to them, the execution of said chattel mortgage was fraudulent.

This raises the question, if it be assumed that Livingston & Block and their three said creditors had a fraudulent intent, which was executed in part by the execution and delivery of this chattel mortgage, whether that made the entire mortgage void, and prevented the property in the hands of the trustee, Stern, from being applied to the payment of the valid debts which were held by these other parties who were entirely innocent.

The theory of the plaintiffs in error, as stated in their brief, is:

"That Livingston & Block, in the summer of 1893, became aware that they had lost money during the prosperous preceding year, and were convinced that they must within a short time fail, and they then commenced the fraudulent scheme of getting into their possession, without paying for them, a large quantity of goods from every available source, and selling as many of these goods as they could for money, which they kept, and, when it became necessary, execute the chattel mortgage in question for the purpose of keeping off the creditors, and place the trustee in the possession of their stock, and selling it to one of Livingston's brothers, thus defrauding their merchandise creditors, and still having possession of the goods."

This theory, however, is not sustained by the evidence, in that it is not shown that they kept the money which they received for their goods, nor is it shown that the purchase of the remainder of the stock by one of Livingston's brothers, six months after the execution of the chattel mortgage, was to defraud merchandise creditors. On the contrary, the sale to Resiel Livingston, in February, 1894, was at public auction, after selling at retail had ceased to be profitable, and his bid was kept open for several days, to give all parties in interest an opportunity to object or to advance upon his bid. The price paid, though low, was not inadequate, under the circumstances. So that we think the only question is whether or not the court erred to the injury of the plaintiffs in error in not submitting the question of fraud or no fraud in regard to the three creditors mentioned. This mortgage was made to a third party as trustee, who was innocent of any fraud, or knowledge of any intended fraud, to secure nine creditors, three of whom might, by the finding of a jury, have been secured with a fraudulent intent. The other six were entirely innocent of any knowledge of or participancy in this fraud. This being the case, we concur in the view that the mortgage as to the other six creditors was valid. We think the mortgage to this trustee should be regarded as if it were a separate mortgage for the benefit of each of the creditors.

It is insisted that this case must be governed by the Michigan rule on this subject. This is true, we believe. *Etheridge v. Sperry*, 139 U. S. 277, 11 Sup. Ct. 565. And it is insisted that by this rule the fraudulent intention, if there was any, between Livingston & Block and the three creditors (the two Livingstons and Goldstein), made the entire mortgage invalid. We think the Michigan cases do not sustain this contention.

In *Walker v. White*, 60 Mich. 430, 27 N. W. 554, it was said:

"The mortgage was so drawn as to specify the amount of indebtedness to each creditor specifically, and the plaintiff was by its terms made trustee
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for the collection and payment of the amount owing to each. There is no legal objection to such a mortgage. *Adams v. Niemann*, 46 Mich. 137, 8 N. W. 719. And we think each mortgagee could enforce his own claim under the mortgage, his separate debt being clearly stated. *Herm. Chat. Mortg.* 337; *Burnett v. Pratt*, 22 Pick. 556; *Gilson v. Gilson*, 2 Allen, 115."

The court in that case declared the mortgage valid, which was given to a trustee of partnership assets to pay partnership creditors, and included therein a personal debt owing by one of the partners. The fact that it was a personal debt was known to the trustee when the mortgage was executed, and the court held that, notwithstanding this debt was included and the knowledge of the trustee, the mortgage was valid to the extent of the firm creditors.

The case of *Adams v. Niemann*, supra, which case is referred to as sustaining the plaintiffs' contention, was unlike the case at bar in that it was not to a trustee, but the mortgage was given to *Niemann & Jochem* jointly. It was claimed that it was fraudulent as between the mortgagor and one of the mortgagees. The court below said to the jury that if the mortgage was given to secure an honest transaction, debt, or liability, and if it was not given for the sole purpose of hindering and delaying the other creditors of *Ernest Jochem*, it was valid. This, the supreme court said, in passing, was erroneous, and used this language:

"If this had been the entire charge on the subject, it is undoubtedly open to misapprehension. We have no doubt a partial wrongful purpose may be such as to stand in the way of such a security; but the court, in giving further instructions, put it beyond any doubt that there was no erroneous conclusion justifiable under the whole charge. It was clearly and distinctly laid down that honesty on the part of one of the mortgagees would not save the instrument, if there was any wrong or fraud on the other, and the jury, by special findings, made the instruction unimportant. They found that neither of the mortgagees took the mortgage with any unlawful intent. And, further, they found that the debts intended to be secured were somewhat larger at the date of the mortgage than the whole sum secured, which was \$5,000. A mortgage taken without fraudulent intent, to secure no more than the actual debt of the mortgagee, is not open to an attack as fraudulent."

And then the court decided the case upon another question, which was the important question,—that is, whether or not a joint mortgage could be made to cover separate debts.

In the case of *Showman v. Lee*, 86 Mich. 557, 49 N. W. 578, the mortgagor, *Elder*, was the mortgagee's son-in-law, and the mortgage was given to secure indorsements on notes, and also a direct debt. The court say:

"The court [the trial court] instructed the jury that, in any event, the mortgage was good for the amount of the indorsed notes, whether the personal indebtedness was bona fide or not. This was error. Parties who take securities from insolvents, or from persons who are indebted to others, must act in good faith, and so as not to unnecessarily hinder, delay, or deceive other creditors. The taking of the mortgage for an amount in excess of the debt of the assumed liability is a badge of fraud, and is a fraud, in law, if the purpose is to protect the debtor's interest from other creditors. *King v. Hubbell*, 42 Mich. 597, 4 N. W. 440. To say that a party who assumes a liability may take a mortgage in excess of the amount necessary for his security for the purpose of hiding the debtor's interest from other creditors, and, when the fraud is exposed, may have the benefit of the mortgage to protect himself, would open the door to gross abuses."

This was a case in which the mortgagor and mortgagee, if there was a fraud, both participated in it, and is unlike the case at bar.

These two cases are the strongest cases that have been cited, or that we have found, tending to sustain the plaintiffs' contention, and they are markedly different from the case at bar in the fact that the mortgagees who received the mortgage, and held the title and rights which the mortgage gave, were the beneficiaries either in part or in whole. Here these six creditors, as well as the trustee, are entirely innocent of any knowledge of or participancy in the alleged fraud in regard to the other three.

The case of *Morris v. Lindauer*, 54 Fed. 23, 6 U. S. App. 510, 4 C. C. A. 162, decided in this court, is, we think, a case in point upon this question. There the question was whether or not a chattel mortgage, which was made on the 19th of April, three days prior to the making of a general deed of assignment, which was made on the 22d of April, the chattel mortgage being in favor of the National Bank of Manistee and several creditors of the mortgagors, was made in contemplation of the assignment, and was part of the scheme to unlawfully prefer these creditors. If so, it was within the provisions of the Michigan statute which prohibited preferences. The court said:

"It is necessary, in order to invalidate the mortgage on this ground, that the mortgagee should have had notice of the mortgagor's intention; and, for the purpose of testing the question whether such notice was had, I think that, under the circumstances of the case, the inquiry must be directed to the beneficiaries of the mortgage, and not to the nominal party, who was a trustee. While I should not have much difficulty in regard to the other parties who were active in procuring the mortgage, it does not appear to me sufficiently proven that the bank, which was one of the parties secured thereby, had notice that any assignment was expected to follow, and it being innocent of any fraud, I think it [the mortgage] is valid in so far as the indebtedness of the bank is concerned."

The view here indicated is sustained by the rulings on analogous questions. Thus in the case of *In re Kahley*, 2 Biss. 383, Fed. Cas. No. 7,593, it is held that a chattel mortgage on a stock of goods, authorizing the mortgagor to sell and replace them in such manner as he might determine, and use the proceeds as he sees fit, is void as to such goods as the power of sale relates to; but, as the mortgage covered fixtures and other things, over which no power of sale had been given, the mortgage as to those things was held valid.

Again, where it is held that a chattel mortgage is void if the mortgagor has not the title to the property therein described, yet if he has title to a part of the property described, the mortgage will be valid as to this property. *Pettis v. Kellogg*, 7 Cush. 456.

There is not, and cannot be, a question in this case as to the application of section 8759, How. Ann. St., which prohibits preferences in general assignments. *Warner v. Littlefield*, 89 Mich. 331, 50 N. W. 721; *Clark's Appeal*, 100 Mich. 448, 59 N. W. 150. Nor can it be claimed that the fact that the amount of the debts which were set out in the chattel mortgage as due to A. Livingston, R. Livingston, and Daniel Goldstein, which were more than the amount actually due, because of the goods which had been previously sold them, and

which should have gone as a credit thereon, would make, of itself, the entire mortgage void. The reason for not entering these credits is attempted to be explained by the parties, but, even if unexplained, could not have the effect of making invalid the entire mortgage, although it might be a badge of fraud as against these three parties.

It is insisted that, although the mortgage is not invalid, the court was in error in not submitting the question of the fraudulent intention of the mortgagors and these three creditors to the jury, because, if the security for those debts was declared invalid, the plaintiffs in error would get the benefit of their pro rata, and subject the share coming to them to their judgment. It was shown that the expenses of the various litigations had been very large, and that, with the sum which had been paid to the Michigan National Bank before the institution of the garnishee proceedings, would only leave \$5,300 in the hands of the trustee, which would be entirely insufficient to fully pay the six valid debts. Therefore there was no error in not submitting the question, unless the plaintiffs in error were entitled, under the writ of garnishment, to the pro rata which would be coming to the two Livingstons and Goldstein. We think they are not entitled to this. By the terms of the mortgage the valid debts were entitled to be paid in full if the estate was sufficient. The language is that "with the residue and remainder, he shall next pay in full the following claims and demands hereinbefore mentioned, if sufficient there shall be." This \$5,300 is in fact entirely insufficient to pay these six valid debts. As between the secured creditors, there was no obligation, direct or implied, that the respective creditors should only get such share of the estate as would come to them if all of the debts were as specified in the mortgage, or if all of them were valid. On the contrary, we suppose that, if there had been credits on any or all of the debts which had not been entered, or if it turned out that some of the debts had been paid, the other creditors would be entitled to the increased share which these credits or these paid debts would give them in the event the estate was not sufficient to pay in full.

Whether or not the other beneficiaries under the mortgage are entitled to this pro rata cannot be determined in this proceeding, in which only the trustee is a party. Besides this defect of parties, the record shows that there was another judgment creditor whose writ of garnishment was executed on the trustee at the same time as that of the plaintiffs in error, and who, if they are entitled, would be equally entitled to a portion of this pro rata.

The case of *Heineman v. Schloss*, 83 Mich. 154, 47 N. W. 107, only goes to the extent of deciding that, when a chattel mortgage is entirely void because of fraud, the mortgagee or trustee holds the proceeds of the property taken, and which has been sold by him, subject to be reached by a writ of garnishment, as assets belonging to the principal debtor, and that there was no need, after the amendment of 1889, to go into equity to reach such assets; but this decision cannot apply when the chattel mortgage is not entirely void, or where there are conflicting claims to the assets.

We conclude that there was no error in the instruction of the

court and the finding of the jury, and the judgment as originally entered.

In regard to the costs and expenses allowed by the amended judgment, if the court had a discretion to allow these costs and expenses, this court could not review the amount allowed. *Canter v. Insurance Co.*, 3 Pet. 307; *Fabrics Co. v. Smith*, 100 U. S. 110. But it is insisted that section 8098 of the Michigan Statutes did not give the court the right to allow any of the costs and expenses which were given under the amended judgment. That section is as follows:

"If the garnishee shall appear and make disclosure, as before provided, he shall be allowed his costs for trial and attendance as in case of a witness, and such further sum as the court shall think reasonable for his counsel fees and other necessary expenses; and in case he shall be adjudged liable, the same may be taxed and deducted from the property or money in his hands, and he shall be chargeable only for the balance, and if the garnishee shall be discharged, whether by reason of his having no money or property, or because the plaintiff shall not recover judgment against the principal defendant, or for any cause, his said costs and charges shall be paid by the plaintiff, and the garnishee may have the same taxed, and judgment and execution therefor."

The supreme court of Michigan had the construction of this section under advisement in the recent case of *Wolcott v. Circuit Judge*, 65 N. W. 286, and there determined that section 8089, being construed with section 8073, did not include cases where there was an issue made between a creditor and a garnishee, and a trial had thereon, but applied only when there was no issue framed and trial had. This decision has been rendered since the amended judgment was entered, but, as it is a construction of a Michigan statute, it is binding upon this court. It was error, therefore, to have entered the amended judgment.

It is ordered that, if the defendant in error will, within 30 days after the entry of this order, file in the circuit court of the United States for the Western district of Michigan, Southern division, a remittitur of so much of its judgment as by the amendment relates to special costs and expenses, and produce and file a certified copy thereof in this court, the original judgment will be affirmed; but, if this is not done within the time aforesaid, then the judgment below will be reversed, with directions to set aside the amended judgment for costs and expenses, and affirm the original judgment. The plaintiffs in error will recover costs in this cause.

CARSON CITY GOLD & SILVER MIN. CO. v. NORTH STAR MIN. CO.

(Circuit Court, N. D. California. March 16, 1896.)

1. MINES AND MINING—SURVEY AND PATENT—SIZE OF SURVEY.

While the law prescribes a limitation as to the size of a single location, there is no limitation to the number of claims one person may hold by purchase, or that may be included in a single patent, or, it seems, in a single survey, showing only the exterior boundaries, and omitting all interior lines of the several smaller claims. *Polk's Lessee v. Wendell*, 9 Cranch, 87, and *Smelting Co. v. Kemp*, 104 U. S. 636, applied.

2. SAME—EFFECT OF PATENT INCLUDING SEVERAL CLAIMS.

The question of the right to a patent covering several vein or lode claims, before parallelism of the end lines was required, is within the jurisdiction of the land department; and after the same is determined by it, and a patent issued, the boundary lines as defined by the patent are the lines by which the rights of the parties are to be determined, and the patentee cannot be compelled to rely upon the lines of the several claims of which the patented survey is composed.

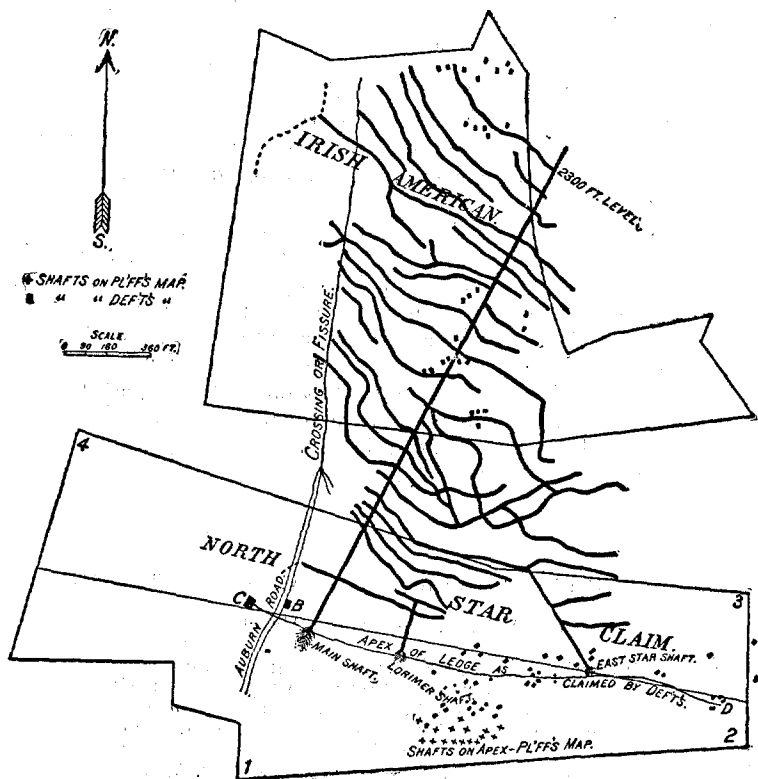
3. SAME—RIGHT TO FOLLOW DIP—VEIN TERMINATING WITHIN A CLAIM.

When the apex of a vein crosses one end line of the claim and runs in the direction of its length, but is cut off, before reaching the other end, by a "crossing," so that it terminates at that point, the right to follow the dip will be confined between the vertical planes of the one end line and a new end line parallel therewith, drawn at the point where the vein disappears.

W. H. Dickson, A. C. Ellis, and C. W. Kitts, for plaintiff.

Curtis H. Lindley, for defendant.

BEATTY, District Judge. This is an action of trespass brought by the plaintiff, as owner of the Irish-American mining claim, situated in Nevada county, Cal., against the defendant, which, as owner of the North Star claim, has followed and worked its ledge, upon its descent, under the surface of the former claim. Each claim is a



consolidation of a number of small claims, many, if not all, of which were located long prior to the enactment of any mining law by congress, and is patented in the irregular shape and of the unusual size represented upon the following plat; the Irish-American being about 1,500 feet square, with a strip extending from the main body about 600 feet east, and the North Star, lying 300 to 400 feet south, is about 3,100 feet long from east to west and 650 to 1,250 wide. The plaintiff's theory is that the apex of the North Star ledge runs so near northwesterly and southeasterly that, if continued in its course, it would cross the side lines, 1, 2, and 3, 4, of the claim; but that the ledge, in its northwesterly course, before reaching the north side line, is interrupted by a nearly perpendicular north and south fissure, or, at least, a distinct line of change in the geological formation of the country, called, in this case, a "crossing," to the west of which the ledge does not appear either upon the surface or in the underground workings. The defendant claims that the apex of its ledge runs in an easterly and westerly direction from end to end, and along the center of its North Star claim, and that its dip is northerly, or practically in the direction of its main working shaft, and, while admitting the existence of the crossing, affirms that the ledge continues to the west of it. The surface of the claim is so covered with soil, and any outcroppings of a ledge that ever may have existed are so obliterated by past mining operations, that very little can now be determined, by surface indications, of the course of the ledge. Perplexity is added from the fact that, over much of the surface, there are many old mining shafts and workings, in which more or less ore has been found, and which are in such relative positions that they are no guide to the location of the course of any ledge. A portion of them are represented on the plat by dots and crosses.

1. During the trial plaintiff objected to defendant's evidence, based upon the North Star claim as patented, and insisted that the claims of which it is composed should be shown as originally located, and that the rights of the parties should be governed by the located lines of those claims, and not by the patented lines of the North Star. This objection was overruled, and as, upon final argument, plaintiff insisted upon its objection, a brief consideration of it will precede any discussion of the other issues. In this objection are involved the questions of the parallelism, and of the intersection by the ledge, of the end lines of the original locations. When those locations were made, there was no law requiring such parallelism, but, independent of all lines, the right to follow the ledge along its course for the full distance claimed, and underground upon its true dip, to any depth, was undisputed. Although section 9 of the act of 1872, in repealing certain parts of the old law, provided that "such repeal shall not affect existing rights," the courts have held that, when any claim is patented, those rights are controlled by the patented lines.

If, however, plaintiff's objection could so far prevail that defendant should be compelled to rely upon the original claims as located, instead of upon the North Star patent, it ought to follow that they should be considered as unpatented claims, and all rights which attached to them prior to patent should accrue to defendant; for, man-

ifently, defendant cannot be deprived of all benefits arising from its North Star patent, as well as those which attached to the original locations while unpatented. Moreover, the defendant, owning the several claims which now compose the North Star, might have procured separate patents for each claim, and in doing so might have so changed the end lines as to make them parallel, just as is always done now in application for patent; and, if the several claims jointly included the entire apex, all the claims could have been so surveyed as to make all the end lines parallel to each other, and thus give it what it now substantially claims by its North Star patent. The defendant has only done, by one act, at less expense, what it lawfully might have done by several acts, at greater expense. The North Star patent is of greater superficial area than any law has ever authorized for a single-ledge location; but it has been held by the supreme court that, while the law prescribes a limitation to the size of a single location, there is no limitation to the number of claims one person may hold by purchase, or that may be included in a single patent, and, as I understand, that may be included in a single survey, showing only the exterior boundaries, and omitting all interior lines of the several smaller claims. Such was the holding as to agricultural lands in *Polk's Lessee v. Wendell*, 9 Cranch, 87, and as to placer claims in *Smelting Co. v. Kemp*, 104 U. S. 636. There appears no reason why the same rule should not apply to quartz claims.

Independent, however, of the foregoing consideration, a patent has been granted for the North Star claim. It has passed beyond the field of discussion that a patent cannot be collaterally attacked on account of any question which the land department could lawfully determine before issuing it. Without now defining what questions are settled by the issuance of a patent, it is held that the question of the defendant's right to a patent to the North Star, with the boundaries as defined by it, was within the jurisdiction of the department, and was determined by it, from which it is held to follow that the boundary lines, as defined by the patent, are the only lines by which the rights of the parties can be determined. To adjudge such rights by the original lines of the several claims of which the North Star is composed would be such an assault upon the patent as cannot be sustained. The former ruling upon plaintiff's objection is therefore adhered to.

2. Without making special reference to the testimony of the several witnesses as to the location and course of the apex, it may be concluded, as clearly established, that a ledge had been found in a number of the group of old shafts existing near the south side line of the North Star. Upon one of the plaintiff's maps is indicated a line of shafts running east and west, which is marked "Shafts on Apex." Plaintiff's witness Hugunin was on the ground the day this ledge was discovered, in 1851, and located a claim running west from the main shaft, and he fixed a point, designated "B" on the plat, being over 100 feet westerly from the mouth of the main shaft, as within his claim, and as the most westerly cropping of the ledge. He also located the apex of the ledge 50 feet south from the mouth

of the Larimer shaft, and 40 to 50 feet south of the old powder house, which was on a direct line connecting the mouths of the main and Larimer shafts. An apex running through these three points fixed by this witness, and continued in its own direction each way, would cross the south side and west end line of the North Star, and the same result would follow to pass a line through these points and the group of shafts. I do not think that, from a fair consideration of all the plaintiff's evidence, it can be concluded that the course of the ledge is across both the side lines. On the contrary, defendant's witnesses locate the apex easterly and westerly near the center line of the claim as indicated upon the plat, and the witness Morse located croppings at the point designated "C," being about 300 feet west from the mouth of the main shaft, and he says that he and his associates located 10 claims, running west from the Auburn road, "as near as we could tell, on the line of the ledge." Defendant's witnesses are corroborated by other established facts: (a) Before the surface was disturbed, and when indications of the ledge were clearer, the original locations were made upon an east and west line, and about along the central line of the North Star. (b) The workings of a mine, made in mining operations, and not in support of litigation, are generally important as evidence of any facts which may be legitimately inferred from them. The three incline working shafts were started upon this North Star central line, and are all shown to follow the ledge in their descent. It is reasonable to presume they were started upon or near the apex of the ledge. (c) The working levels in this case are not so conclusive as usual of the course of the ledge for the reason that there are large "horses" in the mine, to the upper and lower surface of which the workings have conformed, which largely accounts for the varying directions the levels have taken.

A majority, or many, of the upper levels are nearly parallel with the north side line, while others, if prolonged, would cut the west end and south side lines, and still others would cross both side lines, and especially those in the deeper workings. But, as ledges may, in their depths, change their course, and as the surface course or the course of the apex is to govern the miners' rights, the workings nearest the surface are better guides to the course of the apex than those far below. Plaintiff admits that there is a mineral vein along the line claimed by defendant as the apex, but says it is but a spur or seam from the ledge, which runs elsewhere; its exact locality not being fixed. That this is but a spur or seam of a ledge, and so unimportant that it cannot be made the basis of a mineral location, cannot be reasonably concluded, when it is remembered that the first locations were made upon and along it. Moreover, the law fixes no limit to the size or prominence of a mineral-bearing vein before a mining location can be made upon it. While, in the group of shafts referred to, a ledge was found, its apex, or the course of the apex, has not been located, unless it be by the plaintiff's testimony concerning the "shafts on apex" before named; and it has not been shown that any vein crosses, or is found beyond, the south side line. It is not impossible that the apex of whatever vein exists at this

place, if traced out, would assume a course somewhat corresponding to the outline of the group of shafts, and running in a northeasterly and a northwesterly direction until it unites with the other line of apex, and that the two outcrops or ledges are but parts of one vein, which are separated by a large "horse," which defendant's evidence and diagrams show exists near the surface of the mine. There is some evidence, at least, to show that two veins do unite in the workings not far below the surface.

From a full consideration of all the evidence it is concluded that the first mining locations were located along the central line of the North Star claim; that such line is practically the line of the apex of the ledge in controversy; that it has been fixed at different points along the irregular lines indicated upon the plat between the letters "C" and "D" and running in a direction south about 80 degrees east.

3. Generally, when a ledge has been traced for such a distance, in a claim of this size, it would not be an unreasonable presumption that it would continue in the same direction far enough to cross the end lines of the claim. This presumption may be indulged as to the east end line, but, as before stated, plaintiff asserts that it does not, either on the surface or underground, pass west of the "crossing," which contention is sustained by its testimony, while that of defendant is to the contrary. Underground there may be some indications of a ledge west of the crossing; but little, if any, ore has been found there, and the workings of the mine, with some unimportant exceptions, sustain plaintiff's contention. Upon the surface there is nothing shown by which to definitely locate the line of this crossing. Conceding, however, that the ledge intersects the east end line, from whence it extends no further than about 2,200 feet westerly, to the point "C," fixed by the witness Morse as the place where he found the croppings of the ledge, what are defendant's underground rights? That the end lines are not parallel cannot be the basis of an objection, because their convergence, when extended in the direction of the dip of the vein, would give defendant less, instead of more, than the law provides for.

Attention has not been called to any precedent in which a ledge is abruptly terminated in its onward course, as is claimed occurs in this case; but a similar principle is involved when a ledge, passing through an end line, is terminated, as to the claim, by going through and out of it across a side line. Under such circumstances, it has been held that the ledge may be followed, on its descent, between the perpendicular plane drawn through such intersected end line and another similar parallel plane passing through the point where the ledge crosses the side line. *Last Chance Min. Co. v. Tyler Min. Co.*, 9 C. C. A. 613, 61 Fed. 560-564; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.*, 63 Fed. 541-546; *Del Monte Mining & Milling Co. v. New York & L. C. Min. Co.*, 66 Fed. 212; *Fitzgerald v. Clark (Mont.)* 42 Pac. 273, which were followed in the last hearing of *Tyler Min. Co. v. Last Chance Min. Co.*, 71 Fed. 848. When the last case was first before the circuit court of appeals, that court said:

"If the lode in question, instead of extending into the Last Chance location, had abruptly broken off within the surface lines of the Tyler, near the point

where, in fact, it crossed the line, there could certainly be no question as to the right of the Tyler to follow the lode or vein, in its downward course, for its entire depth, outside of the vertical planes drawn through the side lines. The fact that it continued its course, and crossed the side line, does not in any manner change this principle. In either case, the locator is entitled to the same rights. In such cases, the end lines are not necessarily those which are marked on the ground as such. An end line may be drawn at the point where the lode abruptly terminates within the surface lines, or at the point where the apex of the lode crosses the side line of the surface location." 4 C. C. A. 329, 54 Fed. 292.

It is therefore concluded that the defendant may follow its ledge on its descent under the Irish-American claim, and to any depth, between a perpendicular plane drawn through the east end line of its claim and another similar parallel plane crossing such claim at the point fixed as the western terminus of the ledge, being designated by "C," and westerly from the east end line 2,200 feet, measured along the straight central line upon the plat, and along the like line upon defendant's Exhibit 8: provided, that defendant shall in no event pursue its ledge west of a perpendicular plane extended through the west end line of its claim; and judgment for defendant is ordered accordingly.

There was another question suggested, but, as it was based upon the theory that the course of the ledge was such as would carry it across the side lines, which I cannot adopt, it will be unnecessary to consider it.

EDWARD HINES LUMBER CO. v. ALLEY et al.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 330.

1. CONTRACTS—INTERPRETATION—BREACH.

Plaintiffs, manufacturers of lumber, made a written proposal to sell to defendants their product for the season of 1893, in which they stated: "We propose to sell you all of our cut; * * * said lumber to remain in cross-pile at least 60 days, then load on cars, * * * for the sum of \$8.50 per M. feet. * * * Terms of payment to be as follows: When lumber is in cross-pile 60 days, you are either to settle for above lumber by 60-day paper or 2 per cent. off for cash. * * *" This proposal was accepted by defendants. Some months later plaintiffs wrote defendants, inclosing a statement of lumber sold, saying that the same had been cut and cross-piled for 90 days, and requesting a settlement. In fact only a part of the lumber had been cross-piled as much as 60 days. The defendants replied to plaintiffs' letter by saying that they had long since given up the idea that plaintiffs were to cut lumber for them, giving as their reason that they understood plaintiffs had had doubts of their solvency. They mentioned the date of placing the order, and that they would naturally have expected to take some of the lumber in 60 days, said that they could not then perform the contract, and suggested that plaintiffs should dispose of it elsewhere. Plaintiffs wrote again, insisting on the contract, and defendants replied by an obscure claim of a difference in the construction of the contract and refusing to do anything further. Plaintiffs sold the lumber at the market price, which had fallen below the contract price, and sued defendants for the difference. *Held*, that defendants were bound to take the lumber by installments, when it had remained 60 days in cross-pile, and, by refusing to do so, when called upon and when any part of it had so remained for 60 days, committed a breach of the contract which entitled plaintiffs to treat it as at an end.

2. SAME—MISLEADING STATEMENTS.

Held, further, that it was properly left to the jury to determine whether the overstatement in plaintiffs' first letter as to the time that the lumber had remained in cross-pile was made in order to mislead the defendants as to the amount due, and whether the defendants had actually been misled to their prejudice by such statement, failing which, such statement would be immaterial.

In Error to the Circuit Court of the United States for the Western District of Michigan.

The defendants in error, co-partners under the firm name of C. G. Alley & Co., were engaged in the manufacture of lumber at Whitehall, Mich. The plaintiff in error, the Edward Hines Lumber Company, is a corporation engaged in buying and selling lumber, whose principal office is at Chicago, Ill. On the 13th of April, 1893, the defendants in error made a proposal for a contract to sell to the plaintiff in error all their cut hemlock lumber for the season of 1893, which proposal was accepted by plaintiff in error. The material part of this contract was in these words:

We propose to sell you all of our cut of hemlock for the season of 1893, estimated to be about 1300 M. feet, more or less, to be cut in such sizes as you may direct as far as the logs will make to advantage, and grade the same as No. 1 hemlock; sort each length and width separate, and cross pile the same; said lumber to remain in cross-pile at least sixty days; then load on cars such sizes as you may direct, for the sum of \$8.50 per M. feet for ten foot and over in length, and we will agree to cut all the ten foot into 2x4. Terms of payment to be as follows: When lumber is in cross-pile sixty days you are either to settle for above lumber by sixty-day paper, or two per cent. off for cash, you to have the privilege of leaving the lumber there until April, 1894.

On August 25, 1893, the defendants in error wrote the following letter, which was received by the Edward Hines Lumber Company:

Whitehall, Mich., Aug. 25, 1893.

Edward Hines Lumber Co., Chicago, Ill.—Gentlemen: Inclosed find statement of lumber sold to you. This lumber has now been cut and cross-piled on dock for ninety days. Our contract with you was that after lumber was on dock sixty days it was either to be paid for cash, less two per cent., or notes given for sixty days. If you cannot send us the cash, will you make three notes of \$2,000 each, running 30, 60, and 90 days? We have expected your Mr. Baker to be here before this, to look over the lumber. Should you want any changes in the cutting, please inform us. Let us hear from you by return mail.

Respectfully yours,

C. G. Alley & Co.

The statement referred to in the letter showed that 716,297 feet of lumber had been cut and cross-piled. The statement in the letter that this lumber "has now been cut and cross-piled on dock for ninety days" was in large part erroneous, only a little over one-third of the same having been in cross-pile for as much as 60 days. Some of it had been cut and piled in May, some in June, some in July, and some of it in August. In reply to this notification, the plaintiff in error answered, by letter dated September 1, 1893, in the following words:

Chicago, Ill., Sept. 1, 1893.

C. G. Alley & Co., Whitehall, Mich.—Dear Sirs: Referring to yours of 25th ult., we have long since given up the idea that you were to cut the lumber for us, and we understand that you had some doubts as regards our re-

sponsibility, and for this reason concluded that you would hold the lumber; hence have not made calculations for taking same, and we cannot now do so. This order was placed in April, and we would naturally look to taking some of it at the end of 60 days. Five months have now elapsed. We cannot at all comply with the terms of the contract at the present time, so we trust you will have no inconvenience in disposing of it in small quantities elsewhere, where you can realize as you wish to realize on it.

Yours,

Edward Hines Lumber Co.

To this Alley & Co., under date of September 5, 1893, replied as follows:

Whitehall, Mich., Sept. 5, 1893.

Edward Hines Lumber Co., Chicago, Ill.—Dear Sirs: We are in receipt of yours of 1st inst. Whatever doubts we may have had at any time as to your financial responsibility, we have never had any doubts as to our obligations under the contract, and have regarded it as in full force at all times since it was made. We still expect you, as an honorable concern, to perform on your part, and we again ask you to accept the lumber already cross-piled, as per statement made, and remit us your paper therefor. If you prefer, we will sell for your account for the best price we can get upon your assurance that you will make good any deficit between the prices obtained and the contract price. Please advise us promptly of your decision.

Very truly yours,

C. G. Alley & Co.,

Per J. H. Williams.

Upon receipt of the last-mentioned letter the plaintiff in error, under date of September 11, 1893, replied as follows:

Chicago, Ills., Sept. 11, 1893.

C. G. Alley & Co., Whitehall, Mich.—Dear Sirs: Replying to yours of the 5th inst., we must beg to differ with you as regards terms of contract. During the past terrible times we do not think any concern here has aimed to act any more honorable than we have, but we do not propose to be imposed upon as in your case your circumstances of the matter point strongly to. We do not think that it entirely lays with you as regards to allow the matter run along in the way you have, and when you feel it suits your convenience to enact certain parts of the contract for us to have nothing to say but to comply with your request. We do not wish to presume to advise you as regards what you wish to do in the matter, as we have all we can do to take care of our own affairs.

Yours, etc.,

Edward Hines Lumber Co.

No further communication took place between the parties prior to the beginning of this suit. Defendants in error continued the manufacture of the lumber, and completed the manufacture of the cut of the season of 1893 on October 12, 1893. The last of it was cross-piled on the 14th day of October, 1893. On the 28th of October, 1893, the defendants in error sold all the lumber so manufactured under their contract to C. E. & M. B. Covell, of Whitehall, Mich., at \$6.50 per 1,000 feet, on board cars. Between the date of the contract for the sale of this lumber to the plaintiff in error and the sale to the Messrs. Covell there was a great depreciation in the value of lumber of that class. This action was begun in March, 1894, and was a suit by the defendants in error against the plaintiff in error for the damages sustained by defendants in error for a breach of the contract to take and pay for the lumber thus sold under the contract heretofore set out. There was a jury, and verdict against the plaintiff in error, and judgment rendered thereon, from which this writ of error has been sued out.

Bunker & Carpenter, for plaintiff in error.

Smith, Nims, Hoyt & Erwin, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The contention of the plaintiff in error is that, under the contract by which it bought the season's cut of hemlock lumber, it was not obliged to take any part of the lumber or make any payment until the entire season's cut had been in cross-pile for 60 days. The trial judge was of opinion, and so instructed the jury, that the plaintiff in error was required to take the lumber in installments, and that, when any considerable quantity of lumber had been cut and cross-piled for a period of 60 days, the plaintiff in error was required to accept such lumber, and either pay for it in notes or in money at a discount of 2 per cent. We agree in opinion with the trial judge as to the proper construction of this contract. Under the first paragraph it was clearly contemplated that the lumber should remain cross-piled for at least 60 days before it should be deliverable. When sorted and piled for the requisite time, the sellers were to load on cars such sizes as the buyer might direct. The second paragraph deals with the question of payment by providing that "when lumber is in cross-pile sixty days you are either to settle for above lumber by sixty-day paper, or two per cent. for cash, you to have the privilege of leaving the lumber there until April, 1894." The words "above lumber," occurring in the paragraph concerning payment, do not refer, as contended, to the whole cut of lumber for the season of 1893, but to the lumber which had been cross-piled for sixty days. This was the construction placed on the contract by both parties, as indicated by the letters of August 25th and September 1st, heretofore set out. A construction placed by both parties upon a contract so worded as to reasonably admit of such construction, is entitled to consideration in subsequent controversies as to the proper interpretation of the agreement. The contention of plaintiff in error is that the letter of September 1, 1893, does not, when properly construed, establish anything more than an unwillingness, due to a present inability, to comply at that time with the demand of a performance, and that defendants in error afterwards demanded compliance, and thereby indicated that they did not understand that the agreement had been unequivocally repudiated. Upon this interpretation of the correspondence it is urged that defendants in error themselves breached the contract by disposing of the lumber contracted to plaintiff in error before there had been any positive refusal of performance by plaintiff in error. If the conduct or assertions before time of performance of one of the parties to an executory contract is relied upon as a repudiation of the contract, and as justifying an action as for a breach of the contract, there must be shown a distinct and unequivocal refusal to perform, treated and relied upon as an absolute repudiation by the other party to the contract. The rule in respect of such an anticipatory breach is that:

"A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made, for if he afterwards continue to urge or demand compliance with the contract, it is plain he does not understand it to be at an end." *Benj. Sales*, § 860; *Smoot's Case*, 15 Wall. 36; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850.

The circuit court instructed the jury that as a matter of law the plaintiff in error, by its letter of September 1st, had renounced the contract, and had refused performance absolutely and unconditionally, and had, therefore, breached their agreement to receive, not only the installment it was asked to receive at the time, but had committed a breach of the entire contract. This is assigned as error.

We cannot agree to the interpretation of the correspondence upon which this contention is based. If, as we have already decided, this lumber was deliverable in installments and payment was due for each installment of lumber which had been cross-piled for 60 days, then the defendants in error had a right to demand that the lumber which on the 25th of August, 1893, had been cross-piled for 60 days or over should be received and settled for, and it was the duty of plaintiff in error to accept and pay for the lumber thus deliverable under the agreement. This they distinctly refused to do by their letter of September 1st, heretofore set out. It is not a case of reliance upon assertions in advance of the time of performance, as in *Smoot's Case*, or in *Dingley v. Oler*, *supra*. The defendants in error demanded performance at a time when they had a right to demand performance, and a refusal to then perform was a breach of the agreement. No other reasonable construction can be put upon the letter of September 1st, in reply to the demand of the defendants. The refusal is neither put upon the ground that it was not obliged to take and pay for the lumber in installments, nor upon the ground that the lumber alleged to have been cross-piled for 90 days had not in fact been cross-piled for that time, or even for 60 days. Upon the contrary, that letter distinctly states that "we have long since given up the idea that you were to cut the lumber for us," and adds, "This order was placed in April, and we would naturally look to take some of it at the end of sixty days." It was clearly intended as a distinct and unequivocal notice that the plaintiff in error did not regard the contract as in force, for the reason that defendants in error had at one time entertained some doubt as to the responsibility of the plaintiff in error. The letter of September 5, 1893, from defendants in error, does not indicate that they did not understand that plaintiff in error had distinctly refused to comply with its promise, but was an effort to remove the ground upon which that refusal had been based, and contained a repetition of the former demand for payment. This effort to induce a recantation came to nothing. The response elicited is little more than an obscure intimation of a difference as to the proper construction of the contract, and must be regarded as a reaffirmance of the distinct and unequivocal refusal to comply contained in its former letter. There was

no error in the interpretation placed on this correspondence by the trial judge.

There was evidence tending to show that the statement in the letter of defendants in error bearing date August 25, 1893, that the lumber shown by the accompanying statement had been cut and cross-piled on the dock for 90 days, was in part untrue, and that in fact the larger portion of the lumber then on the dock in cross-piles had been thus piled for less than 60 days. It was insisted below, and is now here urged, that that misrepresentation was intended to deceive and mislead plaintiff in error and to obtain from it a larger payment than it was obliged to make under the contract. Upon this point the trial judge instructed the jury as follows:

"I instruct you that if you find from the evidence that Mr. Williams' [a member of the defendant firm, who wrote the letter of August 25th] representations upon the subject as to the cross-piling of that lumber were simply given out in a heedless and inadvertent way without any real purpose or intention to mislead, then they in no wise affect the conclusions to be drawn from the evidence that this letter was sent. If, on the other hand, you find that this statement was an intentional misstatement, and was designed to overreach the defendants, and induce them to part with more money than the plaintiffs were entitled to, and you are satisfied that it did mislead the defendants into supposing that there was more lumber on hand, ready for delivery, then there was, and that that fact influenced them in their action in refusing to go on with the contract, I charge you that the plaintiffs in this case cannot recover, because there has not been any breach of the contract. If, notwithstanding what I have said to you, you should still find from the evidence in the case that this lumber was substantially ready for delivery, and that it was in the main sufficient for the terms of the contract, and according to their requirement, whether there was much or little sawed out and remaining in cross-pile for 60 days, and that the defendant intended not to go on with the contract, but to repudiate it, whatever may be the plaintiff's purpose in making the statement, it would not have the effect of misleading anybody. In other words, in order that any misstatement should prejudice or legally injure, the misstatement must have been made with a dishonest purpose, and be followed by injury to the party to whom the misrepresentation was addressed; but, if he had not been influenced by it, he has not been injured by it. * * * If you are clearly satisfied that it did not at all influence the defendant's conduct in the premises, then it is immaterial; but if there were intentional false statements about it, you should be clearly satisfied before you should disregard the consequences of it upon the assumption that it did not influence the defendant; you should be clearly satisfied that it was so, and that the defendant had no intention to go on with the contract, and would not have done so whether there was anything of that sort in the plaintiff's letter to them or not."

This charge fairly submitted to the jury the question of the intent with which the overstatement of the letter of August 25th had been made, as well as its effect and influence upon the conduct of the plaintiff in error in refusing to go on with the contract. The evidence strongly tended to show that the plaintiff in error had no intention to abide by and perform this contract, and that this intention was due not to any misleading by reason of the letter of August 25th, but to the financial condition of the country which then existed, and to the decline in the value of lumber of this class between the date of this contract and the date of this refusal. There was no affirmative error in the charge as given, and no request was made for any additional charge upon this aspect of the case.

On cross-examination, Mr. Williams, one of the plaintiffs below, was asked if he had not been making inquiries to ascertain whether it would be safe or not to allow the Edward Hines Lumber Company to have the lumber sold them. This was objected to as irrelevant and immaterial. The court thereupon asked counsel for the plaintiff in error, "Do you intend to prove that any communication was had between the parties on that subject?" to which it was replied, "Not directly." The court then asked, "What effect do you think it would have?" to which counsel replied, "No effect, really, affecting the rights of the parties under the contract, but simply in explanation of their correspondence." Thereupon the court ruled the question out as immaterial and irrelevant. There was no error in this.

After the testimony had been concluded the counsel for defendant moved the court to direct a verdict in favor of the defendant, on the ground that under the evidence it had not committed a breach of the contract sued upon, and that the plaintiffs had themselves broken the contract. This motion was overruled, in consequence of the construction which the court then announced that it would put upon the contract. Thereupon counsel for plaintiffs in error moved the court "to allow them to open the case, and show that at the time the contract was made the defendants expressly declined to make any such contract as the court holds was included in it, to make payments from time to time." This was declined upon the ground that such evidence would violate the rule that all preliminary negotiations are presumed to have been merged in the written contract. The action of the court in overruling this motion is now assigned as error. Aside from the fact that this motion came after the conclusion of all the evidence, and after the motion for a peremptory instruction had been argued and overruled by the court, we are of opinion that the line of testimony which the plaintiff in error asked leave to introduce was clearly in conflict with the rule excluding evidence as to the preliminary agreements and negotiations between the parties resulting in a written contract. Upon the whole case, we are of opinion that none of the errors assigned are well taken, and that the judgment of the lower court should be, and accordingly is, affirmed.

POSTAL TEL. CABLE CO. v. ZOPFI.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 351.

NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

One Z. occupied a house fronting on a turnpike. Between Z.'s front gate and the macadamized part of the road was a strip of unpaved, spongy ground, about 10 feet wide, lower than the macadamized road or than Z.'s land, which served as a drain for water falling on the road. Directly in front of Z.'s gate was a small wooden platform, and between this and the road were stepping-stones, used to pass from the road to the gate. The platform and stones were only a few inches above the low ground on which they were laid. The defendant telegraph company, in preparation for erecting a line along the turnpike, caused poles to be dropped, at in-

tervals, in the low ground beside the road. One of such poles was dropped in front of Z.'s gate, with its butt end, measuring 11 inches in diameter, resting on the stepping-stone nearest the platform, in such a position that in order to reach the gate, it was necessary to make a step from the second stone to the platform of about 30 to 36 inches, and high enough to step over the pole. The pole remained in this place for some months. On a rainy day, when the low ground was soft and muddy, and the stones and platform wet and slippery, Z.'s daughter, a girl of about 13, in returning from school, slipped while attempting to step from the stone, over the pole, to the platform, and fell, and was injured. In an action by Z.'s daughter, by her next friend, against the telegraph company, *held*, that it was a question for the jury whether the presence of the pole proximately contributed to cause the accident, and that the defendant was not entitled to a peremptory instruction in its favor.

Error to the Circuit Court of the United States for the Middle District of Tennessee.

Vertees & Vertees, for plaintiff in error.

John Ruhm & Son, James Trimble, and E. L. Gregory, for defendant in error.

Before LURTON, Circuit Judge, SEVERENS, District Judge, and HAMMOND, J.

LURTON, Circuit Judge. This is an action by Emma Zoppi, a minor, suing by next friend, against the Postal Telegraph Cable Company, for personal injuries sustained through the alleged negligence of the company. She obtained a verdict and judgment thereon for \$4,000, and this writ of error is prosecuted by the telegraph company for the purpose of reviewing that judgment.

The fourth, fifth, and sixth assignments of error relate to the refusal of the circuit court to grant a new trial, and need not be further considered. The granting or refusal of a new trial is not subject to exception, and cannot be assigned as error. *Schuchardt v. Allens*, 1 Wall. 370; *Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458; *Van Stone v. Manufacturing Co.*, 142 U. S. 128, 12 Sup. Ct. 181; *Moore v. U. S.*, 150 U. S. 57, 14 Sup. Ct. 26.

The third error assigned is that "there was no evidence to sustain the verdict, and therefore the verdict should be set aside." The question sought to be presented by this assignment need not be considered in the form thus presented, for the reason that, at the close of all the evidence, the plaintiff in error moved the court to instruct the jury to return a verdict for the defendant. This motion was overruled, and is made the subject of the first and second assignments of error. It is evident that, if either of the assignments based upon the refusal of the court to instruct for the defendant below is well taken, it will be unnecessary to determine how far plaintiff in error could be relieved from a judgment based on a verdict unsupported by any evidence whatever, where no motion had been made at the conclusion of the evidence for a peremptory instruction. We shall therefore consider the single question as to whether or not the court erred in submitting the case to the jury, and refusing an instruction to find for the plaintiff in error.

Caspar Zoppi, the father of Emma Zoppi, the defendant in error,

and with whom she lived, resided, at the time of the injury to his daughter, about three miles from Nashville, Tenn., on the metaled turnpike road extending from Nashville to Gallatin, in the same state. His place fronted on the pike, and was inclosed by a fence along the margin of the turnpike right of way. Between the gate opening into the yard or lawn of Mr. Zopfi and the metaled part of the turnpike is a strip about ten feet wide, of unpaved, low, spongy ground, lower than the macadamized road, and lower than the inclosed grounds of Zopfi. This border strip operates as a drain for water falling on the pike. In wet weather it is soft and muddy, and water stands in shallow pools. In front of his front gate was a platform about four feet square, made of plank lying on cross boards an inch thick. Between this platform and the metaled part of the pike, at intervals of eighteen inches, flat rocks were laid down for use as stepping-stones in crossing from the platform to the pike. The plaintiff in error, intending to construct a line of telegraph wire along this turnpike, had scattered, at intervals between Zopfi's fence and the metaled part of the public road, telegraph poles, intending at a convenient time to erect them. One of these poles was thrown just in front of the platform at Mr. Zopfi's gate, the heavy butt end immediately in front of the platform. There was evidence that this pole had been in the position described for some months, and was to some extent an obstruction to the easy and safe use of the pass-way between the traveled pike and Zopfi's premises. There was evidence that this butt end covered one of the flat stepping-stones next the platform, so that the distance between the last exposed stone and the platform was from 30 to 36 inches. There was some conflict of evidence as to the height of the platform above the surrounding ground, the thickness of the obstructing part of the telegraph pole, and the height of the flat stepping-stone from which one would have to step in order to step over the intervening pole to the platform beyond. But, taking the most favorable view of the evidence for the defendant in error, as we must do when we come to determine the question as to whether there was any evidence upon which a jury might reasonably find a verdict for the defendant in error, we may say that there was evidence that both the platform and stepping-stones were not more than from 2 to 4 inches above the low ground on which they were laid. The pole at its butt was, by actual measurement, from 11 to 12 inches in diameter. If, therefore, it lay on top of one of the flat stepping-stones, and these stones were about on a level with the platform, the whole diameter of the pole must have been above the level of the platform. There was evidence to this effect; and we must try this question upon that evidence most favorable for the defendant in error. Upon the day of Miss Zopfi's injury, she was returning from school to her home. The day was wet, and a light rain was falling. Water had settled between the pike and the platform, in part due to the pole having checked the natural drainage. To get into her gate, it was necessary to either go through the mud and water, or use the stepping-stones and the platform at the gate. She took the latter and usual course. In stepping from the last exposed stepping-stone over the pole to the

platform, her foot slipped, and she fell backward on the pole, and sustained very serious and permanent injuries. She says she did not step on the pole, which was a peeled chestnut, and wet. Neither did her foot touch the pole as she stepped over it and onto the platform. But, as she touched the platform, her foot slipped, she lost her balance, and fell.

At the conclusion of all the evidence, the court refused a request to instruct for the plaintiff in error. After telling the jury that, if the presence of the pole in no way caused or contributed to cause the plaintiff's fall, their verdict should be for the company, although they might think that her injury from the fall was aggravated by falling on the pole, the court instructed the jury as follows:

"If the pole caused the fall, or concurred as an operative or producing cause with something else, and proximately produced this injury, the defendant would be liable. You will look to all the testimony, and to the entire situation there, the condition of the weather, and everything else making the complete transaction, and determine what did cause her fall." "If you are satisfied by a reasonable preponderance of the evidence that the pole did cause her fall, or that it concurred with anything else to produce it, the defendant would be liable."

This charge was in accordance with the opinion of this court upon a former appeal in this cause, where a new trial was awarded, because we were of opinion that the court had erred in instructing the jury to find for the present plaintiff in error. *Zopfi v. Telegraph Co.*, 22 U. S. App. 136-143, 9 C. C. A. 308, and 60 Fed. 987.

It is now argued that, upon the facts in evidence, the only legitimate inference to be drawn is that the defendant in error fell alone because she slipped upon the wet platform; that "the wet, slippery platform was the sole cause of her fall; and for that the plaintiff in error is in no wise responsible." It is insisted that this was so plainly and conclusively the only legitimate inference to be drawn from the most favorable view of the evidence which can be taken for the defendant in error that the court should have instructed the jury to find for the plaintiff in error. In support of this position, it has been argued that a conclusion that the pole either caused, or, in co-operation with the wet platform, contributed to cause, her fall, can be reached only by "piling one inference upon another," and that a presumption must be based upon a fact, and not upon an inference or upon another presumption. For this, counsel cite *Lawson*, Pres. Ev. p. 555; *Manning v. Insurance Co.*, 100 U. S. 698; *Douglass v. Mitchell's Ex'r*, 35 Pa. St. 440; *Pennington's Ex'r v. Yell*, 11 Ark. 212; *Lay v. Huddleston*, 1 Heisk. 172.

Counsel suggest in support of this argument that the steps to be taken in reaching a conclusion that the pole contributed to Miss Zopfi's fall are these:

"(1) Emma Zopfi fell because she slipped. (2) She slipped because she must have taken an awkward, dangerous step. (3) The step must have been awkward and dangerous, because it had to be so very high and long. (4) It must have been so high and long because of the presence of the pole. (5) She would not have been obliged to take such a step if this pole had not been where it was. In no other way [counsel continue] can liability be fixed upon this company upon the facts proven, otherwise than by piling inferences upon

inferences, by giving remote inferences the probative weight of immediate inferences. This cannot be done, because such inferences are not evidence, under the established rule of law."

We cannot concur in this reasoning. Some of the steps suggested are but duplications; others are not presumptions or inferences from inferences, but inferences from facts; and others involve statements of fact, and are not inferences from facts at all. In a chain of reasoning, we may have many inferences which unitedly lead to one end or conclusion. Yet it does not follow that any one presumption or inference was based upon another presumption or inference. Neither does it follow that, because a conclusion is reached as a result of many facts and many independent inferences from proven facts, therefore one inference has been obnoxiously piled upon another. This case presented for the consideration of the court and jury a group of facts and circumstances. That Emma Zopfi had not slipped or tripped on the obnoxious pole was one of the conceded facts of the case. We are asked to infer from this fact that the presence of the obstructive pole in the passway in no way contributed to cause her fall, and to ascribe her misfortune solely to the wet platform. This is to ignore the opposing theory, based upon the entire situation, which is that the step she was required to take was unusually long and high for a 13 year old girl, and may have resulted in a loss of balance as her foot touched the platform, and her consequent slip and fall. That a step fully 33 inches long, and high enough to step over the pole which lay between the stone and the platform, was an unusual and dangerous step for such a girl, is something more than either a presumption or an inference. That it was both unusual and awkward is a fact of which either court or jury may take notice, as within the common knowledge of mankind. That the platform was wet, and therefore slippery, is another established fact; and that her foot was on the platform when she slipped and fell is another. That the wetness of the platform was the sole cause of her fall is the inference plaintiff in error draws, and would have the court so conclusively infer as to leave nothing for the jury to decide. That the wetness of the platform contributed to her loss of balance, her slip and fall, is probable. That it was the sole, efficient cause of her slipping is clearly not the only inference which reasonable men might draw from a consideration of all the facts of the case. To analyze into its possible elements a conclusion that her long and high step over the intruding pole contributed to her slipping and fall as she landed on the platform may be a complicated process, and many men might not satisfactorily state the steps to such conclusion, and might, in the estimation of an acute dialectician, be found guilty of obnoxiously drawing one inference from another. Still, the fact remains that the facts and circumstances were such that either of two inferences might be made,—one that the wet platform was the sole cause of her fall; the other, that the pole proximately and efficiently contributed, in co-operation with the wet platform, to her fall. If the jury should be of opinion from all the facts that but for the pole she would probably not have fallen, then, though the pole was not the *causa causans*, it would be

a cause without which the fall would probably not have occurred. Upon such a finding, the liability of the plaintiff in error would be clear. *McDonald v. Railway Co.* (decided by this court April 14, 1896) 74 Fed. 104.

The facts now before us are not in essentials different from those presented on the former appeal. 9 C. C. A. 308, 60 Fed. 987. The case is clearly governed by the opinion then announced, and the judgment is therefore affirmed.

CHESTNUT STREET NAT. BANK et al. v. CROMPTON LOOM WORKS.

(Circuit Court of Appeals, Third Circuit. April 15, 1896.)

No. 5.

LANDLORD AND TENANT—DISTRAINT FROM BAILEE—WAIVER OF APPRAISEMENT.

A bailee of property, distrained for rent under the Pennsylvania laws, has no implied authority to waive, in behalf of the owner, the appraisement, which is an absolute prerequisite to a valid sale of the distrained property. *Purd. Dig.* 1161. And it is immaterial whether the landlord knows that the goods do not belong to the tenant, for it is his duty to ascertain the facts before accepting from the tenant a waiver of statutory requirements. *Briggs v. Large*, 30 Pa. St. 287, followed.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action at law, by the Crompton Loom Works against the Chestnut Street National Bank and others, to recover the value of certain quilt looms and fixtures, purchased for defendant at a sale of property distrained for rent. The circuit court gave judgment, on a verdict, for plaintiff, in the sum of \$3,700, and defendants brought error.

Wm. S. Stenger and R. O. Moon, for plaintiffs in error.

A. S. Ashbridge, Jr., and R. C. Dale, for defendant in error.

Before **ACHESON**, Circuit Judge, and **WALES** and **GREEN**, District Judges.

ACHESON, Circuit Judge. The looms here in controversy were distrained and sold, by virtue of a landlord's warrant, for arrears of rent owing to the landlord by Albert Mitchell, the lessee of the demised premises. At the time of the distress, these looms were the property of the plaintiff in this action, and were in the possession of Mitchell as bailee for hire.

By the settled law of Pennsylvania, the contract under which Mitchell held the looms was, even as against his creditors, a bailment, and not a conditional sale. *Ditman v. Cottrell*, 125 Pa. St. 606, 17 Atl. 504. This is not seriously questioned by the learned counsel for the plaintiffs in error. The only question presented for our consideration is whether the waiver of appraisement by Mitchell bound the plaintiff. The court below, following *Briggs v. Large*, 30

Pa. St. 287, held that it did not, and, therefore, that the plaintiff's title was not divested by the sale under the distraint for rent.

The act of assembly of the commonwealth of Pennsylvania of March 21, 1772 (Purd. Dig. 1161), which gives the landlord the right to sell goods seized under a distress for rent, imperatively requires an appraisement of the goods before the sale thereof, and without such appraisement, unless the same is duly waived, the sale is null and void. *Kerr v. Sharp*, 14 Serg. & R. 399; *Briggs v. Large*, supra; *Brisben v. Wilson*, 60 Pa. St. 452; *Davis v. Davis*, 128 Pa. St. 100, 109, 18 Atl. 514. Here the owner of the goods did not dispense with an appraisement. The waiver relied on was by Mitchell, the tenant of the demised premises. It is not pretended that Mitchell had express authority from the owner of the goods to waive compliance with the requirement of the law. Had he any implied authority to do so? This question must be answered negatively, upon the authority of *Briggs v. Large*, supra. In that case it was ruled by the supreme court of Pennsylvania that, where goods stored with a warehouseman were distrained for rent due by him, he had no authority to waive an appraisement. There the court said:

"He had no other control over or agency in the property than that which arose out of his relation to it, as bailee, to keep safely, for hire, and to receive and to transmit notice of the distress, as we have already seen, as tenant. This was the utmost extent of his agency."

It is, indeed, urged, as distinguishing the two cases, that here the plaintiff's goods were distrainable, whereas, in *Briggs v. Large*, the goods being stored, in the course of trade, with a warehouseman, were exempt from distress. But to the latter circumstance no controlling importance was given by the court in deciding *Briggs v. Large*. The court cited, and recognized as there binding, its previous decision, in *Caldcleugh v. Hollingsworth*, 8 Watts & S. 302, that, under the statute, the tenant is the agent of the owner of the distrained goods to receive and transmit notice of the distress, and that, if such notice is given to the tenant, the owner must contest the legality of the distress before the property is sold; otherwise, he loses his title, if the other requisitions of the statute are complied with. Now, in *Briggs v. Large*, the jury found that the tenant had received notice of the distress, so that, in the supreme court, the case turned upon the question of the authority of the tenant to waive appraisement. The court squarely ruled that the tenant's agency was confined to receiving notice of the distress, and that his waiver of an appraisement was a nullity, as against the owner of the goods. Clearly, that determination is applicable to the present case.

There is no force in the suggestion that, in *Briggs v. Large*, the landlord knew that the goods did not belong to the tenant, while in this case the landlord had no such knowledge. Doubtless, inquiry here would have brought knowledge. If a landlord who distrains upon goods found upon the demised premises, instead of following the requirement of the statute, sees fit to accept from his tenant a waiver of appraisement, he acts at his own risk. He can-

not, by the waiver of the tenant, acquire the right to sell the goods of another; and a sale under such circumstances does not pass the owner's title.

The ruling of the supreme court of Pennsylvania in *Briggs v. Large*, we think, is controlling, and is decisive against the plaintiffs in error. The judgment of the circuit court, therefore, is affirmed.

UNITED STATES v. BOSBYSHELL.

(District Court, E. D. Pennsylvania. March 25, 1896.)

1. OFFICIAL BONDS—SUPERINTENDENT OF MINT.

The bond of a superintendent of a mint was conditioned that he should faithfully discharge "the duties of said office according to the laws of the United States." Rev. St. § 3506, requires the superintendent to receive and "safely keep" all moneys and bullion, etc., until legally withdrawn. *Held*, that the obligation of safe-keeping implied a further obligation to deliver to his successor, and that the obligors were consequently liable for a shortage found to exist in the amount of bullion and coin receipted for by him on assuming charge of the mint, upon opening vaults from which no money or bullion had been taken for the use of the mint during his incumbency.

2. SAME—ADMISSIBILITY OF EVIDENCE — CERTIFICATES OF ACCOUNTS FROM TREASURY DEPARTMENT.

An action on the official bond of the superintendent of a mint, which proceeds on his alleged failure to safely keep money and bullion intrusted to his care, is not a suit founded on the "delinquency of a revenue officer, or other person accountable for public money," within the meaning of Rev. St. § 886, providing for the use of certified transcripts from the treasury department as evidence in such suits; and such a transcript is therefore inadmissible.

This was an action brought by the United States upon the official bond of Oliver C. Bosbyshell, as superintendent of the mint at Philadelphia, from December 19, 1889, to March 31, 1894. At the trial there was a verdict for the United States, and the defendant has now moved for a new trial.

The condition of the bond sued on was in the following language:

"Now, the condition of the foregoing obligation is such, that whereas the president of the United States hath, pursuant to law, appointed the said Oliver C. Bosbyshell superintendent of the mint of the United States at Philadelphia, Penna., and in due form of law caused to be issued to him as such a commission bearing date the 19th day of December, Anno Domini one thousand eight hundred and eighty-nine: Now, therefore, if the said Oliver C. Bosbyshell shall faithfully and diligently perform, execute and discharge, all and singular, the duties of said office according to the laws of the United States, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue."

Among the duties of superintendents of mints are the following:

"The superintendent of such mint shall receive and safely keep, until legally withdrawn, all moneys or bullion which shall be for the use or expenses of the mint. He shall receive all bullion brought to the mint for assay or coinage; shall be the keeper of all bullion or coin in the mint, except while the same is legally in the hands of other officers," etc. Rev. St. § 3506.

Upon assuming the position of superintendent of the mint the defendant relieved the Hon. Daniel M. Fox, and in receipting to

Mr. Fox for the coin and bullion in his possession defendant gave him a receipt for gold bullion to the amount of \$16,200,000, and for silver to the amount of 33,000,000 of dollars in bags. The gold bullion in bars was at the time locked and sealed in a compartment within the working vault used by the deposit weight clerk. The silver was stored in a locked and sealed vault in the post-office building. The receipt was given without counting or weighing, being based upon the certificates attached to the compartment and vault. It appeared that the gold bullion had been placed in the vault in 1887, and had not been counted or weighed since that time, the yearly examination being confined to an inspection of the seals of the compartment, which were found intact. The same course was pursued at the annual settlements in June, 1890, 1891, 1892, and 1893. In September, 1893, there being a demand for gold bars, the vault was opened and a count was had, which disclosed a shortage of \$100,000. The defendant was relieved from the possession and control of the mint, and thereafter the amount of silver was ascertained by weighing, defendant not being present, though represented by another. The weighing disclosed a shortage of \$768.

At the trial there was admitted in evidence, over defendant's objection, a certified transcript from the treasury department, containing copies of statements and certificates of settlement of defendant's accounts.

In respect to the gold bullion, one of the defenses at the trial was that the amount receipted for was not in fact in the vault at the time defendant assumed control of the mint. In regard to the alleged shortage of silver it was claimed that the apparent difference was merely the result of inaccuracy in the weighing, and of deterioration in the bags. The general nature and effect of the evidence bearing on these points will appear from the following extract from the court's instructions to the jury:

"This suit is brought upon the bond of Mr. Bosbyshell and his sureties, given to the United States when he entered upon his duties as superintendent of the mint at Philadelphia. The breach alleged is a failure to account to the government for the full amount of gold bullion received by Mr. Bosbyshell as such superintendent. The amount so received is stated in his receipt to be \$16,200,000. The amount turned over to the government upon his retiring from office was \$16,100,000, showing a deficiency of \$100,000, all of which has been made up to the government but \$12,810.82, which the government claims to recover, with interest. This deficiency is shown as well by the testimony of Mr. Bosbyshell himself as by the certificate of settlement of his account by the treasury department of the government, and by other evidence in the case. It is not necessary to consider whether he might be relieved from the charge by proving that he did not receive the amount acknowledged by his written receipt, inasmuch as there is no evidence to show that he did not receive this amount. The bullion was kept in an inclosure, as described, but it does not appear that a part of it could not have been abstracted while thus inclosed, and in his charge; and there is nothing to prove that it was not so abstracted. On the contrary, it is clear that it could have in part been removed, and there is evidence before you to justify a belief that it was removed. The testimony respecting the inclosure of the bullion, and its condition when the cage or inclosure was opened, is therefore entirely insufficient to justify a conclusion of Mr. Bosbyshell received less than his receipt specifies and his repeated reports to the government state. It was his right and his duty to himself, if not to the government, to ascertain the amount before receiving for

it, and to know that his subsequent reports of the amount were correct. If he chose to accept the statements of others and assume responsibility for the quantity stated, he must bear the consequences. If the amount which was turned over to him was less than the amount he should have received from his predecessor, the government could have held his predecessor and his sureties responsible for the difference. If it was less than the amount that should have been turned over, the written statements in his receipt and subsequent reports tended to mislead the government, if the statements were incorrect, and to deprive it of its remedy against others. But it is sufficient for the purposes of this case that there is no evidence to justify a conclusion that the amount turned over to him was less than the amount stated in his receipt. To the extent of the deficiency claimed on account of the gold bullion the government is therefore entitled to recover. As respects the deficiency claimed by the plaintiff on account of the silver dollars received, the evidence presents a different case. It is not suggested that Mr. Bosbyshell did not receive the amount he acknowledged by his receipt, but it is alleged that the evidence does not show that there was such a deficiency in the amount turned over when he went out of office, as the government claims. The amount so turned over was taken out of his possession before being counted, or an ascertainment of quantity by weighing was made. How the ascertainment was made has been described. It was hurried, and somewhat careless, in the judgment of the court; and, although Mr. Bosbyshell had a representative present, neither he nor his representative had any control over the method pursued. A subsequent ascertainment discovered a difference in the amount to the extent of \$35. You must judge from the evidence whether it is reasonable to believe that a greater credit than the \$35 should be allowed. In view of the circumstances that this property—the silver dollars—for which Mr. Bosbyshell and his sureties were responsible to the government was taken out of his charge before the amount was ascertained, the burden is upon the government to make it plain to you that there was a deficiency. They chose to take it away from him, and make the count in his absence, and the duty is upon the government to make it plain to you that there was a deficiency; that he did not turn over the whole amount which he was obliged to turn over. According to the count or ascertainment made in the manner described, there appears to have been a deficiency of between \$600 and \$700. Now, it is for you to judge how much or how little of an error in each weighing or counting of these bags would have been necessary to result in such a discrepancy."

On the present motion, the following points were urged in argument:

(1) Under the terms of the bond, defendant was not liable for the shortage. He was liable only for ordinary care as bailee, and not as an insurer.

(2) The certified transcript of settlement from the treasury department was not evidence. A settlement of a money account makes section 886 of the Revised Statutes applicable.

Ellery P. Ingham and Harvey K. Newitt, for the United States.
F. Carroll Brewster, F. Merian Allen, and R. C. Dale, for defendant.

BUTLER, District Judge. The point urged that under the terms of the bond the obligors were responsible only for the superintendent's care and fidelity, and that the doctrine enforced in *Boyden v. U. S.*, 13 Wall. 17; *U. S. v. Prescott*, 3 How. 578; *U. S. v. Morgan*, 11 How. 154 and other like cases, is inapplicable, was not made on the trial, though the requests for instruction to the jury embrace it.

Unless it is clear that the point is well taken, the verdict should not be interfered with on this account, but the question be allowed

to go to the court of appeals. I cannot see any good reason for the distinction sought to be drawn between this case and those cited above. The bond binds the obligors for the "safe-keeping" of the property, and its delivery when required. The obligation to deliver is a plain and necessary implication from the language used. This obligation would not be plainer or more imperative if expressed in words. The officer is to "safely keep" the property for the government during his incumbency of the office, and to deliver it up at the expiration of that time. But if the obligation of the bond was confined to the "safe-keeping" of the property only, it would be as clearly broken as if the obligation were held to include a delivery to the government when the superintendent retires. The pith of the decisions cited is that obligors in official bonds will be held strictly to their undertakings—substantially as insurers.

In *Boyden v. U. S.* the terms of the bond are substantially identical with those of the bond before us.

U. S. v. Thomas, 15 Wall. 337, presented a different case. The officer was forcibly deprived of the property involved by a public enemy; and the court held that where the performance is rendered impossible by the act of God, or public enemies, he and his bondsmen are not responsible.

The only other reason urged in support of the rule which need be noticed, relates to the admission of the certificate from the treasury department. This I think is sound. The limitations of section 886, Rev. St., were overlooked. The section, so far as respects the certification of accounts, is confined to suits founded on the "delinquency of a revenue officer, or other person accountable for public money." This suit is not so founded. It rests on an alleged failure of the superintendent of the mint to keep safely certain property intrusted to his care. The language does not embrace the suit; and it cannot be extended so as to cover it, by construction. The learned district attorney concedes that the certificate is not admissible if the suit is not founded on a delinquency respecting "public money," but contends that it is so founded. We cannot sustain the contention. The claim, as before stated, is for loss resulting from failure to keep the property intrusted to the care of the superintendent.

The rule for a new trial is made absolute

STROBRIDGE LITHOGRAPHING CO. v. RANDALL.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 318.

CONTRACTS—ASSENT—NEGOTIATIONS.

The S. Co. was a creditor of the firm of B. & D., and had commenced an action against the members of the existing firm, together with one R., who had recently retired from it, and who alone had been served in the action. Pending this action, negotiations were begun between the S. Co. and B. & D. for a settlement of the S. Co.'s claims, in the course of which an arrangement was made by which it was thought that, if B. & D. could

get certain notes of their own, held by R., they could raise money to effect a settlement. Thereupon S., the president of the S. Co., telegraphed from New York to R., in Michigan: "Will you turn over to us the notes amounting to \$4,000 you hold of B. & D? If so, will release the parties to the suit against B. & D., and they will get you released from all other indebtedness of the firm;" to which R. replied: "Certainly. * * * Will get them, and turn them over to you on condition of your telegram." The settlement was never in fact made. *Held*, that such telegrams were merely intended by the parties as negotiations for an agreement, and did not constitute a completed contract by S. or the S. Co. and R., by which the latter was released from his obligations, as a member of the firm of B. & D., to the S. Co.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

The Strobbridge Lithographing Company is a corporation of Ohio, with its place of business in Cincinnati, and is engaged in printing lithograph advertisements for theatrical companies. Prior to July 1, 1884, Joseph Brooks and James Dickson, of New York, constituted a partnership known as Brooks & Dickson, whose business it was to organize and manage various traveling theatrical companies. James A. Randall is a lawyer, living in Detroit, Mich., who, upon July 1, 1884, became associated as a partner in the firm of Brooks & Dickson. Prior to Randall's entering the firm, Brooks & Dickson had incurred an indebtedness to the Strobbridge Company of about \$9,000 for printed stock, for which they had given notes, 14 in number, maturing at different dates. The new articles of co-partnership between Brooks, Dickson, and Randall provided that Randall should not assume or in any wise become responsible for any debts or obligations of the late firm of Brooks & Dickson, except such obligations as arose from contracts made for the business of the season of 1884-85, which had not then in anywise been performed. Randall withdrew from the new firm in December, 1884, and early in 1885 Brooks & Dickson became insolvent. An action was begun by the Strobbridge Lithographing Company in the Wayne circuit court at Detroit, Mich., against Randall, Brooks, and Dickson, Randall being the only one served, to recover a judgment upon the indebtedness of both the old and the new firms, the contention being that by negotiations and extensions of time on the old indebtedness subsequent to the formation of the new firm it had become liable therefor. The case was heard at length before a jury, and resulted in a verdict against Randall in favor of the company for about \$1,800. An appeal was taken by both parties to the supreme court of Michigan, and upon a hearing by that court the judgment of the court below was reversed. The supreme court held that the court below should have directed a verdict for the defendant on the ground that by a binding contract Randall had been released by the Strobbridge Lithographing Company from all the indebtedness it was then seeking to enforce. The cause was remanded accordingly to the Wayne circuit court, with directions to order a new trial. When the case reached the circuit court, the lithographing company dismissed it without prejudice, and began an action in the court below. The same defense of release was pleaded in this action, and it was upon this ground that the learned judge of the court below directed a verdict for the defendant. The record discloses the following in respect to the alleged release:

After Brooks & Dickson failed, in 1885, and the suit was brought in the Wayne circuit court, as above stated, against Randall, negotiations were begun between the lithographing company and Brooks & Dickson in New York for a settlement of the indebtedness. The matter was considered by the board of directors of the lithographing company, and at a meeting held July 24, 1885, they directed their president to send the following telegram to Brooks & Dickson:

"At a meeting of our board, just adjourned, I am instructed to notify you as our ultimatum that we will release you on payment of four thousand dollars cash; we retaining the stock on hand."

This telegram was sent. A few days thereafter, Hines Strobbridge, the president of the company, stopped in New York on his way from Cincinnati

to Watch Hill, R. I., and had a conference with Brooks & Dickson. They told him that Randall had notes against them for \$4,000; that if the lithographing company could obtain these notes from Randall, a friend of theirs, named Connor, would discount the notes, and thus furnish \$4,000 with which they could pay the lithographing company the amount agreed upon as a composition of the whole indebtedness, and that, with this indebtedness provided for, they could settle with all their other creditors. Thereupon Strobridge sent Randall the following telegram:

"James A. Randall, Attorney at Law: Will you turn over to us the notes amounting to four thousand dollars you hold of Brooks & Dickson? If so, will release the parties to suit against Brooks & Dickson, and they will get you released from all other indebtedness of the firm. Answer quick.

"Hines Strobridge."

Randall answered:

"To Hines Strobridge, Strobridge Lithographing Co., New York City: Certainly. Notes have been assigned to Atkinson, but will get them, and turn them over to you on condition of your telegram. James A. Randall."

On August 6th, Strobridge, at Watch Hill, advised the board of directors of the lithographing company at Cincinnati that the proposition of Brooks & Dickson to pay or secure the payment of \$4,000 could not be carried out by them, and referred the matter to the board of directors. On August 10th the board decided that the proposition to settle for \$4,000 must be carried out, either in money or in secured notes. Randall testified that after he sent the telegram he immediately wrote to Strobridge to say that he had procured the Brooks & Dickson notes from Atkinson, and held them subject to his order, and that Strobridge replied to that letter. Strobridge denies having received such a letter, and says that Randall never offered to turn the notes over to him at all, but that the whole matter was broken off; that he met Randall in 1886, and that nothing was said about the notes, and that he had no idea that Randall claimed a right to tender them in settlement until March, 1887, when he delivered them to the clerk of the state court.

The evidence before the supreme court of Michigan was slightly different from that presented in this cause. Their opinion is reported under the name of *Lithographing Co. against Randall*, 78 Mich. 195, 44 N. W. 134.

Ramsey, Maxwell & Ramsey and Griffin & Warner, for plaintiff in error.

Alfred Russell, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts as above). The first question that meets us in this case is whether the two telegrams between Strobridge and Randall made a contract of release. If they did not, then the judgment of the court below must be reversed, without regard to the other questions made here, of accord and satisfaction, and of Strobridge's authority to bind his company by the alleged contract of release. Mr. Justice Foster, of the supreme judicial court of Massachusetts, speaking for that court in *Lyman v. Robinson*, 14 Allen, 242, 254, said:

"A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation."

In *Ridgway v. Wharton*, 6 H. L. Cas. 238, Lord Wensleydale said:

"An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms."

In *Rossiter v. Miller*, 5 Ch. Div. 648, 659, Lord Justice James said:

"On a question of construction different minds may differ, but, for my own part, I have often felt that in cases of this nature parties have found themselves entrapped into contracts which they wrote without the slightest idea that they were contracting."

—And the same learned judge used similar language in *Smith v. Webster*, 3 Ch. Div. 56.

Whether correspondence with the purpose of entering into a contract is merely preliminary negotiation or the contract itself must be determined by the language used and the circumstances known to both parties under which the communications in writing were had. If it is plain from the language used that some term which either party desires to be in the contract is not included or definitively expressed in the correspondence relied upon, no contract is made. If it is plain from the language that either party wishes or contemplates that another person, not a party to the correspondence, shall be a party to the contract, a correspondence as to the terms of such a tripartite agreement between two cannot be a completed contract between the two. It is as essential that all the parties intended shall be bound as it is that all the terms intended should be definitively agreed upon.

We may infer from the evidence in this case that Randall knew, when Strobbridge's telegram was read by him, that Brooks & Dickson and the Strobbridge Company were negotiating for a settlement of the indebtedness of the insolvent firm to the Strobbridge Company, and that it would help matters if the Strobbridge Company could become the owners of the notes held by Randall. The first sentence was a question. The next two sentences were the basis upon which it was desired that the question should be answered. If the telegram had read, "Will you turn over to us the notes amounting to four thousand dollars you hold of Brooks & Dickson? If so, will release you from the Detroit suit," and if it had been answered by an affirmative acceptance, undoubtedly this would have made a complete and binding contract between Randall and the Strobbridge Company, assuming Strobbridge's authority to make it. But Strobbridge's telegram was more than this. He not only proposed to release Randall from the Detroit suit, but he added that Brooks & Dickson would get Randall released from all other debts of the firm. There is no evidence that Strobbridge had any authority to bind Brooks & Dickson to such a contract with Randall, and there is nothing on the face of the telegram to indicate that he assumed to speak as agent for them in making such a contract. Nor, on the other hand, is there anything in the language used to indicate that Strobbridge, for his company, intended to warrant that Brooks and Dickson would procure their other creditors to release Randall. Undoubtedly A. can make a contract with B. that C. shall do something, or, to bring it nearer to the case in hand, A. can make a contract with B. that C. shall procure D. to do something for B.'s benefit; but such contracts or covenants of warranty are not usual, and the intention should be clear before such a construction will be enforced. Strobbridge does not here say, "We'll agree or warrant that Brooks & Dickson will secure a re-

lease of you by their creditors." He simply states in a positive way something which will happen. He is merely conveying information of a direct and reliable character to Randall, to enable him to say whether he will be a party to a tripartite agreement of settlement between the Strobridge Company and Randall and Brooks & Dickson. Strobridge's telegram was one of inquiry, to know whether the proposed settlement was possible. When answered, it was not a contract, because there was lacking the essential element of the presence as parties to it of the third persons whom Strobridge plainly intended should be the parties thereto of the third part.

The notes of Brooks & Dickson held by Randall were apparently a consideration quite inadequate for the release of Randall from the firm's entire indebtedness. Given to him in an adjustment of an indebtedness between members of the partnership, they would doubtless be postponed in the settlement of the insolvent firm's estate to all the other new firm debts incurred prior to his withdrawal from the firm. They were of no value whatever to the Strobridge Company unless Brooks & Dickson succeeded in procuring their discount. Randall might reasonably understand that the value of the notes to the Strobridge Company grew out of their place in the future agreement of settlement between Brooks & Dickson, the Strobridge Company, and himself, and that, but for such an agreement, they could have no real value. We are not to be understood as holding that the notes were not in a technical sense a valuable consideration sufficient to uphold a contract of the effect claimed for these telegrams, but we hold that the actual inadequacy of the consideration is a pregnant circumstance to show that the contract was not a complete one without the presence and agreement of Brooks & Dickson to insure to the Strobridge Company some value in the notes which were to be turned over. We do not consider the conduct of the parties subsequent to the telegrams, because there is a direct conflict of evidence in regard to it. We rest our construction of the telegrams on their language and the then situation of the parties.

The suggestion is made that as between Randall and Strobridge the contract is complete. There is the proposed surrender of the notes on one side and the proposed release from the Detroit suit on the other. Why cannot Randall waive the release from the other creditors? If there were a binding contract, undoubtedly Randall might enforce one of the considerations moving to him and waive the other, but the question here is not of waiver of a term of an admitted contract, but it is whether a complete contract was made. Now, there was no complete contract as between Randall and Strobridge unless Strobridge could enforce it against Randall. Could Strobridge sue Randall for a breach of a contract on a mere tender to Randall of a release from the Detroit suit? Clearly not, because Randall could say, "My telegram was sent on the basis of the statements in yours, and one of those was that Brooks & Dickson would procure my release from the other firm debts." This shows that the contract, if it was made, necessarily included as a term in it the release of Randall from the other firm debts. That statement in Strobridge's telegram cannot be rejected as part of the alleged con-

tract, either on the theory of Randall's present willingness to waive it, or on the ground that it was mere surplusage. We are bound to construe its effect in deciding whether both parties intended to make a complete contract, or were only engaged in preliminary negotiation. We have given above our reasons for holding that this was a mere statement of the term of a future contract to which Brooks & Dickson would agree, rather than the statement of a condition or term of a contract which Randall was then invited to close finally by acceptance.

We reach in this case a conclusion different from that announced by the supreme court of Michigan in the same controversy. We regret it, because of the high respect we have for that tribunal. We should have differed from it with even more diffidence had that learned court considered the point upon which our decision rests. The completeness of the telegraphic correspondence as a contract seems to have had little consideration before it, but was assumed in the discussion.

The judgment of the circuit court is reversed, with directions to order a new trial.

SUTHERLAND v. BRACE et al.

(Circuit Court of Appeals, Seventh Circuit. April 6, 1896.)

No. 256.

1. SALE—TRANSFER OF TITLE—DELIVERY.

As between the parties, delivery is not essential to the transfer of title in a chattel. The title passes when the bargain is complete, unless, by the terms of the contract, it is not to pass until the happening of some future event.

2. REPLEVIN—WHEN MAINTAINABLE.

Whenever, under a contract relating to chattels, the circumstances become such that the legal title and right of possession cease in one of the parties, and become vested in another, the latter, after demand and refusal, may maintain replevin, when, by statute, that form of action has been authorized in cases wherein the original taking was not wrongful. 71 Fed. 469, affirmed.

3. SAME.

The sellers of certain logs were to have a lien for the purchase money on the lumber manufactured from the logs, and, on default by the buyers, were to have a right to take possession of the lumber on hand, sell the same, pay themselves, and turn over to the buyers any surplus. *Held*, that the title and right of possession to such lumber vested in the sellers upon a default, and after demand and refusal they could maintain replevin for the lumber, under the Wisconsin statute (Rev. St. Wis. c. 123). 71 Fed. 469, affirmed.

On Petition for Rehearing.

This was an action of replevin brought by H. Brace, S. H. Davis, and others against W. R. Sutherland, to recover possession of certain lumber. There was a verdict and judgment for plaintiffs, and defendant brought error. The judgment was affirmed by this court on January 6, 1896. 71 Fed. 469. Plaintiff in error has now filed a petition for a rehearing.

Tomkins & Merrill (T. A. Moran, of counsel), for plaintiff in error.
 Lamoreux, Gleason, Shea & Wright, Brossard & Collignon, and
 Olin & Butler, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. Plaintiff in error has moved for a rehearing in this cause, and, on that motion, elaborate printed arguments have been filed and considered. The strong insistence is that the two concluding paragraphs of the contract, as quoted in the opinion of this court, create an equitable charge, in distinction from a lien at law, wherefore the action of replevin, which depends on the legal right to possession, cannot be maintained. As between the parties, a delivery is not essential to the transfer of title to a chattel, unless made so by the terms of the contract. The title passes from vendor to purchaser when the bargain is complete, unless, by the terms of the bargain, it is not to pass until the happening of some event in the future. Whenever, in view of the contract, the case stands so that the legal title and right of possession cease in one contracting party, and vest in the other, the latter, after demand by himself and refusal by the former, may maintain replevin for the chattel in question, if there be any statute authorizing that form of procedure where the original taking was not wrongful. In such case the refusal to deliver, or the persistent retention after demand, is in the nature of a wrong. The contract has so far affected the status of the chattel as to vest the plaintiff with the legal right to possession, and this right is appropriately asserted on the law side of the court, and in a trial by jury. In *Benj. Sales* (Ed. 1892, by the Bennetts), it is said on page 308, "In a sale of a portion of a larger mass, the whole remaining in the possession of the vendor, with a right and power in him to make a separation, both upon principle and the weight of authority, no title passes until that be done, so as * * * to enable the vendee to maintain trespass, trover, or replevin against the vendor;" meaning that, when the condition precedent to the vesting of title has been performed, replevin will lie, as a matter of course: provided, always, there be a statute authorizing replevin in a case where the original taking was not wrongful, or that at common law a wrongful detention be tantamount to a wrongful taking. Said the supreme court of Illinois in *Rhea v. Riner*, 21 Ill. 530:

"At the common law a delivery of possession was not necessary to pass the title to chattels from the vendor to the purchaser. To complete the purchase, and vest the title in the buyer, it was only necessary that the terms of the sale should be complete, and the property sold specified, and separated from other property of the same kind, where it was incapable of identification. When this was done by the parties the sale was complete, and the title to the property became vested in the purchaser."

In that case plaintiff and defendant agreed to swap horses. The former delivered his to the latter. The animal of defendant was to be delivered to plaintiff at a future day. Plaintiff made demand at the appropriate time, but defendant refused to deliver. Held, that when the demand was made the title and legal right of possession

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were in plaintiff, that the detention of the animal by defendant was wrongful, and that replevin would lie. Upon the argument as addressed to this court on this motion, replevin would have been inappropriate in *Rhea v. Riner*. Applying the theory here urged, there was in that case merely a breach of contract. But, as understood by the supreme court of Illinois, the contract affected the status of the property, by investing the plaintiff with the legal right of possession. The retention of the animal after demand was therefore the wrong. In the case at bar, in a certain contingency,—which, according to the verdict, happened,—defendants in error were to have possession of certain lumber, already specifically set apart and identified. After taking possession, they were to sell this lumber, and pay a certain balance of the proceeds, if there should chance to be any, to plaintiff in error. To do what was contracted to be done, it was necessary that they have both the possession and the legal title. This was the sense of the contract. Therefore, when the contingency happened, namely, the default in payment by plaintiff in error, and defendants in error had signified their election to retake the property, the legal title and the legal right of possession vested in them. The retention of the property by plaintiff in error after demand for possession by defendants in error was hence wrongful, and the action of replevin was well brought. If the lumber had been delivered pursuant to the request of defendants in error it could hardly be contended that the legal title would not have been in them. The fact that defendants in error would have held the property in trust to make sale and account for the proceeds makes no difference. It is enough that they would have become vested with the legal title, and the legal right of possession. Now, as between the parties themselves, the law in the text-books is—as in *Rhea v. Riner*, and as already stated—that where delivery is not made a condition precedent the legal title and right of possession may vest, as the result of the contract, and if that be the sense of the contract, before delivery. In *Bank v. Rogers* (Sup.) 37 N. Y. Supp. 365, cited in the argument on this motion, plaintiff contracted with Sardy, Coles & Co. Thereafter, Sardy, Coles & Co. contracted with defendants, and, pursuant to that contract, transferred and delivered the goods to defendants. Defendants had made no engagement with plaintiff, and the contract between Sardy, Coles & Co. and plaintiff was not effectual, as against third parties, to vest the legal title in plaintiff. *Wade v. Moffett*, 21 Ill. 110. Therefore, all that the plaintiff had was no more, at most, than an equitable lien, as against defendants, and replevin could not be maintained. If, in the case at bar, plaintiff in error had alienated and delivered the lumber to a third party, and this action of replevin had been brought against such third party, the case would be like *Bank v. Rogers*. Statements in the books that in cases like the present no action for the recovery of a chattel can be maintained at common law are on the assumption, doubtless, that at common law replevin would not lie except where the original taking was wrongful. We do not agree with counsel for plaintiff in error that the present suit is for a mere breach of contract, or that the only right of defendants in error, as against

the property, was an equitable charge thereon. The action is grounded on the wrongful detention, as against the legal right, and the appropriate forum was a common-law court and a jury. The motion for rehearing is denied.

MacLEOD et al. v. GRAVEN.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 354.

CONTRIBUTORY NEGLIGENCE—CROSSING RAILROAD TRACKS.

One G. was a passenger on an electric railway operated by defendant. At the station where he was to leave the train, there were platforms, on both sides of the double track, on a level with the car steps. The ground between the tracks was considerably below such steps, and was ungraded and unpaved. On reaching the station, G., who lived near by, in order to save walking about 15 or 20 feet, left the train by the side opposite the platform intended for the discharge of passengers from his train, and attempted to cross the other track, in doing which he was struck by a train approaching on such track, and so injured that he died. Before he stepped off the train, he turned up his coat collar, and pulled down his hat, to shield himself from rain which was falling. It was daylight at the time, and, on descending from the train, G. was in a place of safety, from which he could have looked for a train approaching on the other track; and the time elapsing between his leaving his train and the accident indicated that the train by which he was struck must have been only a few yards away, and in plain sight had G. looked when he descended from his train. G. was familiar with the road, and knew that trains were passing frequently in both directions. *Held*, that G. was guilty of contributory negligence, which barred him from any right of recovery, even if defendant had also been negligent; and that the jury, in an action by G.'s administrator against defendant, should have been so instructed.

In Error to the Circuit Court of the United States for the District of Kentucky.

Bennett H. Young and Young, Trabue & Young, for plaintiffs in error.

Gardner & Moxley, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

LURTON, Circuit Judge. The intestate of the defendant in error, while crossing one of the tracks of an electric street railway, was struck by a moving car, and received such bodily injuries as resulted in his death. His widow and administratrix has recovered a judgment for the damages thus sustained, against the plaintiffs in error, who were operating and managing the street-railway line as receivers. To review this judgment, this writ of error has been sued out. The defenses interposed by the plaintiffs in error were: First, that they were not guilty of any negligence; and, second, that the deceased himself so far contributed to his misfortune, through his own negligence, that, but for the absence of ordinary care and caution on his part, the collision by which he suffered would never have occurred. At the conclusion of the whole of the evidence, the plain-

tiffs in error moved the court to instruct the jury to find for the defendant. This was refused, and this action of the court is now assigned as error.

The plaintiffs in error were receivers in possession and operation of a line of electric railway under order and direction of the circuit court of the United States for the district of Kentucky. This line consisted of two parallel tracks, extending from a point in the city of Louisville, Ky., to a point in the city of New Albany, Ind. Cars going west used the most northerly of these tracks, and those going east used the other. Alpha Graven, the deceased, lived in the western part of the city of Louisville, near the Twenty-Sixth street station of the company, and was accustomed to go into the city on the cars of the railway company, taking them at the Twenty-Sixth street station, and returning every evening by the same route. On the afternoon of May 10, 1894, he returned from the city in the usual way, taking a car at Seventh street. The train consisted of a motor car, with a trailer attached. When nearing the Twenty-Sixth street station, he came out of the motor car, and stood under the hood of the rear platform, until the train slowed up for Twenty-Sixth street, when, without waiting for the car to stop, he jumped off upon the right-hand or southerly side of the car, and started across the parallel track somewhat obliquely, in the direction of the Twenty-Sixth street crossing, and, just as he stepped upon the second track, was struck by the forward corner of a motor car going east. The collision was so violent as to knock him down in such position that he was dragged along for from 20 to 40 feet by the oil box attached to the car. Deceased left the car before Twenty-Sixth street was reached, and undertook to cross the parallel track at a place which was not a public crossing. The two tracks were from 7 to 9 feet apart. The space between was neither graded nor paved, and was part of the private right of way. It was some inches lower than the level of the tracks. There was a platform on the right or northern side of the track, for the convenience of passengers getting on or off the cars going west, and another upon the opposite side of the parallel track for the use of passengers taking or leaving cars going east. These platforms were about level with the lower step of the cars, were each about 118 feet long, and extended up to the line of Twenty-Sixth street. Deceased lived on the south side of the railway, and, to reach his home, was therefore obliged to cross the railway. He had two courses open to him when his car reached Twenty-Sixth street,—either to get off on the platform provided for that purpose, thence, by the platform, to Twenty-Sixth street, crossing the railway at the crossing of that street; or he could get off on the railway right of way, crossing the track at point of debarkation, and thence obliquely to Twenty-Sixth street. The distance saved was possibly from 15 to 20 feet. There was no other advantage in debarking in the way deceased did, and that advantage involved a step down to the right of way of about two feet, and the danger of crossing the parallel track at a place other than a public crossing. The rules of the company required passengers to take and leave the cars by the platform. This rule was fre-

quently violated by persons living, as the deceased did, south of the railway, and there were no gates to prevent passengers from getting on or off the cars upon either side. The servants of the company operating the trains did not willingly acquiesce in violations of the company's rule, for they all testified that they endeavored to prevent it when done under their observation. There was in evidence a rule of the company requiring that "all trains and engines on either track must approach Twelfth, Eighteenth, Twenty-Sixth, and Twenty-Ninth streets under full control, and keep careful lookout for passengers crossing to and from K. & I. trains, and must NOT UNDER ANY CIRCUMSTANCES PASS THESE STATIONS while K. & I. trains are RECEIVING OR DISCHARGING PASSENGERS." The evidence tended to show that this east-bound train passed the Twenty-Sixth street crossing at full speed, and was not under control, as required by this rule. There was a conflict of evidence as to whether the motorman on the train had made any effort to prevent passing the station while the west-bound train was receiving or discharging passengers, though the motorman testified that he threw off the current before crossing Twenty-Sixth street, because he saw the other train pulling into the station. There was a conflict of evidence as to whether the gong was sounded or any other warning given upon approaching or while crossing Twenty-Sixth street. The evidence also tended to show that the train which collided with the deceased was traveling at a speed of from 15 to 20 miles per hour when it crossed Twenty-Sixth street, and when it struck deceased.

Assuming, therefore, that the evidence relating to the negligence of the railway company was such as to make an issue for the jury upon that part of the case, we come to the important question upon which our judgment must turn: Was the evidence touching the alleged contributory negligence of the deceased undisputed, and were the facts touching his negligence such that all reasonable men must draw the same conclusion from them? If so, the question of contributory negligence was one of law for the court. If not, the whole case was properly submitted to the jury.

Upon this branch of the case, counsel for defendant in error have assumed that the resemblance between the facts of this case and those stated in the opinion of the supreme court in *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, is so strong that the judgment here should be governed by that case. While there is much in common between the cases, there is much that distinguishes them. That case did not turn upon the question as to whether the plaintiff had looked or listened before undertaking to cross the track, for it is distinctly stated in the opinion that he neither saw nor heard any train coming. More important still is the fact that the request for a peremptory instruction was made after the conclusion of the plaintiff's evidence, and was not renewed at the conclusion of the entire evidence. That motion could not be the subject of an exception or error, as it had been waived by the introduction of evidence after it had been overruled. *Railroad Co. v. Hawthorne*, 144 U. S. 202-206, 12 Sup. Ct. 591; *Bogk v. Gassert*, 149 U. S. 17-23, 13 Sup. Ct. 738; *Railway Co. v. Callaghan*, 161 U. S. 91, 16 Sup. Ct. 493.

The only errors cognizable upon the writ of error were those pertaining to the instruction touching the plaintiff's alleged violation of the company's regulation requiring passengers to alight from the train on the platform side. This question, upon the facts of that case, was held to have been properly submitted to the jury, under proper instructions. In that case it appeared that there were two tracks, with a platform, on either side of the double track, as here. The plaintiff's residence was on the side of the track opposite to the platform provided for passengers debarking from his train. He could have gone under these tracks, or crossed at grade. He chose the latter, and was run down by a wild train running backward, without a light, and which gave no warning. Concerning the question as to whether the action should have been defeated because the plaintiff had not disembarked on the platform, and gone under the tracks, the court said:

"We are of opinion that there was no absolute obligation on the part of the plaintiff to cross the track by way of the ravine known as 'Victoria Street.' To do this would have required him to descend a flight of steps at the east end of the station, about fifteen feet to the level of the street, which was not graded or in any way improved, but was a natural ravine, passing under the tracks at this point. There was a stream of water, varying in width from two to six feet, and in depth from two or three inches to two feet, running over the surface of the street under such tracks. The ground beneath the tracks was marshy, muddy, and wet at the time. The street was uneven and irregular, and there were no lights or other illumination along the street at that point, and the night was dark. It seems to have been the universal custom for all persons living on the south side of the tracks to cross over the tracks in going to their homes, and not under the tracks by Victoria street. Under such circumstances, the plaintiff had a right to make use of the customary mode of alighting and reaching his home." *Railway Co. v. Lowell*, 151 U. S. 218, 14 Sup. Ct. 281.

Even in this particular there is a most striking difference between that case and the one at bar. To have gotten off on the platform, and crossed the railway at the street crossing, was no greater inconvenience than to add about fifteen feet to his necessary travel towards his home. To offset this, he had a step of about two feet down to the right of way, which was unpaved, and was obliged to cross the ties and rails of a track ballasted only with cinders. Neither did the proof show, or attempt to show, that the method adopted by deceased was the "universal custom for all persons living on the south side of the tracks in going to their homes," as was shown in the *Lowell Case*. The most that was shown was that some persons living in that neighborhood did adopt that plan, but it was neither general nor acquiesced in by the railway people. Though no good or even plausible reason appears for the failure of the deceased to debark upon the platform, and conform to the regulation of the company, still we are not prepared to hold that his failure to obey that regulation, and his undertaking to cross the track at the place and time he did, was, as matter of law, such contributory negligence as should have defeated this action. For the purposes of this case, and upon the facts of this case, placing upon those facts the construction most favorable to the deceased, we shall assume that the question of negligence in leaving the car as he did, and

crossing the track at the time and place he did, was a question for the jury, under proper instructions.

Passing by all other questions, we shall rest our judgment upon the conduct of deceased after he debarked from the car, and upon our conception of ordinary care and caution in crossing a railway track by one situated as the deceased was. Under the schedule of the company, a train was due to pass one way or the other every $7\frac{1}{2}$ minutes. So, by the same schedule, the trains which passed at Twenty-Sixth street were due to pass each other between Eighteenth and Twenty-Sixth streets. There was, however, some irregularity in the passing point, for there was evidence that they sometimes passed at Thirty-First street. The east-bound train was on time the day of this occurrence; and, as the trains had not passed between Eighteenth and Twenty-Sixth streets, it was due to pass when deceased undertook to cross at any moment. His position before getting off the train was on the rear end of the motor car. That position necessarily cut him off from any view of the western end of the parallel track; so that, when he got off the car, he was for the first time in a position to observe a train coming from the west. But, before getting off, he had, as shown by all the evidence, obstructed both his ability to see and hear such a train by pulling his coat collar up about his ears, and his hat down over his face. The heavy rainfall added to his difficulty of seeing as well as of being seen. When he got down on the right of way, he was in no danger. He might have walked between the double tracks to Twenty-Sixth street, which was but 30 to 50 feet west, and in the direction of his residence, and then crossed by a macadamized street crossing. Thus, while in a place of safety, he might have looked up and down the track he was about to cross. It was broad daylight, being about 5:50 p. m. on a May day. The track was unobstructed, and there was no reason, if he had looked, for not seeing the train which struck him. When on the right of way between the tracks, he was in no danger. From this place he went into a place of danger, without taking the ordinary precautions required from all responsible persons who place themselves voluntarily in similar positions of danger. He made no stop to inspect the track he was about to cross, but heedlessly pursued his way, either not seeing because he would not look, or seeing and recklessly endeavoring to cross in front of the approaching train. If he was going at the rate of but 3 miles an hour, and the car at a speed of 15, the car would travel just five times the distance he walked, and demonstrates that, when he stepped off the car steps, the car which struck him was not more than 25 to 50 feet away. This calculation accords substantially with the evidence of the motorman and trailman on the east-bound train, who agree in saying that he got off almost in front of the passing east-bound train. Allowing for the distance each car would overlap the rails, it is altogether likely that he was brought in contact with this passing train before he had taken more than two or three steps. How is it possible that he could have exercised his sense of sight and hearing without both seeing and hearing this approaching train? What other inference could reasonable men draw than that

deceased was so inattentive to the danger to be apprehended in crossing a railroad track as that he neither looked nor listened, and thoughtlessly pursued his way, so absorbed by his effort to shield himself against the falling rain as to take no precautions against a possible collision with a passing train?

When one, by his own negligence, brings an injury upon himself, he cannot recover damages. The rule is well settled that a plaintiff cannot recover for an injury, although the defendant was guilty of negligence, if it appears that "the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that, but for such negligence or want of care and caution on his part, the misfortune would not have happened." *Railroad Co. v. Jones*, 95 U. S. 439-442.

The negligence of the servants of the plaintiffs in error in passing this Twenty-Sixth street crossing without having the train under control, or at too high a rate of speed, or in passing at all while the passengers from the west-bound train were debarking, or in failing to give warning by sounding a gong or whistle, may have been very culpable; still, it did not excuse the deceased from taking ordinary precautions for his safety.

In *Railroad Co. v. Houston*, 95 U. S. 697-702, it was said, concerning the duty of one undertaking to cross a railway track at a street crossing, that such a person—

"Is bound to look and listen before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure."

This language was approved in *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, which was a case where a peremptory instruction for the defendant, on the ground of contributory negligence of the plaintiff, was approved. If we assume that no train was due to pass the station at that time, that did not absolve the deceased from using his senses, and exercising reasonable precaution against the possibility that one might pass. *Schofield v. Railway Co.*, *supra*.

Elliott v. Railway Co., 150 U. S. 245, 14 Sup. Ct. 85, was a case where a peremptory instruction for the defendant was sustained upon the ground of the contributory negligence of the plaintiff in going upon a railway track without looking and listening. In *Elliott's Case* the evidence established that the deceased had in broad daylight, with nothing to obstruct his view, gone upon a track with which he was familiar, with cars approaching not more than 25 or 30 feet away, and, before he got across the track, was overtaken by those cars, and killed. Concerning these facts, the court said:

"But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such

omission has been again and again, both as to travelers on the highway and employes on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom."

In the case of *Blount's Adm'x v. Railway Co.*, 22 U. S. App. 129, 9 C. C. A. 526, and 61 Fed. 375, the cases we have cited were applied, and an instruction for the defendant was approved in a street-crossing case. In that case it was insisted that the fact that the gate maintained at the crossing by the railway company was not lowered operated to throw the deceased off his guard, and absolve him from the duty of looking and listening before he crossed the track. To this the court, speaking through Judge Taft, said:

"It is undoubtedly true that the failure to lower the gates modifies the otherwise imperative duty of travelers when they reach a railway crossing to look and listen, and the presence of such a fact in the case generally makes the question of contributory negligence one for the jury, when otherwise the court would be required to give a peremptory instruction for the defendant. The fact is much more important when the traveler is driving a horse and vehicle than where he is walking, because in the former case his attention is necessarily divided between the control of the horse and observation of the track, and his reliance upon the gates and flagman must, in the nature of things, be greater than in the case of a pedestrian. There is no reason why the latter should not look and listen as he approaches the railway track before he reaches the gates, and before it may be time to lower them. The right to rely on the action of the railway company's employe in lowering the gate is not absolute. *State v. Boston & M. R. Co.*, 80 Me. 430, 444, 15 Atl. 36. If it were, then a man would be justified in walking up to and over a railway crossing with closed eyes and stopped ears whenever the gate is not down to obstruct his passage. The weight to be given to such an implied invitation depends on circumstances. In this case, Blount had stood at Hoy's porch, where he could see the track for 800 feet. From Hoy's gate, for sixty feet, he walked towards the track, while the train was in full view, and but three hundred feet away, and was getting nearer and nearer each second. As the train passed the ice house at a speed of fifteen miles an hour, its roar must have been heard by any one giving the slightest attention who was not one hundred feet away. When he was six feet from the track, the train was only thirty feet from him, and in full sight, and yet he did not halt or hesitate, but rashly stepped in front of it. It was a quiet night. There was no confusion at the crossing. There was no other train in sight. There was nothing to distract Blount's attention from the on-coming train except a self-absorption which, in approaching a railway crossing, is gross negligence. On these facts, can reasonable men fairly reach any other conclusion than that Blount was wanting in due care in not observing his danger?"

Where the facts touching a question of the negligence of the defendant, or of the contributory negligence of the plaintiff, are undisputed, and the inferences to be drawn from those facts are such as all reasonable men must draw, the question as to the effect of the facts is one of law for the court. *Elliott v. Railway Co.*, 150 U. S. 245, 246, 14 Sup. Ct. 85; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140; *Southern Pac. Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 338.

For error in refusing the request at the conclusion of the whole evidence to instruct the jury to find for the plaintiff in error, the case must be reversed, and a new trial awarded.

BALTIMORE & O. R. CO. v. HENTHORNE.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 376.

1. MASTER AND SERVANT—DUTY TO EMPLOY COMPETENT SERVANTS—NOTICE—EVIDENCE.

In an action against a railroad company for damages for personal injuries sustained by an employé of the company in an accident which some of the evidence tends to show was caused by the drunken condition of the engineer of the train, it is entirely competent to prove the engineer's general reputation for drunkenness and consequent incompetency, for the purpose of showing that the railroad company was negligent in retaining him in its employ.

2. SAME—PERSONAL OBLIGATION OF MASTER.

The duty of a master to exercise due care in selecting and retaining his employés, proportioned to the consequences that may result from negligence of such employés, is one of the personal obligations of the master to the servant of which he cannot rid himself by delegating it to an agent, and such obligation is not fully discharged by inquiring into an applicant's fitness at the time of employing him, but it requires the master to exercise a proper supervision over the employés' work, and thereby to keep himself advised of their continued fitness.

3. SAME—NOTICE OF INCOMPETENCY.

It is sufficient, to charge a railway company with knowledge of the incompetency of an employé, that notice of such incompetency should be given to those officers of the company who supervise such employé's work, and are given authority to suspend him temporarily from his position, for incompetency of the kind in question, and it cannot be required that notice of such incompetency should be brought home to those superior officers of the company who alone are entitled finally to discharge the employé.

4. DAMAGES—MEASURE—LOSS OF EARNING CAPACITY.

The proper measure of damages for loss of earning capacity of one who has been injured by another's wrongful act is the sum required to purchase for such person an annuity equal to the difference between his probable yearly earnings during his entire life in his actual condition and as he would have been had he not suffered the injury.

Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This writ of error is brought to review a judgment for the plaintiff in the circuit court of the United States of the Northern district of Ohio in an action brought by Charles Henthorne against the Baltimore & Ohio Railroad Company, for damages for a personal injury. Charles Henthorne was a brakeman in the employ of the defendant company on a freight train running from Chicago Junction, in the state of Ohio, to Garrett, in the state of Indiana, being the east half of what is known as the "Chicago Division" of the Baltimore & Ohio Railroad Company. Henthorne was the head brakeman; that is, his place of duty was in the forward part of the train, and upon the engine. His train was the second section of No. 23, west bound. The conductor and engineer of this train had received orders that they were to pass the second section of the east-bound train, No. 28, at the switch at the station of Inverness. The east-bound train had the right of way as between it and plaintiff's train, and this required that plaintiff's train should enter the switch to the east of Inverness, and wait the coming upon the main track of No. 28. The engineer of No. 23 forgot his orders, and did not stop at the switch at Inverness, but ran on a mile or more beyond the switch, and brought his train into collision with east-bound No. 28. The plaintiff was on the engine at the time of the collision, and was so pinned in that before he could be extricated, both of his legs had to be amputated, and he

suffered other severe and painful injuries from the crushing of his arm and from burns by escaping fire and steam. The plaintiff's petition charged that the accident was due to the intoxication of John Harrison, the engineer of the train upon which the plaintiff was, and that the defendant knew that Harrison was incompetent as an engineer by reason of his habits of intoxication, and was grossly negligent in retaining him in its employ in such a responsible position. The petition further averred that the plaintiff, because it was his first trip as brakeman in defendant's employ, had no knowledge of the incompetency of the engineer, or of his habit of becoming intoxicated, or that he was intoxicated on the day of the collision. The plaintiff introduced the evidence of the conductor of train No. 23, of Harrison's boarding house keeper, and of others, to show that Harrison, the engineer, was drunk and in a drowsy condition during the trip west from Chicago Junction to the place of the collision. Plaintiff introduced further evidence to show that Harrison was in the habit of drinking to excess, and was habitually intoxicated. Plaintiff introduced further evidence to show that Harrison had a general reputation, both at the town of Garrett and the town of Chicago Junction, the terminal stations of his run, as well as among the railroad men along the line of the division, of being addicted to the excessive use of intoxicating liquor. The plaintiff introduced the depositions of a former superintendent, one Britton, and a former master mechanic, one Lowther, both of whom had left the company before the collision, who stated that Harrison had been discharged from the employ of the company while they were connected with it for negligence and drunkenness. The plaintiff also introduced a witness who had been in the employ of the defendant company, who testified that when, as conductor of a train, with Harrison as his engineer, he was about to leave Chicago Junction, Fitzgerald, the yardmaster of the defendant company at the Chicago Junction, cautioned him concerning Harrison's intoxicated condition, and directed him to keep watch to prevent accidents. As yardmaster, Fitzgerald had the right, and it was his duty, upon discovering the intoxication of the engineer, to side-track and hold the train, and notify the superintendent of the condition of affairs.

The defendant introduced evidence to show that Harrison had never been discharged for drunkenness; that he had been suspended twice or three times,—once for running by a target with the red light signal out, once for carelessly mashing the end of a car by reckless backing of his engine, and once for some other minor offense. The defendant did not produce in court, however, the record it had kept of Harrison's service, as it might have done. Defendant also introduced evidence to show that the only persons with authority to dismiss an engineer were the superintendent of motive power, whose office was at Newark, Ohio, and the division superintendent, whose office was at Garrett, Ind.; that the master mechanic had power to suspend an engineer pending a court of inquiry, but not to dismiss him. Defendant introduced much evidence to show that Harrison's reputation was that of a sober, careful, competent engineer, and that he was not a drinking man. The case went to the jury, and resulted in a verdict of \$30,000 for the plaintiff. The trial judge made it a condition of overruling the motion for a new trial that a remittitur should be entered of \$15,000. This was done, and judgment was entered for the plaintiff for the remaining \$15,000.

The defendant requested the court to charge the jury as follows: "J. P. Fitzgerald, the defendant's agent at Chicago Junction, was a fellow servant with the plaintiff, and for his negligence, if he was guilty of any, the defendant is not liable to the plaintiff; and the knowledge of said Fitzgerald that said John Harrison was not competent to run the engine of said train, if he had such knowledge, was not the knowledge of the defendant,"—which charge the court refused to give, and the defendant excepted. The court also refused, over defendant's exception, to give this charge: "Thomas Taylor, the master mechanic at Chicago Junction, was a fellow servant with the plaintiff, and for his negligence, if guilty of any, the defendant is not liable to the plaintiff; and the knowledge of said Taylor of the unfitness of said John Harrison to run the engine of said train, if he had such knowledge, was not the knowledge of the defendant." The defendant requested the court to give this charge to the jury: "The evidence introduced on this trial with reference to the general character of John Harrison, the engineer, as to

his habit of drunkenness or intoxication, cannot be considered by the jury as tending to prove that he was in fact a drunkard, or a person in the habit of becoming intoxicated,"—which charge the court gave as requested, adding at the same time the following language: "That I can make a little more plain. The plaintiff did not attempt to prove that Harrison was drunk at this particular time by offering evidence as to his general bad reputation. That was offered solely for the purpose of showing that it was so notoriously bad that it ought to have come to the knowledge of the defendant. They do not rely upon that to prove the intoxication at the time of the accident. There was other testimony directly upon that point. Therefore I give you this last instruction. Juror: If your honor, please, we do not understand the last instruction. Court: You could not look to the general bad reputation as establishing drunkenness at this particular time. It was not offered by the plaintiff for that purpose. They claim it for the purpose of showing that his reputation was so generally bad that it ought to have come to the knowledge of the defendant, and that, therefore, they were responsible for his bad conduct." To which explanation and comments of the court upon said request, after giving the same, the defendant, by its counsel, at the time excepted.

The court charged the jury, among other things, as follows: "The plaintiff, on his behalf, has offered proof tending to show that the bad habits of Harrison, the engineer, were known to the officers of the defendant authorized to employ and suspend engineers. If you find that such knowledge of bad habits was so brought to the defendant's knowledge through such officers, then the defendant was guilty of negligence, and had a share in causing the injury, and is liable even though the negligence of a fellow servant was contributory also. You will then first consider and weigh the evidence on this point. Corporations can act only through their officers. Knowledge to the company of the bad habits of its engineers must reach it through its officers, and it must be through such officers as are charged with the employment and retention in service of such engineers. There must necessarily be a division of labor and responsibility in such immense corporations, and each department has its appropriate head, who is held responsible for his division of labor or business. In this case the officer who has the supervision of engineers—their employment or suspension, and who is charged with looking after the manner in which they discharge their duties—is the eye and ear of the corporation through which knowledge must go to it of the incompetency of Harrison. It will not be sufficient to trace such knowledge to some officer of some other department. The information and notice must be traced to this particular source." To this charge the defendant excepted.

The court charged the jury also as follows: "Now, there has been evidence on behalf of the plaintiff offered tending to show that such officer had such knowledge. The officers who were in the employ of the defendant about the time of the accident, and some of them who had charge of Harrison's branch of the service, have been examined on behalf of the defendant, and each denied that he knew of Harrison's alleged habits of drunkenness, or that such reputation had ever come to his attention. If you find this to be true, then the defendant is not liable, unless you find that Harrison's reputation as a drinking man was so notorious and widespread, and of such long standing, that the defendant, by reasonable diligence, could have ascertained such incompetency. If his reputation along the line of defendant's road was so notoriously bad as being a careless or negligent employé, and knowledge of such bad reputation could have been ascertained by reasonable diligence, the jury is at liberty to infer from that fact that the defendant, through that means, should have obtained notice of his carelessness; and if the accident which caused the injury was the result of Harrison's recklessness and incompetency, because of his bad habits, then the defendant was guilty of the negligence charged, and would be liable for plaintiff's injury, provided he did not contribute to such accident by his own negligence, as I shall hereafter instruct you."

Again, the court charged the jury as follows: "It is not enough, therefore, to show a bad general reputation, unless it is known and talked about by those around and about those to whose knowledge it is necessary to bring such facts. Apply these rules to this case, and see if the common rumor

referred to by the witnesses as to Harrison's habits was circulated among those who would likely and naturally bring it to the attention of the proper officers of the company. Did his brother engineers who saw him on duty and off duty know of it and hear of it? Did the train master and master mechanic and local agent or other officers having supervision of him know of it and talk about it? If they did not, consider and find out whether the rumors and facts testified to by plaintiff's witnesses would reach defendant's officers. And in this connection it is proper to say that if you find from the evidence that Harrison had been previously discharged, or suspended one or more times, that fact would put defendant upon its inquiry, and you would be justified in sooner inferring from his general bad reputation (if such is established) that notice of his bad habits had reached defendant." To this charge the defendant excepted.

The court, on the question of damages, charged the jury as follows: "The plaintiff has testified that he was earning about sixty dollars per month averaging the year through, so that you may accept that as his earning capacity, in the absence of other evidence. Consider the probable length of his life, the probable periods when he might not earn so much, and the chances of promotion, when he might earn more. All these are proper suggestions to enable you to determine what his probable future earning capacity may be. This is to be measured also by the extent of the disabilities. With this data and these suggestions you should fix his damages at a sum which would, when prudently invested and applied, furnish him what would be his probable earnings for the laboring years of his life, and in this way compensate him for his diminished earning capacity." To this charge the defendant excepted.

The court also stated to the jury they should allow a proper sum for the pain or injury, and what would probably be suffered in the future.

On the question of the plaintiff's contributory negligence, the court charged the jury as follows: "Did the plaintiff know of Harrison's drunkenness at the time of the accident? He swears that he did not; that it was his first trip; that he had not known Harrison before, and states his reasons for not suspecting he was drunk. Consider this in connection with his own witnesses' narrative of Harrison's conduct all through the trip, of plaintiff's statement of the engineer's inability to read his order, and from it all determine whether he knew, or ought to have known by exercising ordinary care, that the man was too drunk to drive his engine. If you find that he did know it, or should have known it, he contributed to his own injury by his negligence, and cannot recover. He was not obliged to continue on the train and imperil his life by the recklessness of a drunken engineer. There were stations where he could have reported the fact to the defendant through the depot operator, and have refused to proceed further."

J. H. Collins, for plaintiff in error.

Skiles & Skiles, on brief for defendant in error (no argument).

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts as above). We find no error in this record, and affirm the judgment. Defendant has stated 24 general assignments of error, which include many minor specifications, but we do not find it necessary to consider them in detail. The assignments of material points can be grouped under a few heads. The defendant complains of the action of the court below in permitting evidence of the general reputation of Harrison for drunkenness and consequent incompetency as an engineer. It should be premised that this was accompanied by evidence that Harrison's drunken condition was the cause of the accident, and by further evidence that Harrison was in the habit of getting drunk. It was entirely competent to show Harrison's general reputation for

the purpose of showing that the defendant was negligent in retaining him in its employ. In *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, the court held:

"The same degree of care which a railroad company should take in providing and maintaining its machinery must be observed in selecting and retaining its employes, including telegraphic operators. Ordinary care on its part implies, as between it and its employes, not simply the degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of employes, is fairly commensurate with the perils or dangers likely to be encountered."

This is one of the personal obligations of the master to the servant which he cannot rid himself of by delegating it to an agent to perform. *Railway Co. v. Brow*, 13 C. C. A. 222, 31 U. S. App. 192, and 65 Fed. 941; *Railway Co. v. Daniels*, 152 U. S. 684, 689, 14 Sup. Ct. 756; *Railroad Co. v. Baugh*, 149 U. S. 368, 386, 13 Sup. Ct. 914; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Hough v. Railway Co.*, 100 U. S. 213, 218; *Fuller v. Jewett*, 80 N. Y. 46. Nor does he fully discharge all of the obligation to his servants by fully inquiring concerning the applicant's fitness at the time he takes him into the service. It is the master's duty to exercise proper supervision over the work of his servants, and through such supervision to keep himself advised as to the continued fitness of those in his employ. It was therefore entirely proper to show that the company, through its proper agents, did know, or ought to have known from a due supervision of its employes, that Harrison was an unfit man for engineer, by showing that he had the general reputation of an habitual and excessive drinker of intoxicating liquors. This conclusion is so fortified by authority that we content ourselves with citing the leading cases on the subject: *Davis v. Railway Co.*, 20 Mich. 105; *Hilts v. Railway Co.*, 55 Mich. 437, 21 N. W. 878; *Gilman v. Corporation*, 10 Allen, 233; *Gilman v. Railway Co.*, 13 Allen, 433; *Railroad Co. v. Sullivan*, 63 Ill. 293; *Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241; *Driscoll v. City of Fall River*, 163 Mass. 105, 39 N. E. 1003; *Railway Co. v. Hoover*, 79 Md. 253, 29 Atl. 994; *Bailey, Mast. Liab.* p. 55, and cases there cited. See, also, decision of this court in *Railroad Co. v. Camp*, 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952.

Counsel complains of the failure of the court to give the charge, as requested, that evidence as to the reputation of John Harrison in respect of his habit of drunkenness could not be considered by the jury as tending to prove that he was in fact a drunkard. The court did give this charge, but attempted to make it a little more plain by applying it to the issue as to whether Harrison was drunk at the time of the accident, and stated to the jury that such evidence of general reputation did not tend to show that he was drunk at that time. Counsel for the railway insists that he requested the charge, not for the purpose of avoiding the use of evidence of reputation to show that Harrison was drunk at the time of the accident, but to avoid its use to show that he was in fact a drunkard. If counsel had

wished a further elaboration of the charge, he should have asked it from the court. The court gave one illustration, but did not attempt to limit the application of the charge requested to that. We do not think there was any error in this.

Objection is made by counsel for the company also that the plaintiff's contributory negligence was made out so clearly that the case should have been taken from the jury. This objection cannot be sustained. The defendant swore that he did not know of Harrison's drunkenness, and the circumstances were such as to make this possible, and an issuable fact for the consideration of the jury. The court charged the jury that if he did know of Harrison's drunkenness, he could not recover. We do not wish to be understood as affirming that it would necessarily have been contributory negligence on the part of a new brakeman, which would bar him from recovery in this case, not to leave the engine when he found the engineer drunk. All that we hold is that the charge of the court upon this point and to this effect was not error prejudicial to the defendant below.

The court instructed the jury that it was necessary for the plaintiff to show that the incompetency of Harrison, the engineer, was known, or ought to have been known, to those officers of the company who were given authority to employ, discharge, or suspend him in order to charge the company with the same knowledge; and one of the chief grounds of complaint of counsel for the company is the ruling of the court that the power to suspend an employé for incompetency vested an agent of the company with authority to receive notice of such incompetency. The contention of counsel is in this case that knowledge must have been brought home either to P. C. Sneed, the division superintendent, or to W. H. Harrison, the superintendent of motive power. W. H. Harrison's office was in Newark, Ohio, several hundred miles distant from that part of the railroad upon which Harrison, the engineer, whose competency is here in question, was engaged; while Sneed's duties carried him from Chicago to Chicago Junction. It would be exceedingly difficult to bring home in any way the knowledge of an engineer's incompetency to these two officers under the circumstances. For the safety of the road the company was obliged to intrust to many other agents than those mentioned the power to suspend incompetent servants in order that the company's property, and the persons whose lives were in its custody, should not be exposed to extraordinary dangers. Clearly, the men whose duty to the company it was to exercise this power were those through whom the company sought its knowledge of the manner in which its servants were discharging their duties. They were agents for the very purpose of discovering habitual negligence, and of preventing danger from its presence, when discovered, by immediate suspension. We entirely concur with the court below in holding that an officer entitled to suspend a servant of the company temporarily is an officer who has authority to receive notice for the company of the incompetency of the person to be suspended. If, as was testified to, Fitzgerald, the yard

master, had power to suspend the engineer from a further discharge of his duties when he found that he was intoxicated, if the master mechanic had the power to suspend an engineer pending inquiry for any dereliction of duty, if the train master had the same power, then all these officers were persons whose knowledge of the incompetency of employes under their supervision was the knowledge of the company, and the failure on their part to use due diligence in observing the competency and sobriety of those whom it was their duty to suspend for incompetency or inebriety was the negligence of the company. This obligation of a railway company to use due diligence in the selection and retention of its employes is one which, in view of the assumption of risk by the employes of any casual negligence of their fellow servants, it is most important to maintain, and it should not be frittered away by limiting those whose knowledge shall be the knowledge of the company to one or two officers so far removed from possible knowledge as to make it a hopeless task to bring the incompetency of subordinate servants to their notice. The conclusion thus reached is not in harmony with the decision of the court of appeals of Maryland in *Railroad Co. v. Hoover*, 79 Md. 253, 29 Atl. 994, already cited, or with that of the supreme court of Michigan in *Railroad Co. v. Dolan*, 32 Mich. 509. It is held in these cases that the duty of a corporation as master to a servant of using due care in the selection of competent fellow servants is fully discharged when its general or representative officers have exercised due diligence in the selection and appointment of the subordinate officers whose duty it is to employ and discharge servants. These cases are based upon the same view as those in which it is held that a master sufficiently performs his duty to his servant of furnishing reasonably safe machinery and keeping the same in safe repair when he exercises proper and reasonable caution and diligence in the selection of those servants whose duty it is to make the repairs, and to supervise the condition of the machinery. *Wonder v. Railroad Co.*, 32 Md. 418. The supreme court of the United States, in a series of cases, has left nothing to be desired in the clearness with which it has drawn a line of distinction quite at variance with the views of the courts just referred to. Its holding is that, where the law recognizes a positive duty owing from the master to the servant, a violation of such duty creates a liability to the servant, whether it arises from the personal neglect of the master or from that of any subordinate, however inferior, to whom the discharge of such duty may have been delegated by the master. In the case of *Railroad Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, it was held that a railroad company was bound to see to it at the proper inspecting station that the wheels of the cars in a freight train about to be drawn out upon the road were in safe and proper condition, and that if the servants to whom it delegated this duty performed it so negligently as to permit a car to go into service, one of the wheels of which had a defect that might have been detected without difficulty, the company was liable for any injury to another of its servants caused by such defect. In *Railroad Co. v. Baugh*, 149 U. S. 369-

386, 13 Sup. Ct. 914, after referring to the duty of the master to use due care in the selection and maintenance of safe machinery, Mr. Justice Brewer, in delivering the opinion of the court, said:

"That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relation of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is fully discharged when reasonable precautions have been taken to place fit and competent persons in charge."

It is manifest from the foregoing passage that the duty of the master to select fit and competent persons is viewed by the supreme court in the same light as the duty of the master to provide reasonably safe machinery, and that neither duty can be so delegated as to relieve the master from liability for a failure on the part of his subordinate to whom the duty is delegated to exercise proper care in its discharge. See, also, *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Hough v. Railroad Co.*, 100 U. S. 213-218; *Fuller v. Jewett*, 80 N. Y. 46; *Railway Co. v. Brow*, 13 C. C. A. 222, 65 Fed. 941. It follows that to the officer who has the power to suspend employés is delegated the discharge of that positive duty which the company owes to each of its servants, to wit, the duty of using reasonable care to retain in its service only competent persons, and of reasonably supervising the work of its servants for this purpose, and that a failure on the part of such officers to discharge this delegated duty to the other servants of the company, resulting in injury to one of them, renders the company liable.

There remains to consider only the objection to the charge with respect to the measure of damages. The charge of the court, as we interpret it, directed the jury to consider as one element of damage the loss of the plaintiff in his earning capacity by reason of his bodily injuries, and to reach the loss of his earning capacity by estimating as near as they could his probable yearly earnings during his entire life, and to give to him a sum which would purchase him a life annuity equal to the difference between the amount which he would have earned each year if he had not been injured and that which he could earn each year in his injured condition. We see no objection to this measure; indeed, we think it technically accurate.

The assignment of error based on the refusal of the court to grant a new trial for newly-discovered evidence of course cannot be sustained.
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tained. It is too well settled in the federal courts to need the citation of authority that motions for a new trial are addressed to the discretion of the trial court.

Judgment affirmed, at the costs of the plaintiff in error.

LAKE ERIE & W. RY. CO. v. CRAIG.

(Circuit Court of Appeals, Sixth Circuit. January 30, 1896.)

No. 374.

1. MASTER AND SERVANT—PERSONAL INJURIES—UNBLOCKED RAILWAY FROG.

Failure of a railroad company to block a frog in its yard, in violation of a statute (Act Ohio, March 23, 1888), does not prevent the company from escaping liability to an employé injured in such unblocked frog, on the ground of contributory negligence. *Krause v. Morgan* (Ohio Sup.) 40 N. E. 886, followed.

2. SAME—PROXIMATE CAUSE—QUESTION FOR JURY.

Where a switchman was injured by catching his foot in an unblocked frog while uncoupling moving cars, *held*, that the question whether the danger from the frog was so substantially different in character from the danger of slipping, or of tripping upon the ties or cross rails, as to prevent his original negligence in going between the cars from being the proximate cause of his injuries, was a question for the jury, and that it was error to charge that he could not be found guilty of contributory negligence with respect to the injury caused by the frog, unless he knew, or ought to have known, that the frog was unblocked. *Smithwick v. Hall & Upson Co.*, 21 Atl. 924, 59 Conn. 261, distinguished.

3. SAME—CONTRIBUTORY NEGLIGENCE—UNCOUPLING MOVING CARS.

A court cannot say, as matter of law, that it is not negligence for a switchman, who might have pulled the coupling pin while the cars were standing still, to wait until they have attained a speed of five miles an hour, and then step in between them, on a dark night, when the ground is frozen and likely to be slippery, with snow upon it, at a point where the tracks interlace, and the ties rise above the level of the roadbed.

In error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

This is a writ of error brought to review the judgment of the circuit court for the Northern district of Ohio in a suit brought by Frank B. Craig, defendant in error, to recover damages for personal injuries from the Lake Erie & Western Railway Company, plaintiff in error. The judgment was in favor of Craig, for \$12,000. Craig was conductor or foreman of a night switching crew in the yards of the railway company at Lima, Ohio. He had been in the employ of the company for nearly three years prior to the accident, in various capacities,—chiefly as brakeman upon a freight train. His service as conductor or foreman of the switching crew in the yards of the company at Lima began on the 16th of December, 1892, and the accident upon which this action is founded occurred on the 20th of the same month. The switching crew, which consisted of Craig himself, two switchmen, the engineer and the fireman of the locomotive, had completed their work about 4 o'clock in the morning, had washed themselves, and were waiting until 6 o'clock should arrive, when their duties would end. They received an order to switch two cars,—one to one train, and one to another,—which, coming at this late hour, put them in bad humor. The two cars to be switched were attached to the front end of the engine, and the engine was backed north on the main track in the Lima yard to what was called the switch into the B track. There was a slight grade from the center of the yard down to the switch. The grade from the switch north on the main track was also downward, though upon this point there was a conflict of evidence. As

the train backed down on the main track, beyond the switch, Craig stepped off on the east side of the main track, about opposite the switch point, and waited until the train had passed beyond the switch. One of his switchmen turned the switch, and then Craig gave the swift signal to kick the car hard up the B switch. The engineer obeyed the signal, and pushed the cars up the B. switch. Craig stepped in between the first and second cars as they went by him, to pull out the coupling pin. He succeeded in doing this, but fell and was run over. His legs were so mangled that both had to be amputated. He was found lying under the fire box of the engine. The contention for the plaintiff was that Craig had caught his foot in a frog which was unblocked, in violation of the statute of Ohio, and that this was the cause of the accident. The evidence was very conflicting as to whether the frog was blocked or not. There was some conflict of evidence, also, as to the speed of the train at the time that Craig entered between the cars. Craig himself said that the speed was from three to four to five miles an hour. Other witnesses said that the speed was from four to five miles an hour. The engineer testified that Craig had given him a swift signal,—that is, a signal for a hard kick,—and that the speed was about ten miles an hour. His fireman, however, thought that it was about five miles an hour. The night was cold. The ground was frozen. The roadbed about the switch was usually moist, when not frozen. There was some snow on the ground. It was quite dark. The rule of the company forbade brakemen and switchmen to enter between cars in motion, to uncouple them. This rule was upon a time card furnished by the company to Craig. It was in evidence that the rule was generally not observed in the Lima yard, and that the violations of the rule were known to the division superintendent and the yard master. The division superintendent admitted upon the stand that the rule was not always observed, but stated that he had cautioned the men against entering between the cars when they were moving too rapidly, and advised them against their taking such risks. It was also in evidence that it was the general custom on railroads to uncouple cars in this way. The learned judge who presided at the circuit told the jury that the single question before them was whether Craig had been injured by getting his foot in the unblocked frog; that if he went in between the cars, knowing that the frog was unblocked, he was guilty of contributory negligence, and could not recover. The court further told the jury that if Craig did not know, or might not, by reasonable care, have known, that the frog was unblocked, there was no other question of contributory negligence in the case, and that even if Craig had been negligent in going in between the cars, because of a possible danger of falling, such negligence would not prevent his recovery for an accident happening by reason of the unblocked frog, because it would not be the proximate cause of the injury.

J. B. Cockrum, W. H. Miller, and Doyle, Scott & Lewis, for plaintiff in error.

King & Tracy and Cable & Parmenter, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The liability of the defendant railway company was asserted by the plaintiff on the ground that it had failed to block a railway frog in its yard at Lima, in violation of a statute of Ohio passed March 23, 1888 (85 Ohio Laws, 105), requiring all railway corporations operating railways in the state to block or fill such frogs, for the safety of their employes, and imposing a punishment for failure to do so. We have already held, in *Railroad Co. v. Van Horne*, 16 C. C. A. 182, 69 Fed. 139, that the effect of this statute is to make a failure by a railroad company to comply with it negligence, as matter of law. This is the ruling of the supreme court of Ohio in construing an

analogous statute enacted to compel mine owners to adopt safety appliances for their employes. *Krause v. Morgan* (Ohio Sup.) 40 N. E. 886. The statute does not, however, prevent the master, in such cases, from escaping liability, if the employe injured by the master's noncompliance with the statute is himself guilty of contributory negligence. This is expressly ruled by the supreme court of Ohio in the case cited, where, after an elaborate review of the authorities in other states, Judge Speer, speaking for the court, sums up its conclusions as follows:

"While the statute, as we construe it, does not make the operator of the mine absolutely liable to a party injured by an explosion of gas, where the operator has not complied with the statute, such conduct is negligence per se; and the employer cannot escape liability by showing that he took other means to protect the workmen, equally efficacious. Proof of failure to obey the statute is all that is necessary to establish negligence on the part of the operator, but the statute does not change the well-established rule that, where one has been guilty of negligence that may result in injury to others, still the others are bound to exercise ordinary care to avoid injury."

This was the view which the trial court took of the statute, and it was correct.

The only material question presented on this record is whether the trial court erred in its ruling that unless Craig knew, or ought to have known, that the frog was unblocked, he could not be guilty of negligence contributing to an injury occurring to him by catching his foot in the unblocked frog. The court below held that if Craig got his foot in the unblocked frog, without knowing that the frog was unblocked before he went in between the cars, his negligence in going in between the cars, however great, would not, in law, contribute proximately to the injury. We cannot concur in this view. If the circumstances under which he went in between the cars to do the uncoupling were such that he might reasonably have anticipated falling or tripping over the crossrails, or the heavy crossties which projected above the ground to support the switch, or upon the slippery ground, we think it would not have been unreasonable in the jury to find that his falling by reason of being caught in the frog was so similar in its character as to connect his negligence in going between the moving cars with the accident, as the *causa causans*. A fall from any cause, while he was between the cars moving at the rate of five miles an hour, would be most likely to result in serious injury to him, and to bring some part of his body under the wheels of the car. It might not have been necessary, to cause the accident which happened, that his foot should have been so fixed in the jaws of the frog that he could not remove it without effort. It might have been quite sufficient that he tripped against the frog, or caught his toe in it but temporarily, to have caused the injury in this case. In other words, any other possible obstruction in the roadbed, or reason for falling, might have caused the same accident in the same way. In this view, though Craig did not know that the frog was unblocked, and had no reason to know it, the jury might still have found, with reason, that he should have anticipated the presence of something upon the roadbed operating in substantially the same way to cause the accident which happened. Let us put an extreme

case, for the purpose of illustration: Suppose that a man upon the highway near a railroad crossing saw a train approaching at a very rapid rate, and, instead of waiting until it should pass, recklessly attempted to cross in front of it, and that, in jumping before the engine, he caught his foot in an unblocked frog, which he did not know, and had no reason to believe, was there, and that he was thus run down and killed; could it be said, as matter of law, that his wanton exposure to danger, in jumping before the rapidly approaching train, was not a direct and immediate cause of his death? Would it not at least be a question for the jury to say whether his negligence was a proximate cause? In *Railway Co. v. Kellogg*, 94 U. S. 469, Mr. Justice Strong, speaking for the supreme court, said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science, or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances. * * * But when there is no intermediate, efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events, an interval may always be seen, by an acute mind, between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. * * * Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

The question here is whether the intervention of the unblocked frog was so new and independent a cause of the injury, as distinguished from the original negligence of Craig in going between the moving cars, that it was the sole, proximate cause. Much reliance was placed by the defendant in error on the case of *Smithwick v. Hall & Upson Co.*, 59 Conn. 261, 21 Atl. 924. In that case a workman had been warned not to go to the end of an unfenced platform, because of the danger of slipping on the ice which was there, and falling off to the ground below. He went there nevertheless, and while there the wall of an adjacent building fell on him, and he was injured. The supreme court of errors of Connecticut held that his negligence in not heeding the warning was not contributory to

the injury which happened to him. The case is easily distinguished from the one at bar. There the injury which happened proceeded from a manifestly different cause from that which the plaintiff had been warned against, and, while he might have assumed the risk from the one, he did not assume the risk from the other. Here, if the jury were to find that the accident, as it happened, by the catching of the foot in the frog, was entirely different in its character from that which the plaintiff might have expected by falling over any obstruction, or by slipping, they would be at liberty to do so, and to find that his negligence in going between too rapidly moving cars was not a proximate cause of the accident. All that we hold is that the jury might reasonably have found, from the evidence in this case, that the danger from the frog was not substantially different from the dangers which he had reason to anticipate, and, therefore, that his negligence did contribute to the accident, as a proximate cause. Hence the question of proximate cause should have been submitted to the jury.

2. It is also urged in support of the charge below that there was no evidence to sustain the contention that the plaintiff's going in between the cars was negligence. There was a rule of the company which forbade it. It was in evidence that this rule had been more or less disregarded, and that the division superintendent was aware of it. He himself stated that he had seen switchmen enter between moving cars, and had only warned them against taking the risk of going in between the cars when they were moving too rapidly. If this was all the evidence, the court might perhaps have held that the rule had been abrogated; though ordinarily, when a rule is formally adopted, its abandonment by matter in pais is a question for the jury. But, the rule aside, there was evidence which should have been submitted to the jury on the question of Craig's negligence. The engineer testified that the train was going at ten miles an hour, and the other witnesses testified that it was going about five miles an hour. Assuming, for the purpose of the argument, that we might reject the evidence of the engineer as too slight for consideration, we do not think the court is able to say, as matter of law, that it was not negligence for a switchman, who himself admits that he had the opportunity to pull the pin while the cars were standing still, to wait until they had attained a speed of five miles an hour, and then to step in between them, on a dark night, when the ground was frozen and there was snow upon it, at a point where the tracks interlaced, and where the ties rose up above the level of the roadbed, and where the usually moist ground, in a frozen condition, was likely to be slippery. Five miles an hour is a very fast walk, and approximates, in ordinary persons, the speed of a trot. It is in evidence, and it is not denied, that, just before going between the cars, Craig gave the swift signal to the engineer, which means a hard kick of the cars. The jury might reasonably say that, where such a hard kick was necessary, it was the duty of the switchman, if possible, to avoid stepping in between the cars, under the circumstances, to uncouple them, when he might have done this just as well with the cars standing still. Evidence of the existence of

a general custom of uncoupling cars when in motion was introduced. It is not necessary for us to consider the competency of such evidence. Suffice it to say, it did not show what was the customary speed of the train when the uncoupling was done. Nor could it be regarded as conclusive on the question of negligence. It was, at most, but a circumstance for the consideration of the jury. A verdict based on the negligence of Craig in uncoupling as he did could not be set aside for insufficient evidence. The judgment of the court below is reversed, with directions to order a new trial.

GLEASON v. DETROIT, G. H. & M. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 355.

CONTRIBUTORY NEGLIGENCE—UNCOUPLING CARS.

Plaintiff was a brakeman on a freight train of the defendant railway company. In order to cut out five cars from the train, and leave them on a siding, such five cars, with the two between them and the engine, were uncoupled from the remainder of the train, drawn forward, and backed down upon the siding. Plaintiff then uncoupled the second car from the first of the five cars which were to be left behind, the coupling on the second car being an automatic one, but attached to the other car by a link and pin; gave the signal to the engineer to go ahead; and rode on the drawbar of the second car to the switch leading to the siding. He there dismounted, closed the switch, gave the signal to the engineer to back down to the remainder of the train, and, as the engine and cars approached the switch, stepped out on the track, and attempted to remove the link and pin from the rear of the second car, while walking in front of the moving train, in order that the automatic coupling might connect with a similar one on the next car. While so walking in front of the moving cars, he tripped on a grade stake between the ties, and was run over and injured. The rules of the company forbade employes to step in front of moving cars. Plaintiff might have removed the link and pin either before the engine and cars began to back, by walking a short distance up the track, or before coupling them to the remainder of the train, by giving the engineer the signal to stop before reaching the standing cars. The track was covered with snow, and, at the point where he stepped upon it, was obstructed by the rails leading into the switch. There was evidence that the rule forbidding employes to step before moving cars was often disregarded, but no evidence that the officers of the company had any notice of such disregard, and it was shown that the course adopted by plaintiff was considered by the employes generally as dangerous. *Held*, that plaintiff was guilty of such contributory negligence as to bar any recovery from the railway company for his injuries, even if the presence of the grade stake constituted negligence.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

This is a writ of error to review a judgment of the circuit court for the Eastern district of Michigan for the defendant in a personal injury suit brought by William J. Gleason against the Detroit, Grand Haven & Milwaukee Railway Company. Gleason was a brakeman in the employ of the defendant railway company. On the 3d day of February, 1894, he was acting as head brakeman upon a freight train running wild; that is, not running upon schedule time. The conductor of the train decided that, in order to reach Pontiac before a regular passenger train was due there, it was necessary to leave five cars of his train upon a switch track at Birmingham, a station upon the road.

Accordingly, all the train but the seven cars next the engine were cut off, and left standing upon the main track, while the engine drew the seven cars forward beyond the switch. When the switch was opened, the engine backed the seven cars upon it, in order to leave the last five cars there. These the plaintiff uncoupled from the two cars attached to the engine. The second car from the engine had what was known as a Gould or Janey coupler, which, when used with another of the same kind, operated automatically, so that the brakeman was not required to step in between the cars to do the coupling. When, however, the Gould coupler was to be coupled to the drawbar coupling in ordinary use, it was necessary to use a link and pin. The connection between the second car from the engine and the next car left upon the side track had been made by a link and pin. The plaintiff, after having cut off the five cars on the switch track, rode upon the drawbar and link of the second car back again to the main track. He jumped off the car as it went by the switch, and turned the switch so that the engine with the two cars attached might back up to the part of the train which had been left upon the main track. As he turned the switch, he perceived that the first car upon the main track with which the coupling was to be made had also a Gould coupler, and that the link upon the second car upon which he had ridden must be removed before the coupling. As he turned the switch, he gave the signal to the engineer to back up. He waited until the car had reached the switch, going at the rate of a fast walk, and stepped in front of it, to remove the pin and link. He had to use both hands to do this. At a point 25 feet from the switch, his foot struck a grade stake, which protruded about 2¼ inches above the ground, in the middle of the main track. He stumbled, and fell forward upon his hands, and attempted to get off the track; but, in doing so, he was run over, about 22 or 23 feet from the point where he stumbled. His right leg was so injured that it had to be twice amputated, and he suffered other injuries. The plaintiff had been in the employ of the defendant company for three or four months, and had been a brakeman for two or three years on other roads. The stake upon which he stumbled was a grade stake, which had been where it was for more than a year. It lay abutting a cross-tie. There was snow upon the ground, and it had drifted up against one side of the stake, so as to partially conceal it. It was cold weather, and the ground was frozen. It was in the afternoon, and in daylight. The passenger train was due at Pontiac at 5:07. The rules of the defendant company required that the freight train should be there 10 minutes before the passenger train. The run from Birmingham to Pontiac was a little over 7 miles, and usually required 35 minutes. It was 15 minutes after 4 when the freight backed off the siding, and was about to start for Pontiac. This left 42 minutes in which to make the run, which usually took 35 minutes. The plaintiff, in his evidence, however, stated that they had but 25 minutes in which to make the run, which usually took 35, and he was therefore in a hurry. On cross-examination, the plaintiff stated: "As soon as I had set the block, I got down, and rode back on the link of the rear car of the two attached to the engine. I sat on the link, and hung on the drawbar. Why I did not pull the pin while sitting on the link was because I could do it more conveniently after backing up, and I could not pull it while sitting on it. I could not pull before starting north with the two cars, because I had to run to catch them. I jumped off when the car passed the switch, so as to turn the switch and lock it. I did not go beyond the switch. I swung them down. It was my duty to do so. I did not ride as far as the cars went. I dropped off, and went over to the switch, so as to turn it, so these two cars could be put on the main track. As I turned the switch, the rear car where the pin was might have been twenty or twenty-five feet north of the switch. Q. Now tell the jury, after you had turned the switch, and while the car was standing still, why didn't you walk up there, and take that link out? A. The car was not standing still after I had the switch turned. Q. You said it didn't back up until you gave the signal? A. Well, I gave him the signal to stop, and, when I threw the switch, he knew enough to back up, and then I had given him the slow signal. Q. Then, before he commenced to back up, you gave him the signal to back up, didn't you? A. Well, about the same time. Q. Now, just once more tell the jury, while that car was standing there, why didn't you step up and take out that pin? A. I didn't have time to walk down and do it. I had 25 minutes ahead

of the mail to make Birmingham. I swung him down, and started him back at the same time. Q. Then the fact is that the engine and the two cars commenced to back up before you attempted to take the link and pin, is that so? A. Started to back up; yes, sir. When they started to back up, I was standing by the switch, waiting for them, until the cars got opposite me. About two or three seconds I waited, until the car was opposite about two or three feet north of the switch, when I stepped in front of it, to take out the link and pin. I had to walk over the ties where the split switch is. There are some six or eight of those ties. I got over the switch ties without any trouble. I went about twenty-five feet up to where this stake was before I met with any obstruction. I was faced kind of sideways like, going right along the track, kind of a fast walk. The train was backing all the while. The pin came out without any trouble. I took some eight or ten steps before I got it out. I took the pin out with one hand, and the link with the other, and let the pin drop back in, and threw the link to one side." Again, the witness said: "When I got off from my seat on the coupling at the point of the switch, the last car had passed over the switch. As I got off, I signaled the engineer to stop. After that I threw the switch for the main track, locked it, and gave the signal to back up. It took me about as long as it took the engineer to stop and back up even with the switch. When I had got the switch locked, the rear car that was backing was about four to eight feet north of the switch. I stood at the point of the switch until the car got right opposite me. Then I went in between the rails, to do what I have described. Q. After you had put these cars into the side track, what order or direction, if any, did the conductor give you? A. The conductor said, after we put in the four cars: 'Get on and set the brake of that head car, Billy, and let them out on the main track, and couple up and get out of here.' Q. Mr. Gleason, when did you first discover that there was a Gould coupling attached to the stationary car? A. Well, I discovered that after getting off the link that was on the two cars, and after giving the engineer the signal to back up, and from my switch I looked down and saw in the stationary car there was a Gould coupler there, and the jaw was open. Q. Where was the rear car attached to the engine with the other Gould coupler then? A. It was backing for the switch towards me. Q. How far from you was the car when you discovered that there was a Gould coupler on the stationary car; that is, how far from you was the rear car that was advancing? A. The rear car was about opposite me from the switch stand, or perhaps a foot or so behind, but I got in opposite the switch just immediately. Q. Now, on the day of the accident, how did you know that the north end of the train that was standing on the main track was a car that had a Gould coupler upon it? A. Because, when I threw that switch at the switch stand, I saw it. I could see from where I stood the Gould coupler on the car on the main track, and knew the one on the north end of the two cars that were attached to the engine was a Gould coupler also. I knew that by the looks of it."

Rule 24 of the company, which the plaintiff had received and read, was as follows: "All persons entering into or remaining in the service of this company are warned that the business is hazardous, and that, in accepting or retaining employment, they must assume the ordinary risk attending it. Each employé is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains. Stepping on the front of approaching engines and cars, jumping on or off trains or engines at high speed, getting between cars while in motion to uncouple them, coupling by hand when it is practicable to use a stick or pin for guiding the link, and all similar imprudences, are dangerous and in violation of duty, and strictly prohibited. Employés are warned that, if they commit them, it will be at their own peril and risk. Employés of every rank and grade are warned to see for themselves, before using them, that the machinery or tools which they are expected to use are in proper condition, or see that they are so put, before using. All will be held responsible accordingly. The company does not wish nor expect its employés to incur any risk whatsoever from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins them to take time in all

cases to do their duty in safety, whether they may be at the time acting under orders of their superiors or otherwise."

The plaintiff sought and was permitted to introduce evidence of the custom among switchmen on defendant's road and other railroads of removing links from the Gould coupler of a car while in motion just before it was to be coupled with another Gould coupling. Accordingly, the plaintiff's counsel put this question to the plaintiff: "Q. And, during the time you were employed by the defendant railway company, state whether or not there was any custom as to the removal of a link from the Gould coupler attached to a car moving backward to be coupled to another car to which a Gould coupler was attached. (Objected to by defendant as incompetent and immaterial. Answer permitted by the court.) A. Yes, sir; the custom was to step in between the rails ahead of this car, take the link in one hand, and pull the pin with the other, also move along with the car." James F. Lynch testified that "the custom is that when they are backing up the engine and cars, and there is a link in the car, we get in and remove the link if they are going slow enough. We remove the link before we make the coupling, if necessary to remove it." On cross-examination the witness testified as follows: "Brakemen take chances in going, while the car is in motion, to remove a link, if it is going too fast. The only excuse for plaintiff going in and walking back in front of the car would be that they were probably in a hurry to get away. He could not have walked on the side and get the link out. The better way would have been for him to have removed the link before giving the signal to start, if he knew the link was to come out, and if he had time. It would have been the safest way for him to take the link out before he signaled the train to back to make the connection. I think it would have been the proper thing for him to take the link before he gave the order to the engineer to back up, provided he knew it was to be taken out. If he rode back on the link, he must have known that it was there. It is always dangerous to go in front of a car when it is being backed up. A man that goes in, in that way, takes his chances. The only excuse there could be for him to go in and walk back in front of the car to take out that link, the engineer being under his control, would be that they were probably in a hurry to get away. It would have been a great deal safer to remove the link while the car was standing. Walking over those switch ties, and also having to step over the rail that extends off from the main track onto the side track, would be a dangerous place. The switch ties are considerably higher than the surface of the ground. There being snow on the ground, and being frozen, it would naturally be slippery. Plaintiff having opportunity to take the link out while the car was standing, it would be negligence for him to go in and walk over the ties and rails. It would depend a good deal on how fast they were going. The faster they were going the greater the danger. It is always dangerous to go in front of a train that is moving. If the cars were 300 feet apart, I don't think it would be necessary to go in between the switch rails where it bears off to go onto the side track." Robert H. Staggs testified that it was the custom to step in between the rails next to the moving car to take the link out, and throw it aside with one hand, and to raise the pin with the other. That this was the custom on the defendant's road. On cross-examination he testified as follows: "Q. Would not the safe way and the proper thing for him to have done have been to have walked along by the side between the side track and the main track until the car that was backing up had arrived nearly to the car that was standing on the main track, and then signal the engineer to stop, and go in and remove the pin? A. I suppose that is according to the rule. Q. That is according to the rules? A. Yes, sir; but it is not customary. Q. But you men do this for your own convenience, to get over the road, as you call it? A. We do it to save time and hold our positions. If we don't, we lose our jobs. Q. Never mind your job. Now, I want to ask you the question, what officer of the company did you ever tell you were habitually doing it? A. I have not told any one of them. Q. And you have no knowledge any officer saw you do it, have you? A. Not that I know of. Q. So that every time you went in there you knew you were violating the rules of the company, didn't you, while the cars were in motion? A. Of course, but— Mr. Hurd: I object to this as incompetent. It is a question of the construction of the rule, and we say the rule

don't apply at all— Court: Mr. Hurd, I will give you an exception." The witness continues: "It would have been the safe thing and the right thing for him to remove the link before he gave the order to back after he turned the switch if he was within 20 or 25 feet of it. It was reckless for him to go in there, and walk over those switch ties, and over that rail that led from the main track onto the side track if he did not know it was necessary to remove the link in order to make the coupling. The safest way would be for the plaintiff to walk back between the main track and the side track, and wait until the car arrived nearly to the one standing on the main track, and then signal the engineer to stop, and then to go in and remove the link. The plaintiff selected the most dangerous place he possibly could for the purpose of removing the link by going in where this split switch passed over the ties and over the rail, where it led from the main line onto the side track." Similar evidence was given by three other brakemen who were called to testify to the custom of going in to remove a link from a coupler while the car was in motion.

At the conclusion of the defendant's evidence, the court directed a verdict, on the ground that the plaintiff, on his own evidence and on all the evidence in the case, was shown unquestionably to have been guilty of contributory negligence causing the accident.

Hurd, Brumback & Thatcher and G. W. Radford, for plaintiff in error.

W. B. Williams, Harrison Geer, and L. C. Stanley, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts as above). The judgment must be affirmed. We do not see how a verdict for the plaintiff upon this evidence could possibly be allowed by the court, in its judicial discretion, to stand. The plaintiff had the choice of doing the work which it was his duty to do either in a safe or in a very dangerous and reckless way. This is fully established by his own evidence. He chose the reckless and dangerous mode, and he must bear the consequences of his choice. It is urged on his behalf in this court that he was in a hurry; urged thereto by the conductor. The language of the conductor does not indicate that he told him to be in a hurry, but only that he should be prompt. The time which he proposed to save by the course he took, instead of removing the link while the car was at a standstill before the engine backed up, was so slight as not to make any practical difference whatever in the train's reaching its destination at Pontiac. He says that he did not perceive that the stationary car had a Gould coupler until he turned the switch; but he might have seen it, and it was his duty to see to this in order to determine at a time when he could safely remove the link whether it was necessary to do so. He knew that the link was there, because he rode on it, and knew, also, that Gould couplers were common in Michigan, because the statute of that state requires that all cars now made in Michigan should have Gould couplers. It was his duty to anticipate, therefore, the probability that the car to which the coupling was to be made would be a Gould coupler, and that it might be necessary to remove the link. By not removing the link when the car was not in motion, he took his chance of injury from a removal of the link while the car was in motion as it passed the switch. Even then there was no necessity

for his going in front of the car, for he might have waited until the two cars had come near together, and then have stopped the engine by a signal, and have removed the link. He had two courses which were entirely free from danger, and one which, by the evidence of his own witnesses, was very dangerous; and he selected the dangerous one.

Rule 24 strictly prohibited as dangerous, and in violation of duty, stepping on the front of approaching engines and cars, jumping on or off trains or engines at high speed, getting between cars while in motion to uncouple them, coupling by hand when it was practicable to use a stick or pin for guiding the link, and all similar imprudences. It was certainly within the inhibition of this rule for the plaintiff to step in front of a moving car to remove a link, when it was possible and proper for him to remove the link before the car began to move. It was manifestly an imprudence similar to those exactly described in the rule, and plaintiff's own evidence shows that it was so understood by the defendant's employes. It is attempted, however, to justify plaintiff's course by proof that it was customary for switchmen to do what the plaintiff did. The evidence thus introduced did not show that the custom was known to the officers of the company; but it did show that the custom when practiced in a situation like that in which the plaintiff was, even by those who testified to it, was regarded as dangerous and reckless, as contrary to the rules of the company, and as only to be followed at the risk of the employé. The supreme court of Michigan has reached similar conclusions on all the points here considered in a case very like this one in all its facts. *Loranger v. Railway Co.* (filed Feb. 12, 1895) 62 N. W. 137.

It is contended on behalf of the plaintiff that, even if the course which the plaintiff took was negligence, it was not the proximate cause of the accident, because he did not know of the presence of the grade stake. The obstruction offered by the grade stake was not different from that which was offered by the cross-ties and the cross-rails. It was exactly of the same character, and it was of the class of dangers which the plaintiff had every reason to anticipate in going in between the rails and in front of the moving car under the circumstances. It seems to us clear, as a matter of law, therefore, that his negligence was the proximate cause of his injury.

The present case is a different case from that considered at the present term in *Railway Co. v. Craig*, 73 Fed. 642. There the accident happened by reason of an unblocked frog, the presence of which the plaintiff had no reason to suspect. It was held that the question of proximate cause in that case was a question for the jury, because the jury might there reasonably have found that the trap-like character of the unblocked frog was such a new independent and unexpected cause of the accident as to break the chain of legal causation between the plaintiff's negligence in stepping in between the moving cars and the injury which did occur from the unblocked condition of the frog. We reach our conclusion in this case on the assumption that the presence of the stake in the middle of the track for a year tended to show negligence on the part of the company,

causing the accident. The evidence was insufficient in law to sustain a verdict for the plaintiff, and required the court below to direct a verdict for the defendant. Judgment affirmed.

PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS BANK & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 343.

LIFE INSURANCE — MISREPRESENTATIONS IN APPLICATION — CONSTRUCTION OF STATUTE—"GOOD FAITH."

A statutory provision that no immaterial misrepresentation in the application shall avoid the policy unless it is made "in bad faith" (Act Pa. June 23, 1885), means with an actual intent to mislead or deceive, and does not include a misstatement, honestly made, through inadvertence, or even gross forgetfulness or carelessness. 72 Fed. 413, reaffirmed.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

This was an action at law by the Mechanics' Savings Bank & Trust Company, of Nashville, Tenn., against the Penn Mutual Life Insurance Company, on a policy of insurance on the life of John Schardt. The circuit court gave judgment for the plaintiff on the verdict of a jury, and the defendant brought error. This court heretofore affirmed the judgment (72 Fed. 413), and the defendant has now filed a petition for a rehearing.

F. C. Maury and J. B. Daniel, for plaintiff in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge. This is a petition for rehearing by the plaintiff in error. The action below was on a policy of life insurance, and resulted in a verdict and judgment against the defendant, the insurance company. In the opinion heretofore filed in the case we reversed the judgment of the court below for an error in excluding evidence, and for the guidance of the court below in a new trial we considered other questions upon the record. The Pennsylvania statute which controlled the construction of the policy provided, in effect, that no misrepresentation in the application should avoid the policy unless it was either made in bad faith or was material to the risk. It appeared upon the trial that in answering a question as to other life insurance upon his life the insured had stated three policies aggregating \$16,000, but had omitted one which he had for \$5,000. The court below refused to charge the jury that this misrepresentation avoided the policy because necessarily made in bad faith, even if it was not material to the risk. In this we held there was no error, and we are pressed by the petition for a rehearing to examine the correctness of our holding. The argument of learned counsel is that a misrepresentation in bad faith, within the meaning of the statute, is an untrue statement,

made under such circumstances that it would, if resulting in injury, support a recovery in an action for deceit at common law; that in such an action, if the fact misrepresented is one concerning defendant's own affairs, of which he must at some time have had personal knowledge, he is held to a knowledge and recollection of it at the time of the statement, and cannot be heard in defense to say that inadvertently and through forgetfulness he made the statement in the honest belief of its truth. Therefore it is said that in this case the court below should have told the jury that, as the insured must have known of the omitted policy when he took it, he is conclusively presumed to have known it when he signed his application, and so to have made the statement concerning his other insurance in bad faith. The argument is unsound. We have here to deal with the statutory meaning of the phrase "misrepresentation in bad faith." "In bad faith" is not a technical term used only in actions for deceit. It is an ordinary expression, the meaning of which is not doubtful. It means "with actual intent to mislead or deceive another." It refers to a real and actual state of mind capable of both direct and circumstantial proof. A man may testify directly to his knowledge and intention if they are in issue, and they may also be inferred from circumstances. If a man makes a statement in the honest belief that it is true, he does not make that statement in bad faith, even if his honest ignorance of the truth is the result of the grossest carelessness. The fact that he could only be ignorant through gross carelessness may be evidence to show that he was not ignorant, and therefore spoke in bad faith; but, grant his honest belief in his statement, and there cannot be bad faith on his part in the ordinary sense in which those words are used in the English language. This is the sense in which they are used in the Pennsylvania statute. Therefore it would clearly not have been bad faith in the insured if he made the statement concerning his other insurance in the honest belief in its truth, and omitted the \$5,000 policy through forgetfulness and inadvertence.

Whether actual bad faith must be shown in common-law actions for deceit to justify a recovery has been the subject of much controversy, and it has been finally settled in England by the decision of the house of lords in *Derry v. Peek*, 14 App. Cas. 337, that there can be no recovery in such an action whenever the defendant made the statement complained of in the honest belief of its truth, however unreasonable such belief. Such, too, would seem to be the holding of the supreme court of the United States in *Lord v. Goddard*, 13 How. 198 (see, also, *Biggs v. Barry*, Fed. Cas. No. 1,402), though, in view of some of its later cases, the question may still be an open one in the latter court. *Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219. There is much authority in this country supporting the view that an action for deceit may be maintained against one making an untrue statement, though in the honest belief of its truth, if there was no reasonable ground for such belief; or, to put it in another way, if he ought to have known the truth. *Cooley, Torts* (2d Ed.) p. 585. Nearly all the cases upon which the petitioner relies are cases in equity of rescission or equitable es-

toppel in which bad faith is never indispensable as an element, and such of them as are English are expressly distinguished on this ground in *Derry v. Peek*; *Burrowes v. Lock*, 10 Ves. 470; *Raley v. Williams*, 73 Mo. 310; *Bullis v. Noble*, 36 Iowa, 618. The other English cases relied on are, of course, controlled by *Derry v. Peek*. The other American cases are cases of misrepresentation in contracts of insurance made the basis of the contract, and given a contractual effect. *Towne v. Insurance Co.*, 7 Allen, 51; *Byers v. Insurance Co.*, 35 Ohio St. 606. The conflict of authority in regard to actions for deceit is whether actual bad faith is necessary to sustain the action, and not whether an untrue statement, founded on an honest belief in its truth, though inadvertently or forgetfully or negligently made, is a statement in bad faith. Here the statute expressly declares the material issue to be whether the misrepresentation was made in bad faith. This relieves us of all difficulty. The statute means what it says. It does not mean constructive bad faith. It does not mean gross negligence, which some courts have held sufficient to sustain an action for deceit. It means the same actual intent to mislead that must be found in convicting one of the crime of false pretenses, and surely honest belief in the misstatement, through forgetfulness and inadvertence, is a defense to such a charge. The reference to the essential basis of recovery in common-law actions for deceit only tends to confusion because of the conflict of authority, and is in no way helpful in construing the statute. The petition is denied.

BLALOCK v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES.

(Circuit Court, N. D. Georgia. November 6, 1895.)

1. PLEADING—LEGAL AND EQUITABLE CAUSES—JURISDICTION OF COURTS.

Plaintiff, as administrator of one W. B. brought an action against a life insurance company, in a state court possessing only common-law jurisdiction, and in his petition alleged that the insurance company had issued a policy on the life of one C. B. for the benefit of W. B., for \$5,000; that while both C. B. and W. B. lay sick, and near death, agents of the insurance company visited them, and by falsely and fraudulently representing that the insurance company was in possession of evidence which would avoid the policy, that it would resist payment thereof, and make great trouble for the representatives of C. B. and W. B., and by urgent and persistent solicitations, which C. B. and W. B. were unable, in their feeble condition, to resist, persuaded them to agree to a cancellation of the policy, in consideration of a payment of \$2,500, and that the company had refused to pay the balance of the policy, or to accept proofs of C. B.'s death. Thereupon plaintiff prayed judgment for the \$2,500, with interest and penalties, and that the policy be brought into court, and delivered up, and the agreement of cancellation set aside, and offered to credit upon the policy the \$2,500 paid to C. B. and W. B. The insurance company demurred to the petition, and the case was removed to the United States circuit court. *Held*, that the case made by the plaintiff's pleading was substantially an equitable one, of which neither the state court nor the federal court on its law side, to which the case was removed, could take jurisdiction; nor could the allegations, framed for the purpose of

equitable relief, be taken as making out a cause of action for damages for deceit.

2. SAME—AMENDMENT.

Held, further, that the plaintiff could not be permitted so to amend his pleading as to change such equitable cause of action for cancellation of the agreement into a cause of action at law for deceit in procuring it.

John L. Hopkins & Sons and Chas. Z. Blalock, for plaintiff.
King & Spalding, for defendant.

NEWMAN, District Judge. This case was removed to this court from the city court of Atlanta. The petition filed by the plaintiff in the city court is as follows:

The petition of John T. Blalock, the duly-appointed administrator on the estate of W. B. Blalock, deceased, respectfully shows to the court the following facts:

(1) That the Equitable Life Assurance Society of the United States, a corporation doing business in the state of Georgia, and in said county, and having and maintaining an office in said county of Fulton for the transaction of business, and having resident in said county of Fulton a legally appointed agent or officer, to wit, Alber Perdue, upon whom the legal process of the courts of said state may be served as by statute required, is indebted to petitioner in the principal sum of twenty-five hundred (\$2,500) dollars, besides interest; the same being a balance due upon a policy of insurance issued by said defendant company upon the life of C. W. Blalock, copy of which is hereto attached.

(2) Petitioner shows that said policy was issued upon the life of said C. W. Blalock on the 10th day of June, 1892, for the sum of five thousand (\$5,000) dollars, the same being made payable to W. B. Blalock, the brother of the said C. W. Blalock, upon the death of the said C. W. Blalock.

(3) Petitioner shows that the said C. W. Blalock died on the 30th day of January, 1894; and that the said W. B. Blalock died on the 5th day of March, 1894; that petitioner was duly appointed administrator on the estate of the said W. B. Blalock on the 6th day of September, 1894, by the court of ordinary of Upson county, Georgia.

(4) Petitioner shows that since the death of the said C. W. Blalock and W. B. Blalock, and after petitioner's appointment as administrator, as aforesaid, he has frequently demanded of the said defendant company payment of the amount due upon said policy of insurance.

(5) Petitioner shows that the said defendant company have refused, and still refuse, to pay the amount so due, as aforesaid.

(6) Petitioner shows that, after the death of the said insured and beneficiary, and after petitioner was so appointed administrator, he applied to said defendant company for blanks upon which to make the proofs of death, as required by said policy, and that said defendant company failed and refused to furnish said blanks; whereupon petitioner prepared and had executed sufficient legal proof, as required by said policy, of the death of the said C. W. Blalock, and submitted the same to the said defendant company, and it then refused, and still refuses, either to consider said proofs, or to pay the amount due on said policy.

(7) Petitioner shows that said policy was in the possession of the said C. W. Blalock up to about the 27th of January, 1894, in full force and effect, and was a legal and binding obligation existing against the said defendant company, and that all the conditions and requirements incumbent upon and chargeable to the said insured, including the payment of all the premiums due thereon, had been fully and lawfully complied with, by the said C. W. Blalock.

(8) Petitioner shows that on or about the 25th day of January, 1894, one Dr. A. S. Hawes, an agent of said defendant company, came to the house of petitioner, where both the said C. W. Blalock and W. B. Blalock lay fatally sick, and wholly unable to properly consider and attend to business; and, notwithstanding the weak and debilitated condition of the said C. W. Bla-

lock and W. B. Blalock, the said Dr. Hawes began, by the use of artful means and deceitful practices and fraudulent representations, a preconceived scheme of procuring a cancellation of said policy. The said Dr. Hawes insisted on having an interview with the said insured and beneficiary, notwithstanding petitioner, who was present, protested against the same, and stated to the said Dr. Hawes that the said C. W. Blalock and W. B. Blalock were then almost at death's door, and were in no condition to meet the said Dr. Hawes on equal terms in the discussion of this or any other business matter. Petitioner had never seen the said Dr. Hawes before, and, on finding out the nefarious purpose for which he came, insisted that the said C. W. Blalock and W. B. Blalock were too near death's door to discuss any business matter; but the said Dr. Hawes persisted in the purpose for which he came, and falsely informed the said C. W. Blalock and W. B. Blalock that the policy which they held in the said defendant company was absolutely void, and that the said defendant company was not liable thereon, and represented to the said beneficiary and insured that said defendant company was in possession of evidence of fraud in the procurement of said policy that would not only vitiate the same, and prevent a recovery thereon, but would show that the same was obtained by false representations. But the said Dr. Hawes, when called upon to specify the charges of fraud made by said defendant company, refused to tell upon what grounds it demanded a cancellation of the policy, saying that he was not authorized by said defendant company to give the facts in their possession, but that he was advised that the company had such evidence as would make the policy void and uncollectible; and then and there offered first to return the premiums paid, and then offered to pay one thousand (\$1,000) dollars, and then seventeen hundred and fifty (\$1,750) dollars, in settlement of said policy. And petitioner shows that said Dr. Hawes remained at the house from early in the morning until about nine o'clock at night, at frequent intervals urging and persuading said insured and said beneficiary to compromise and settle said policy.

(9) Petitioner shows that, notwithstanding all the false and fraudulent statements and ingenious arguments used by the said Dr. Hawes upon the said C. W. Blalock and W. B. Blalock, and the great persistency with which he pressed the same, and said C. W. Blalock and W. B. Blalock insisted that they had done no wrong, that there was no fraud in the procurement of said policy, that the said defendant company, in case of insured's death, would be liable for the full amount thereof, and they then and there refused to cancel said policy, or to accept in settlement thereof any of the said offers made by the said Dr. Hawes to compromise or settle said policy; whereupon the said Dr. Hawes left.

(10) Petitioner shows that about three days thereafter the said Dr. Hawes, accompanied by one J. A. Morris, who was an agent of said defendant company, returned to petitioner's house, and again began their assault upon the said C. W. Blalock and W. B. Blalock, and remained at the house, and continued to urge them, through the day and until the afternoon. All of the statements above referred to as having been made by the said Dr. Hawes were repeated and insisted upon with great energy by both of said agents, and each of them represented that said defendant company was in possession of evidence that vitiated said policy, and that it would contest the same, and show that the policy was obtained by false representations. Each, in turn, made persistent arguments to both insured and beneficiary, claiming that the said defendant company was not liable on said policy, for the reasons above stated, and, in addition thereto, represented to said insured that the beneficiary of said policy, in case of the death of the insured, would have to bring suit thereon in the state of Florida; that the said defendant company could establish fraud by witnesses; that the said defendant company, having ample means, would carry the case from court to court, ending only with the United States supreme court; and that he (the insured), being dead, would not be present to meet the evidence of fraud submitted by said defendant company, and that, necessarily, there could be no recovery, but the beneficiary could be put to great expense and trouble, and get nothing in the end.

(11) Petitioner shows that after long and tedious argument, in which the said C. W. Blalock and W. B. Blalock, in their enfeebled condition (this last-
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mentioned interview occurring only two or three days before the death of C. W. Blalock, and but a short time prior to the death of W. B. Blalock), were overreached; and, while not positively denying any fraud on their part, yet, being unduly excited, and desiring to avoid litigation over the estate in case of death, and fearing, from the statements of said agents, that false testimony would be produced against the assured which would reflect upon his honor and integrity after death, they then and there accepted from said agents the sum of twenty-five hundred (\$2,500.00) dollars, and signed an agreement to surrender the said policy.

(12) Petitioner shows that two days thereafter, to wit, on the 30th day of January, 1894, the said C. W. Blalock died, and soon thereafter, to wit, on March 5, 1894, W. B. Blalock died.

(13) Petitioner shows that in pursuance of said payment, and by means of false and fraudulent representations, the said defendant company obtained possession of said policy, a substantial copy of which is here attached; but petitioner avers that said original policy, as well as the proofs of death submitted by petitioner, are now in the possession, custody, and control of said defendant company, and it is hereby notified to produce the same upon the trial of this case, to be used as evidence by the plaintiff.

(14) Petitioner avers that the said cancellation was obtained by fraud; that the representations made by the agents of said defendant company as inducement to the said cancellation were absolutely false, and were made for the purpose of getting an unconscionable advantage of the said C. W. Blalock and W. B. Blalock in their last dying struggles.

(15) Petitioner shows that the refusal of said defendant company was in bad faith, by reason of which it has, by said unwarranted refusal to pay the balance due on said policy on petitioner's demand, become liable to petitioner, in addition to the amount claimed as balance due on said policy, to a penalty of twenty-five per cent. upon the amount so due, as aforesaid; also to pay reasonable attorney's fees, to wit, the sum of five hundred dollars, for which amount petitioner expressly sues.

(16) Petitioner shows that on account of the fraudulent action of said defendant company in procuring the cancellation and possession of the said policy, petitioner has been damaged in the sum of twenty-five hundred (\$2,500.00) dollars, besides interest, to which amount is to be added the twenty-five per cent. penalty, and reasonable attorney's fees.

(17) And petitioner prays as follows: That he shall have judgment for said sum of twenty-five hundred (\$2,500.00) dollars, and attorney's fees and damages; that said policy shall be brought into court, and delivered up, and the agreement thereon, canceling it, shall be canceled, and that judgment be rendered for the balance due thereon, after crediting the twenty-five hundred (\$2,500.00) dollars paid. Petitioner here offers to account for said twenty-five hundred (\$2,500.00) dollars by entering such credit. And petitioner prays process may issue, requiring the said defendant company to be and appear at the next term of the said court, to answer petitioner's complaint.

Jno. L. Hopkins & Sons.

Chas. Z. Blalock,

Attorneys for Petitioner.

To this petition a demurrer was filed in the city court, and it was pending when the case was removed to this court. The demurrer is as follows:

And now comes the defendant, and demurs to the petition filed in the foregoing case upon the following grounds:

(1) That the said petition, under the allegations therein contained, discloses no cause of action against said defendant.

(2) That the said petition shows that the said cause of action was compromised and settled at and for the sum of twenty-five hundred dollars, and the said policy sued on surrendered; and said plaintiff does not aver that prior to the bringing of said action it tendered the said sum of twenty-five hundred dollars back to the said defendant, and offered to cancel said settlement, and that said defendant refused to do the same; and this de-

murrant says that said plaintiff cannot maintain said action without first tendering back and offering to cancel said agreement of compromise set forth in said petition.

(3) Because the said plaintiff in said action seeks to invoke the jurisdiction in equity to account for said twenty-five hundred dollars, and to cancel said agreement of compromise, which same is essentially necessary in any action upon said policies. That this court is a court of common-law jurisdiction alone, and cannot maintain jurisdiction of said matter of equitable cognizance.

Without waiving said demurrer defendant answers said petition as follows:

(1) It denies so much of paragraph 1 as stated that said defendant is indebted to petitioner in the sum of twenty-five hundred dollars, or any other sum. It denies that the same is a balance due upon a policy of insurance issued by defendant company, or that the copy attached is a copy of any such policy. It admits the preceding allegations of said paragraph 1.

(2) It admits that on the 22d day of July it issued a policy, as stated in paragraph 2, to said petitioner; but denies that the policy attached to said petition is a copy thereof.

(3) Defendant is without sufficient information to admit or deny the allegations of paragraph 3.

(4) It denies the allegations in paragraph 4.

(5) It denies the allegations in paragraph 5.

(6) It denies the allegations in paragraph 6.

(7) It denies the allegations in paragraph 7.

(8) It denies the allegations in paragraph 8.

(9) It denies the allegations in paragraph 9.

(10) It denies the allegations in paragraph 10.

(11) It denies the allegations in paragraph 11, except the allegation that said party then and there accepted the sum of twenty-five hundred dollars in full settlement of said policy, and signed an agreement surrendering said policy; and avers that the policy was duly, lawfully, and fairly surrendered.

(12) Defendant is without sufficient information to either admit or deny the allegations of paragraph 12.

(13) The defendant denies all of the allegations in paragraph 13 except the statement that the policy of insurance alluded to was surrendered into the possession of defendant.

(14) It denies the allegations of paragraph 14, and says that the same are absolutely false.

(15) It denies the allegations of paragraph 15.

(16) It denies the allegations of paragraph 16.

(17) It saith that petitioner is not entitled to the judgment claimed in paragraph 17, or any part thereof, and prays judgment in favor of the defendant. Of all of these facts defendant puts itself upon the country.

King & Spalding,
Defendant's Attorneys.

The demurrer has been argued here. The city court has no equity jurisdiction, and while there is no distinction, now, under the practice in the state courts, between law and equity, still, where equitable relief is sought, it seems that the city court is entirely without jurisdiction to entertain the case or to grant relief. In suits for equitable relief, the superior courts of the state still have exclusive jurisdiction. The petition filed by the plaintiff in the city court, and brought here, prays, among other things, that the policy of insurance which is the subject-matter of contention be brought into court, and delivered up, and that the agreement thereon canceling it shall be canceled. So far as the petition seeks this relief, it is not seriously contended by counsel for the plaintiff that it could be

entertained in the city court, or on the common-law side of the court here, to which it was removed. It is contended, however, that there is enough in the petition to make it a suit for damages by the administrator against the insurance company for the deceit which he claims was practiced on his intestates. While it is true that there is some language in the petition which is sufficient to base argument upon in favor of this contention, it is not believed that, considering the whole of the petition together, it can be entertained as constituting a good petition or declaration in a case for damages for deceit, etc. The language which is relied on by counsel is only such language as would be used in a suit to set aside a contract of cancellation, and to recover the balance due on the policy; and where the evident theory and purpose of the petition is for equitable relief, it would not do to take fragments of the petition, and make out of them a suit of a totally different character from that which seems to have been in the mind of the pleader, and which alone the defendant would have the right to believe he was called on to answer. Entertaining this view of the pleadings, it is unnecessary to consider the forcible argument of counsel for defendant that, upon the substantial merits of the action, no cause for recovery, as the case stands, is shown, on the ground that the tender back by the administrator to the insurance company of the amount paid by it would be necessary to give the administrator a standing in court.

Suggestion has been made of a desire to amend the petition in the event the court should consider it insufficient as it stands. Counsel will be heard as to this. Unless proper amendment can be made and allowed, the demurrer must be sustained, and the case dismissed.

After the foregoing decision had been filed, the plaintiff amended his petition by striking out certain language, leaving it, as he claimed, simply an action for damages for deceit in obtaining the cancellation of the contract of insurance. Upon this application to amend the matter was again brought before the court, and the following decision was had:

(February 7, 1896.)

The necessary logical as well as legal result of the decision of the court in this case of November 6, 1895, on the demurrer, is the rejection of the present application to amend. The proposition and the effort here now is to amend the pleadings so that the case shall be changed from what the court determined was an equitable proceeding to cancel the contract of cancellation of the policy, and the recovery of the balance due thereon, into an action for damages for deceit. The pleadings, as then construed by the court, made this a suit on the policy, treating the contract of cancellation as fraudulent, and such that it should be set aside for that reason, and judgment rendered for the balance of the face of the policy. It would be, if amended as proposed, an action for damages for deceit by false representations made, by which the cancellation of the policy was obtained. Not only would it be changing an action sounding

in contract to one of tort, but it would change a suit in equity to an action at law. In this view of the matter, that the offer to amend must be denied can hardly be questioned.

In view of the confidence expressed by the eminent counsel for the plaintiff in the correctness of his pleadings originally, I have re-examined the matter with considerable care, and this re-examination has not shaken my belief in the correctness of the decision made after the argument of the demurrer in November last. The offer to amend must be denied, and the demurrer sustained.

CENTRAL TRUST CO. OF NEW YORK v. EAST TENNESSEE, V. & G. RY. CO. (CLARK, Intervener).

(Circuit Court, N. D. Georgia. October 1, 1895.)

1. RAILROADS—NEGLIGENCE—STATION-LIMIT BOARD.

Upon an application of one C., intervening in a railroad foreclosure suit, and claiming damages from the receivers of the road for personal injuries, it was found from the evidence that C., a fireman on a locomotive, while in the discharge of a duty assigned him by the engineer, and in a position which he could naturally and properly assume for the purpose of such duty, was knocked from the engine by a station-limit board placed near the track. *Held*, that it followed from these circumstances that the board was too near the track, and was a dangerous structure, the maintenance of which was negligence in the receivers.

2. SAME—DUTIES OF FIREMAN.

Held, further, that a fireman on a locomotive, whose duties are to look after the coal and steaming of the engine, is not bound to observe the distance from the track of all objects along the line of the road, so as to make him chargeable with contributory negligence in failing to remember and avoid such an object when called upon to lean out of the cab in the discharge of a duty outside his usual routine.

Arnold & Arnold, for intervener.

Dorsey, Brewster & Howell, for defendant.

NEWMAN, District Judge. Under orders of this court in the case above named, Samuel Spencer, Henry Fink, and C. M. McGhee are receivers operating the property of the defendant corporation. The case now before the court is the intervention of Martin Clark, claiming damages alleged to have been inflicted on him while in service of the receivers as fireman on the freight train. The facts and the issues involved will appear fully by the report of the special master to whom the intervention was referred, which report is as follows:

To the Honorable the Judges of Said Court: The above-stated intervention was duly referred to me, by an order of the court, and I have taken the evidence and heard the argument in the case, and report as follows:

Statement of the Case.

The intervener alleges that he was employed as a fireman by the receivers operating the East Tennessee, Virginia & Georgia Railway on June 14, 1894, and that on the night of that day, while in the proper discharge of his duties as such fireman, he was knocked off the engine attached to a freight at a point south of Powder Springs, on the line of said railway, and in the Northern district of Georgia. He alleges that he was knocked off said en-

gine by a station-limit board, which he alleges was located too near the track; that, at the time of the injury to himself, he had received an order from the engineer to look out of the gangway and inspect the condition of a hot box, and, while leaning out of said gangway, he was struck on the side of the head by a station-limit board, and knocked from said engine to the ground. He alleges that the train was running at the rate of twenty-five miles an hour. He sets forth in his petition, specifically, the extent of his injuries, and their character. The negligence which he alleges against the defendant, as the cause of the injury, was, that the station-limit board was located too near the track; rendering it unsafe for employes, in the proper discharge of their duties. The defendants admit that the intervener was employed as a fireman at the time alleged, and that said railway was operated by them as receivers. They deny any negligence, and claim that said station-limit board was not located too near the track, but at a reasonably safe distance, and that an injury therefrom could only happen by the negligence of an employe in leaning out too far, or from an improper place on said engine. They claim, further, that the intervener was fully aware of the position of said station-limit board, and its nearness to the track, or could have ascertained it by the exercise of ordinary diligence. They deny, as a matter of fact, that the intervener was injured by being struck by the said station-limit board, but insist that he either accidentally fell from said engine, or that the accident was the result of his own negligence. These are the contentions of the parties.

The evidence in the case is somewhat voluminous and contradictory. After a careful consideration of the same, I am of the opinion that the following conclusions are reasonably deducible therefrom: The station-limit board in question, a few days after the accident, was taken up by the employes of the defendant, and removed three feet further from the track than where it had originally been placed. From an actual measurement, it was shown that the post was located, at the time of the accident, six and one-half feet from the near rail of the track, the measurement being from the hole left in the ground where the post formerly stood. The post was about seven feet high from the ground, having at the top a board with the words "Station Limit" printed thereon, extending towards the rail eighteen inches. This would bring the end of the board on top of the post four and one-half feet from the near rail of the track. It was shown from the evidence that the engine extended over the rail from two to three feet. These facts clearly show that the station-limit board was sufficiently near the track to have struck the employe, if he had been leaning out from the gangway two and one-half feet. Was this station-limit board, therefore, so near the track as to render it dangerous to servants of the defendant, in the proper and reasonable discharge of their duties? On this point the evidence of the defendant fixes the customary and safe distance of such obstructions at least eight feet from the rail of the track,—one foot and a half further than the actual measurement makes this station-limit board. In view of these facts, I think it is fair to conclude that this particular post was located too near the track.

In the next place, was the intervener injured, as he claims, by having been struck by said station-limit board and thrown to the ground. On this point there is some doubt, but my conclusion is that the intervener was knocked from said engine, by leaning out therefrom, in obedience to an order of the engineer, for the purpose of looking at the condition of a hot box on one of the cars. The facts proven, which establish the correctness of this theory, are as follows: The fireman was knocked off at or near the station-limit board. This is shown by the uncontradicted evidence of all the witnesses. The intervener swears positively that he felt something strike his head while he was standing, looking out at the hot box; that he knew something hit him, but he could not tell what it was that knocked him from the engine. Both physicians who testified in the case swore that, when they examined the head of the intervener, they discovered on the back of his head, on the right-hand side, a wound, and that his face, his nose, and his eyes were also injured and mangled. This testimony shows that the intervener received injuries both in front and on the back side of his head. Add to these facts the further fact that this

station-limit board was sufficiently near to have caused the accident, and I think the conclusion that the intervener was knocked off by the board is reasonably certain, unless there are other facts that account for this injury. It is insisted by the defendant that the station-limit board did not knock the intervener off the engine—First, because the evidence shows that he could not have been struck by said board in the manner as testified to by him, it being impossible for a man to lean out far enough to come in contact with the board. This conclusion, the master thinks, is based upon the testimony of witnesses who make their calculations from the distance the board is now from the track, and not from the distance the board was at the time of the accident. In addition to these facts, and on the request of the master, the engine was furnished by the defendants, and, in company with the counsel for both sides, a practical experiment was made; and it was shown to my satisfaction that, while the injury did not occur just as described by the intervener in his testimony, yet he could have been struck by the board substantially as described by him. The post was taken up, and placed in the hole where it was located at the time of the accident. The intervener was located as he testified he was, and the engine moved by the board. It didn't strike the head of the intervener, but it was seen by the master that a very slight change in the position of the intervener made it possible for him to have been stricken by said board. In view of the fact that it was night, that the engineer ordered the intervener to look out and see the condition of the hot box, I don't think it reasonable to hold the intervener to an unerring recollection of his position at the time of the accident, provided the facts show that in the discharge of his duty, and without negligence on his part, he could have been struck by said station-limit board while leaning out of said gangway and looking at the condition of said hot box; and the experiment satisfies my mind that such could have been the result. In the next place, it is contended by defendants that the body of the intervener was found, shortly after the accident, some sixty or ninety feet south of the station-limit board, in the direction in which the train was running. This fact, it is claimed, clearly shows that he could not have been knocked off by the board, because he was too far from it, and must have fallen off accidentally, or by his negligence. The evidence on this point shows that the cap of the intervener was picked up some thirty feet nearer the station-limit board than his body, and the condition of the ground between the cap and the body indicated that he either had been dragged or had crawled over the intervening space; but I don't think that the fact that the intervener was found at this distance south of the station-limit board, in the light of the other facts in evidence, is sufficient to show that he was not knocked off by the board, or proved a theory of an accidental or negligent falling from the engine. The testimony showing the distance of intervener from the post was not by exact measurement, but an opinion as to distance, and is therefore not sufficiently reliable to overcome the other undoubted facts in the case going to establish the theory that he was knocked off by the station-limit board. The testimony of the witnesses also shows that the train was running at the rate of twenty-five miles an hour, and that the tendency of a falling body is to follow the direction of the train. I am clear that it is altogether reasonable to account for the distance of the body from the post on the theory that in falling from the engine the momentum of the train carried the body such distance. I am aware of the rule of law that negligence must be shown by an affirmative proof, or that the facts upon which it is to be inferred as a reasonable inference must be established by affirmative proof; in other words, that the existence or nonexistence of the facts upon which the inference is based must not be left to conjecture. But I am of the opinion that the facts of this case, and the conclusions fairly deducible therefrom, reasonably establish the truth of the theory as contended for by intervener,—that he was knocked off of said engine by the station-limit board, and that said board was located too near the track for the safety of the servants of the defendants, in the ordinary and diligent discharge of their duties. I think, as matter of law, an obligation rests upon masters to keep the right of way and the vicinity of the track clear from all obstructions that would render an

injury to their servants in the ordinary discharge of their duties, or in case of sudden emergencies, likely or probable.

My conclusion, therefore, from a consideration of the facts of this case up to this point, is that the defendants are liable to the intervener, unless the injury was caused either by his own negligence, or that the dangerous character of the station-limit board, and its nearness to the track, was known to him, or could have been known by the exercise of ordinary diligence on his part. The defendants contended on this point that the intervener was guilty of negligence in leaning from the gangway; that the safer place, and the proper place, to look out, was from the window of the engine cab. The evidence, however, does not sustain this contention. It shows that it is the usual practice to look out either from the gangway, or from the window; that the place of looking out is the place where the employ  happens to be at the time of the emergency which caused him to look out, and one place is about as safe as the other. Counsel for the defendant, on this branch of the case, cite the decision of our supreme court in the case of *Railway Co. v. Head*, 92 Ga. 723, 18 S. E. 976. I do not think the facts in this case are altogether analogous to those in the *Head Case*. In the *Head Case*, according to the opinion of the supreme court, the evidence was clear, strong, and undisputed that without leaving his seat in the cab, and without subjecting himself to any peril whatever, the engineer might have seen the hot journal fully, but that he left his place of safety, and went to a dangerous position on the locomotive, for the purpose of getting a view of the journal. What dangerous place he went to does not appear from the evidence in the *Head Case*, but the supreme court says it was a dangerous place. The evidence in this case we are now considering does not show that the gangway—the place from where the intervener looked—was necessarily a dangerous place, nor did he leave his position in the cab, and go to the gangway, for the purpose of looking at the hot box, but he was already in the gangway when ordered by the engineer to look out. Each case must stand on its own facts; and I hold, under the facts in this case, that the mere fact that the intervener looked out of the gangway, and did not go to the cab window, was not an act of contributory negligence on his part.

In the next place, counsel for the defendants contend that even conceding, for the sake of argument, that this intervener was injured by having been knocked off by the station-limit board, and that the station-limit board was too near the track, yet the position of the station-limit board was well known to the fireman at the time of his injury, or should have been known to him by the exercise of ordinary diligence. They contend that having been an employ  of the road, running by the said station-limit board, in the progress of his employment, for several years, his opportunities for finding out the nearness of the station-limit board were sufficient to put him on notice of its position. They also rely, in support of this position, on the *Head Case*, above cited. In the *Head Case* the post which knocked the engineer off was the contrivance commonly called a "tell-tale," designed to warn employ s on the train of their approach to a bridge; and the supreme court say that, granting that the post was erected too near the track, the evidence establishes, almost to a certainty, if not absolutely, that this fact must have been known to the deceased. He passed over the road almost daily for a considerable period of time; the post was near a bridge; and, in view of all the evidence, it was almost impossible to conceive that he was ignorant of the existence of the post, or unaware of the distance it stood from the track. I do not think these facts are similar to the ones in the case we are now considering. The *Head Case* was that of an engineer whose special duty it was to look out for, and take cognizance of, all obstructions in and near the track; and I think that a tell-tale contrivance, located near a bridge, is an object which would much more reasonably and naturally be called to the attention of an employ  than a station-limit board. However this may be, I hold, as matter of law, that a fireman, whose duties are to look after the coal and steaming of his engine, is not bound to observe the distance of every object on the line of railway. Intervener's duties had no relation to the roadbed and track, and I do not think an employ  is bound to take knowledge of defects necessarily observed in the performance of his duty. I do not think that a fireman traveling on a train, whose attention is fixed and directed

to the discharge of his duties in connection with the running of the train, is bound to observe the distance of stationary objects from the track, or the fact of his passing objects along the track furnishes such opportunity for observation as would bring the case within the reasonable application of the rule of law. Intervener swears that he had, in a general way, observed these station-limit boards, and this station-limit board, but he had no knowledge of its nearness to the track. I think he had the right to assume that his employer would have such an object at a reasonably safe distance from the track.

I therefore conclude, from the evidence in this case: (1) That the intervenor was knocked from said engine by the station-limit board. (2) I find from the evidence that said station-limit board was located too near the track. (3) I find, as a matter of law, that the intervenor was not in any manner guilty of contributory negligence in connection with the accident. (4) I find, on application of the law to the facts, that the defendants are liable to the intervenor for the injuries sustained by him as the result of said accident. The amount of such damages, of course, depends altogether upon the extent of intervenor's injuries. He contends that he was very severely and permanently injured, and the description of his condition, given by himself and by his counsel, is distressing in the extreme. The evidence, however, satisfies my mind that the intervenor and his counsel very greatly exaggerate the extent of the injuries received as the result of said accident. His own physicians testify that the immediate result of the accident, besides physical disfigurement, was compression of the brain, and a partial concussion of the spine, and that these injuries produced very serious functional derangement and disturbance; but they testify that such injuries will not be permanent, and that in their opinion the intervenor will be entirely restored to his normal health at the end of this year. He was injured on the 4th of June, 1894, and, at the date of the trial of the case before me, he appeared to be in good physical condition. This condition was made more clearly manifest by his conduct and action at the place where the accident occurred when the experiment was made above referred to. I think the apparent physical condition and strength, and the conduct of the party before the master, as both court and jury, are legitimate matters for consideration. In my opinion, it is a fair deduction from the evidence that the intervenor was incapacitated to earn money, as a result of his injuries, for a period of six months. He was earning, at the time of his injuries, from sixty dollars to seventy-five dollars per month. Taking the average of sixty-five dollars per month, it would make his actual damages on account of lost capacity for earning a living at three hundred and ninety dollars. I think he should also be allowed fifty dollars for medical bill, and, for his pain and suffering, the sum of four hundred dollars. This would make his total damages amount to the sum of eight hundred and forty (\$40) dollars, and I so report in his favor. I further report that this amount should be paid by the receivers out of the fund in their hands arising from the sale of the property, and that it ranks as receivers' expenses.

The evidence and minutes of the proceedings had before me are filed with this report, under my approval.

Respectfully submitted,

Benj. H. Hill, Special Master.

This July 27, 1895.

It will be perceived, from the foregoing report of the special master, that three questions are necessary for determination, and were determined by him, in disposing of the case: (1) Was the intervenor knocked from the engine by the station-limit board? (2) Was the board located too near the track? (3) Was the intervenor guilty of contributory negligence?

The first two questions were purely and simply questions of fact. It may be stated that there was fair room for argument on both sides of the two questions. From the facts adduced in evidence, there was room for doubt as to whether the accident occurred as

claimed by intervener. At the same time, there was sufficient evidence to justify the conclusion reached by the special master in favor of the intervener's contention. Conceding the conclusions of the special master as to the first proposition to be correct, it seems to follow necessarily that his conclusion that the station-limit board was too near the track is also correct. If an employé, in the proper discharge of a duty which was required of him, was liable to be struck by the board, it certainly was a dangerous structure. While I am less satisfied about this than any other proposition in the case, it can hardly be said that error on the part of the master is sufficiently clear to justify me in setting aside his report on this ground. While it is true that the intervener, when struck by this board, must have been in a position that an employé of the road would rarely assume, yet it seems that this position of leaning out, as he was, is one that may be required of employés; and it does not seem unfair to say that, in erecting these structures, it should be anticipated.

The third question presented for the determination of the special master is somewhat a mixed question of law and fact,—that is, in the first place, did the intervener really know of the existence and location of the station-limit board, as a matter of fact? and, in the next place, how far the law will charge him with knowledge, on the ground of ample opportunity to know the location of the board. I see no reason for differing with the special master in his position on this question, or with the reasons he gives for his decision. While the fireman might have a general knowledge of the condition of structures of this sort along the tracks of the railroad on which he is employed, he could hardly be said to have such exact knowledge on the subject as would make the act he did by the direction of the engineer a negligent act. He seems to have been performing in a reasonably proper way the duties required of him by his superior, and if, while in the performance of this duty, he was injured, as found by the special master, by reason of the dangerous location of the structure near the track, he is entitled to recover. The evidence is, in my opinion, sufficient to justify the report. Consequently the exceptions will be overruled, and the report confirmed.

Ex parte SLAUSON.

(Circuit Court, E. D. Virginia. April 18, 1896.)

INTERSTATE EXTRADITION—IMPROVIDENT ISSUE OF REQUISITION.

One S., who had been engaged with G. in the insurance business, in Tennessee, was found, on a settlement of their accounts, to be indebted to G., in about the sum of \$1,300, for various sums advanced to him and his family by G., and expenses paid by G. for his account. After bringing the business to an end, and making some efforts to raise money for its further prosecution, S. returned, with his family, to his home in Virginia. G. assigned his claim against S. to one C., who caused a civil suit to be brought upon it in Virginia against S. He also endeavored, by persuasions and threats, to induce S. to return to Tennessee, for what purpose did not appear. S. having refused to return, C. procured from the governor of Tennessee, upon affidavits, a requisition for S., as a fugitive from justice, alleging that he was guilty of "fraudu-

lent appropriation of money," and caused S. to be arrested thereunder in Virginia, for removal to Tennessee. *Held*, that no crime had been committed or was charged, that the requisition was improvidently issued, and S. should be discharged on habeas corpus.

Lassiter & Lassiter, for petitioner.
R. Carter Scott, for respondent.

HUGHES, District Judge. On the 23d ult. the governor of Tennessee made requisition upon the governor of Virginia for the extradition from this state to Tennessee of George W. Slauson, a citizen of Petersburg, Va., alleging in the requisition that Slauson stands charged in that state with the crime of "fraudulent appropriation of money," and that he is a fugitive from justice. The governor of Virginia, complying with this requisition, and reciting that it was accompanied by affidavits duly made, issued a warrant on the 14th inst., directed to the sergeant of Petersburg, requiring him to arrest and secure Slauson, afford him opportunity to sue out a writ of habeas corpus, and thereafter to deliver him to the custody of one Snapp, to be taken back to the state of Tennessee, "from which he fled." Slauson was arrested by the sergeant and turned over to Snapp, who committed him temporarily, overnight, to the jail in Petersburg. From the jail there he sent his petition to me praying for the writ of habeas corpus. This was granted, as of course, and Slauson is before me in pursuance of it.

The writ of habeas corpus is extolled by Blackstone as another Magna Charta of civil liberty. It is the most celebrated writ of English-speaking peoples. It is the process provided by law for deliverance from illegal confinement. The writ has no respect for persons. It lends itself to the humblest human being, and questions and inquires into the actions of the most exalted persons in the community and most powerful officers of government.

In regard to extradition, this writ is indicated by the law itself as the special remedy available to the citizen against the misuse and abuse of that proceeding. Requisitions for persons stigmatized as fugitives from justice, when issued, as in the case at bar, on mere *ex parte* affidavit, and not founded upon indictment, are liable to abuse. Little care can be taken to obtain the real facts of the case by the officers issuing a requisition. Papers are prepared and the demand issued, often in the most perfunctory manner; and it is impracticable for the governor, to whom the requisition is addressed, to inquire into the merits of the proceeding. But requisitions based upon affidavit are issued only in sudden emergencies, rarely after as much as four months of deliberation. The laws provide for no hearing to the alleged fugitive before the executives of the two states, and seem to recognize the fact that he has no redress except in this writ of high privilege,—this writ of habeas corpus.

Slauson is here clothed by law with the right to show why he should not be taken away from his wife and children and his home in Petersburg, to the distant state of Tennessee, and there tried on the vague charge, upon merely individual affidavit, of "fraudulent

appropriation of money." He has a right to show here that he has not committed the crime of a "fraudulent appropriation of money," and he has a right to show, moreover, the animus of the person who has instituted this proceeding. This writ would be a mockery in the case at bar if it were not competent for me to inquire whether the governor of Tennessee has been imposed upon by false affidavits. Slauson shows that his indebtedness in Tennessee is a balance of \$1,328.69, which is the result of dealings with Gerald M. Funnell during the year 1895, under contract mutually agreed upon, and recognized by both. Their business was not successful, and towards the close of the year it was found that Slauson would have to leave Tennessee and come to the East to recuperate his finances. This recourse was talked over and agreed upon between Slauson and Cecil G. Funnell, the person who is now prosecuting him. Slauson and Gerald M. Funnell had been engaged in the business of soliciting insurances. The plan was, that Slauson, on coming East, was first to go to Baltimore to consult there with Mr. Breezée, a well-known and very prominent man in the business of insurance, and that Slauson's after movements should be governed by the result of his visit to Baltimore. Cecil G. Funnell not only advised and counseled Slauson to come to the East from Tennessee, but gave him pecuniary aid for making his visit to Baltimore.

As to the pecuniary debt left by Slauson in Tennessee, it was made up of items set out in a bill of particulars filed by C. G. Funnell, in a suit instituted by him against Slauson in the hustings court of Petersburg, on the 10th of March just past. The notice or declaration in the case claims the balance already mentioned, "as due to me by you on contract as follows: (1) For money due under contract made in duplicate between you and Gerald M. Funnell, dated July 25, 1895, * * * said Gerald M. Funnell having duly assigned to me all of his rights and claims thereunder. (2) For money had and received by you for my use. (3) For money advanced you and your wife, at your request. (4) For money paid, laid out, and expended for you, at your request. All of which indebtedness is fully shown in the statement of my account against you, hereto attached, * * * which amount of money is justly due to me on contract, as aforesaid,"—meaning Slauson's contract with Gerald M. Funnell.

The account filed opens with a debit balance of between \$400 and \$500, and embraces credits near its close of nearly the same amount, so that the items set out in the account make up the amount of the existing indebtedness of Slauson to C. G. Funnell,—an indebtedness which C. G. Funnell purchased from G. W. Funnell. I will set out some of the items which make up this \$1,300 of indebtedness:

1895.

2. Aug. 27. Cash credited H. B. Maupin, as per request and notification of this date.....	\$42.00
8. Sept. 12. Cash handed Mrs. Slauson at Greeneville.....	1.00
4. Sept. 16. Cash at Greeneville, just prior to G. W. S.'s trip to Knoxville	15.00

24. Oct. 28. Livery charged C. G. F., as per order given G. W. S. to hand Hall & Hall.....	15.25
36. Oct. 28. Cash (\$55) and check (\$55) at Greeneville, prior to leaving for Pulaski	110.00
24a. Nov. 1. Draft to order G. W. S. sent to Columbia, from Greeneville	30.00
25. Nov. 1. Cash to Mrs. Slauson at Greeneville.....	5.00
26. Nov. 2. Cash to Mrs. Slauson at Greeneville.....	3.00
27. Nov. 2. Cash to Mrs. Slauson at Greeneville.....	5.00
28. Nov. 4. Cash to Mrs. Slauson at Greeneville.....	5.00
29. Nov. 5. Hotel bill at Greeneville for family, paid by C. G. F., according to arrangement prior to G. W. S.'s departure for Pulaski...	15.00
30. Nov. 5. Railroad fares for family, paid by C. G. F., according to arrangement prior to G. W. S.'s departure for Pulaski.....	18.42
31. Nov. 5. Cash handed Mrs. Slauson while en route Greeneville to Columbia	10.00
32. Nov. 5. Pullman fares and baggage charges while en route Greeneville to Columbia.....	3.50
33. Nov. 9. Draft to Columbia from Memphis.....	30.00
38. Nov. 18. Check from C. G. F. while at Columbia.....	30.00
40. Nov. 18. Check to H. E. Jones to take up G. A. Blackmore's note (application written by G. W. S. and postponed). Subsequently H. E. Jones' check sent G. W. S., refunding \$18.80.....	125.25

Section 5445 of the Code of Tennessee provides as follows:

"If a contract of loan for use, or of letting and hiring, or other bailment or agency, be used merely as the means of procuring possession of property, with an intent to make a fraudulent appropriation at the time, it is larceny."

The items set out in the foregoing list are given merely to show the character of the indebtedness. All the debit items are of the same character. It would be an insult to the intelligence of the inspector of these items to enter into an argument to show that neither the items nor the aggregate which they constitute could be regarded as evidences of money "fraudulently appropriated," within the meaning of the Tennessee law. Here are two men engaged in the business of insurance,—one of them as a traveling solicitor of insurance; the other keeping their office, collecting and managing their earnings, under an express contract, and defraying the traveling and family expenses of the traveling associate in business. These dealings run on for a year, and there is a settlement in December, and a balance ascertained due from Slauson to Gerald M. Funnell. There is no misunderstanding at the time of this settlement between Slauson and Gerald M. Funnell. There is no pretense or charge of fraud at the time. It is not shown that Gerald M. Funnell, with whom the business was done, ever believed or charged fraud against Slauson. But Cecil G. Funnell bought the debt held by Gerald M. Funnell against Slauson. He did not charge fraud for a series of months. He sued for the debt, as due by contract, as late as March 10th, just passed. He sent his claim to Petersburg, where Slauson lived and kept house with his family, ordering suit to be brought upon it, as due on a contract.

It seems that, for some reason not proper or necessary to be exposed in public court, Cecil G. Funnell was very anxious for Slauson to return with his family to Tennessee. His eagerness for this return began to manifest itself in the latter part of December, 1895,

apparently before he purchased the debt against Slauson from Gerald M. Funnell. Persuasions failing to bring about Slauson's return to Tennessee, resort was soon had to threats. He first threatened to publish, and then published, circulars assailing the character of Slauson, and mailed them to insurance men and others. He threatened other attacks upon Slauson, the character of which was not made known to Slauson. He talked to Slauson's wife, and rehearsed his threats to her. He did this on one occasion on a railroad train, and did it so effectually that the woman, in alarm, wrote to her husband a letter, from which the following extracts are made:

"On Train.

"* * * Cecil arrived in Chattanooga last night at 11. He has told me of all the awful things that he could do to you. He will write to papa, to the bank at —— [illegible], and, in fact, to every one. He will have it advertised that you did God knows what. He said that he could take our trunks, but for our sakes he don't want to do that; but, if I go on to you before you and he come to some understanding, he will make it dreadful for all. He said you have his railroad ticket. Have you? He said he gave you money to go to Baltimore on, and back, if you did not succeed in arranging things." etc.

Nothing availed to bring back Slauson and his family to Tennessee,—neither persuasion nor threats. After purchasing the debt due from Slauson to Gerald M. Funnell, and after bringing suit upon the debt, as due upon a contract, as late as the 10th of March just passed, he then resorted to the extradition proceedings which have been brought before me for consideration, the foundation of which is Cecil G. Funnell's affidavit charging the crime of a "fraudulent appropriation" of money.

Comment upon his conduct is unnecessary. His charge of fraud against Slauson is an afterthought. The affidavit by which he charged the fraud is a flagrant perjury. His prosecution of this extradition proceeding is malicious. The governor of Tennessee was deceived, and the requisition which he issued for Slauson was improvidently granted. The governor of Virginia was not advised of, and had no means of testing the truth of, the allegations of the requisition; but, in performing his duty in issuing his warrant directing the arrest of Slauson, he took care to reserve to him in advance the privilege of the writ of habeas corpus, under which he is now before me.

I have thus dealt with the facts in the case. The prisoner ought to be discharged on technical grounds also. The law in such proceedings requires that the charge shall be substantially set forth in the papers filed. In these papers there is no crime substantially set forth. There is merely a reference to a criminal statute, itself not identified by the reference. Merely to refer to a class of criminal acts is not to charge a specific crime. This is all that has been done in this affidavit. Nor does the affidavit set out important elements of this statutory offense. The warrant is vague, and does not inform the prisoner of the character of the crime, nor the time, place, or circumstance of its commission, of which every prisoner is entitled to be advised.

George W. Slauson must be discharged from custody.

UNITED STATES v. SAUER et al.

(District Court, W. D. Texas. April 6, 1896.)

No. 34.

1. CRIMINAL PROCEDURE—EXAMINATION OF ACCUSED PERSONS—REV. ST. § 1014.

Under Rev. St. § 1014, which assimilates all the proceedings for holding persons accused of crime to answer before a court of the United States to proceedings had for similar purposes under the laws of the state where the proceedings take place, all the regulations and steps incident to the proceeding before a United States commissioner, from its commencement to its close, are guided by the state laws, so far as they may be applicable to the federal courts, if no rule upon the same subject has been prescribed by the federal statutes.

2. SAME—HOLDING TO BAIL—POWER OF UNITED STATES COMMISSIONER.

The authority, therefore, of a United States commissioner to take bail for the appearance of an accused person to answer further before such commissioner to the charge against him is dependent upon the existence of such authority in examining magistrates under the laws of the state in which the proceedings before the commissioner are pending.

3. SAME—TEXAS STATUTE.

Such magistrates have the power under the statute of Texas, and accordingly United States commissioners sitting in that state have the same.

4. SAME—FORM OF BAIL BOND.

The form of a bail bond taken by a United States commissioner should conform, in all substantial particulars, to the requirements of the laws of the state in which the commissioner is sitting, so far as such laws are applicable.

5. SAME—TEXAS STATUTE—RECEIVING SMUGGLED GOODS.

The statute of Texas makes it a requisite of a bail bond that the offense of which the defendant is accused be distinctly named, and that it appear therefrom that he is accused of an offense against the laws of the state. Accordingly, *held*, that a bail bond, taken by a United States commissioner sitting in Texas, which states that the defendant is charged with receiving and concealing smuggled goods, but does not state that he did so knowing the same to be smuggled, is invalid, since the receipt or concealment of smuggled goods is not an offense against the United States unless they are known to be smuggled.

R. U. Culberson, U. S. Atty.

Falvey & Davis and W. M. Coldwell, for defendants.

MAXEY, District Judge. This suit was instituted by the United States, through the district attorney, to recover the penalty of a bail bond, in the sum of \$1,000, executed by George Sauer as principal and J. C. Lackland and Richard Caples as sureties. It is alleged in the petition that the complaint upon which Sauer was arrested was made before F. B. Sexton, a circuit court commissioner at El Paso, on the 12th day of October, A. D. 1894, and, pending the preliminary examination before the commissioner, the defendant Sauer was required to enter into a bond, payable to the United States, to make his personal appearance before the commissioner, at his office in El Paso, on the 1st day of November, 1894, to further answer the complaint, and there remain from day to day until by the commissioner discharged.

The bond, which is duly signed by Sauer, Lackland, and Caples, is in these words:

"The United States of America, Western District of Texas.

"Know all men by these presents, that we, George Sauer, of El Paso county, as principal, and J. C. Lackland, of El Paso county, and Richard Caples, of El Paso county, as sureties, acknowledge ourselves to owe and stand indebted unto the United States of America in the sum of one thousand dollars, for the payment of which, well and truly to be made, we hereby do jointly and severally bind ourselves, our heirs, and legal representatives. Conditioned to be void if the above-named George Sauer shall well and truly make his personal appearance before F. B. Sexton, commissioner of the circuit court of the United States for the Western district of Texas, at El Paso, at the office of said commissioner, on the 1st day of November, 1894, and there remain from day to day until discharged by the commissioner, to answer the United States in a complaint filed against him, the said George Sauer, in said commissioner's court, charging him with having and receiving into his possession and concealing smuggled goods.

"Witness our hands this 16th day of October, in the year of our Lord one thousand eight hundred and ninety-four."

It is further alleged that the hearing continued until the 8th day of November, at which time Sauer failed to appear, and the bond was duly declared forfeited by the commissioner. Greater particularity in reciting the cause of action becomes unnecessary in view of the questions raised upon the demurrers.

The defendants appeared, by their attorneys, and interposed several demurrers to the petition, which may be properly and conveniently embodied in the two following: (1) A general demurrer; (2) a special demurrer, as follows:

"That said bond set out in the plaintiff's petition charges that defendants obligated themselves that said Sauer should appear [at the time and place therein mentioned] to answer the United States in a complaint filed against him, the said George Sauer, in said commissioner's court, charging him with having and receiving into his possession and concealing smuggled goods; that there is no offense charged, the said bond not charging that said George Sauer knew that said goods had been or were smuggled goods."

Under the general demurrer the question is presented whether the commissioner had authority to take a bond with surety for the appearance of the defendant before himself. And the answer to this inquiry must necessarily depend upon the law by which circuit court commissioners are governed in admitting to bail persons who are charged before them with the commission of crime. The power of commissioners to act as committing magistrates is conferred by section 1014, Rev. St. U. S., which is in the following language:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode or process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

The question whether, under this statute, the commissioner has authority to take bail for the appearance of a defendant before him-

self, has been considered by the courts in several cases; and it has been uniformly ruled, so far as the court is advised, that such power exists only when it is conferred upon examining magistrates by the laws of the state in which the proceeding takes place. And, on the other hand, the power has been denied in a case where the state statutes did not confer it upon committing magistrates. The cases of *U. S. v. Rundlett*, 2 Curt. 41-48, Fed. Cas. No. 16,208, and 12 Myers, Fed. Dec. § 1525, and *U. S. v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393, come within the first category, and *U. S. v. Case*, 8 Blatchf. 250-254, Fed. Cas. No. 14,742, and 12 Myers, Fed. Dec. § 1529, is embraced within the second.

In the three cases cited the decisions are based upon the ground that, under section 1014, Rev. St., the courts are relegated to the state statutes to ascertain and determine the nature and extent of the duties and powers of commissioners in arresting, imprisoning, and bailing persons accused of offenses against the United States. Thus, in *Rundlett's Case*, it is said by Mr. Justice Curtis that, in his opinion:

"It was the intention of congress by these words, 'agreeably to the usual mode of process against offenders in such state,' to assimilate all the proceedings for holding accused persons to answer before a court of the United States to the proceedings had for similar purposes by the laws of the state where the proceedings should take place; and, as a necessary consequence, that the commissioners have power to order a recognizance to be given to appear before them in those states where justices of the peace or other examining magistrates, acting under the laws of the state, have such power."

In *U. S. v. Horton*, *supra*, it is said by Judge Dillon that:

"Whatever authority the commissioner has in respect to the arresting, imprisoning, or bailing of criminal offenders is conferred by statute, and must be exercised by him pursuant to its requirements. Congress has not seen fit to prescribe a uniform mode of its own in respect to preliminary proceedings against persons accused of a violation of its criminal enactments, but in the thirty-third section of the judiciary act it is provided that the procedure in such cases should be 'agreeably to the usual mode of process against offenders in such state'; that is, in the state in which the offenders may be arrested and the proceedings had. To this section we must resort to ascertain the powers of commissioners in respect to the arrest, imprisonment, and bail of offenders against the laws of the United States."

And in *U. S. v. Case*, *supra*, where the commissioner was held to be without power to take a recognizance conditioned for the appearance of the accused before himself for further examination, because the laws of New York conferred no such authority upon committing magistrates, Judge Woodruff employs this language in reference to the ruling of Mr. Justice Curtis:

"It is quite clear, I think, that the thirty-third section of the judiciary act of 1789 (1 Stat. 91) was rightly construed by Judge Curtis in *U. S. v. Rundlett*, 2 Curt. 41, Fed. Cas. No. 16,208, and that, in a state where a justice of the peace has power to take a recognizance to appear from day to day pending the examination of an accused, there a United States commissioner has such power."

In the case of *U. S. v. Evans*, 2 Flip. 605, 2 Fed. 147, and 12 Myers, Fed. Dec. § 1534, Judge Hammond says:

"The federal courts are bound, in this matter of taking bail in criminal cases, by the state laws, by express command of the statutes."

It is said by Judge Bunn, in *U. S. v. Keiver*, 56 Fed., at page 425, that section 1014—

"Evidently refers the details of the proceeding to the state statute, and it is by that law that we must determine their regularity and validity."

Construing the same section of the Revised Statutes, it is said by Judge Deady, in *U. S. v. Martin*, 17 Fed. 155, 156, that this section—

"Is the authority under which a commissioner of the circuit court acts when engaged in a proceeding for the arrest, commitment, or bail of a person charged with crime against the United States, and such section provides that he shall proceed therein 'agreeably to the usual mode of process' against offenders in such state. A commissioner, acting under this statute, is simply a committing magistrate. The ambiguous phrase, 'mode of process,' is interpreted to mean 'mode of proceeding,' and this proceeding is according to the law of the state in similar cases. *U. S. v. Rundlett*, 2 Curt. 42, Fed. Cas. No. 16,208; *In re Martin*, 5 Blatchf. 307, Fed. Cas. No. 9,151; *U. S. v. Case*, 8 Blatchf. 250, Fed. Cas. No. 14,742. The validity of the process and order in question must, then, be determined by reference to the laws of Oregon for the arrest, examination, and commitment of persons charged with the commission of crime against the laws of the state."

See, also, *U. S. v. Insley*, 4 C. C. A. 296, 54 Fed. 223.

In considering the question of fees due to commissioners for services performed in obedience to section 1014, Mr. Justice Brown, citing the Cases of *Rundlett* and *Horton*, supra, in *U. S. v. Ewing*, 140 U. S., at page 144, 11 Sup. Ct. 743, says:

"As this section requires proceedings to be taken 'agreeably to the usual mode of process against offenders in such state,' it is proper to look at the law of the state in which the services in such case are rendered to determine what is necessary and proper to be done, and inferentially for what services the commissioner is entitled to payment."

And in *U. S. v. Patterson*, 150 U. S., at page 67, 14 Sup. Ct. 20, Mr. Justice Brewer, speaking for the court, uses this language:

"It was held, in the case of *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. 743, that, in view of section 1014 of the Revised Statutes, the law of the state in which the services are rendered must be looked at in order to determine what is necessary in the matter of procedure."

Upon careful consideration of section 1014 of the Revised Statutes and authorities above cited, the following conclusions are derived: (1) Section 1014 assimilates all the proceedings for holding accused persons to answer before a court of the United States to the proceedings had for similar purposes under the laws of the state where the proceedings take place. (2) The term, "agreeably to the usual mode of process against offenders in such state," as used in the statute, should be so construed as to include all the regulations and steps incident to the proceeding before the commissioner from its commencement to its termination, as prescribed by the state laws, so far as they may be applicable to the federal courts. (3) The authority of the commissioner, therefore, to take bail for the appearance of an accused person to further answer the charge before him is existent or nonexistent accordingly as it may be conferred upon or denied to examining magistrates by the laws of the state in which the proceedings before the commissioner may be

pending. (4) Bail bonds, taken by the commissioner, should conform in all substantial particulars to the requirements of the state laws, so far as such laws may be applicable to the federal courts.

It follows that resort must be had to the statutes of this state to determine (1) whether Commissioner Sexton had authority to take the bond in question; and (2) whether such bond, as measured by the laws of Texas, is legally sufficient.

The following articles of the Texas Code of Criminal Procedure bear upon the questions to be decided:

"Art. 259. When a person accused of an offense has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure the aid of counsel.

"Art. 260. The magistrate may, at the request of the prosecutor or person representing the state, or of the defendant, postpone for a reasonable time the examination so as to afford an opportunity to procure testimony, but the accused shall, in the meanwhile, be detained in the custody of the sheriff or other duly authorized officer, unless he give bail to be present from day to day before the magistrate, until the examination is concluded, which he may do in all cases, except murder and treason.

* * * * *

"Art. 284. A 'bail bond' is an undertaking entered into by the defendant and his sureties for the appearance of the principal therein before some court or magistrate to answer a criminal accusation; it is written out and signed by the defendant and his sureties.

"Art. 285. A bail bond is entered into either before a magistrate upon an examination of a criminal accusation against a defendant, or before a judge upon an application under habeas corpus; or it is taken from the defendant by a peace officer who has a warrant of arrest or commitment, as hereafter provided.

"Art. 286. Wherever the word 'bail' is used with reference to the security given by the defendant, it is intended to apply as well to recognizances as to bail-bonds. When a defendant is said to be 'on bail,' or to have 'given bail,' it is intended to apply as well to recognizances as to bail bonds.

* * * * *

"Art. 288. A bail bond shall be sufficient if it contain the following requisites: (1) That it be made payable to the state of Texas. (2) That the obligors thereto bind themselves that the defendant will appear before the proper court or magistrate to answer the accusation against him. (3) That the offense of which the defendant is accused be distinctly named in the bond, and that it appear therefrom that he is accused of some offense against the laws of the state. (4) That the bond be signed by the principal and sureties, or in case all or either of them cannot write, then that they affix thereto their marks. (5) That the bond state the time and place when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. In stating the time it is sufficient to specify the term of the court; and in stating the place it is sufficient to specify the name of the court or magistrate and of the county.

"Art. 289. The rules laid down in this chapter respecting recognizances and bail bonds are applicable to all such undertakings when entered into in the course of a criminal action, whether before or after indictment or information, in every case where authority is given to any court, judge, or magistrate or other officer, to require bail of a person accused of an offense, or of a witness in a criminal action.

* * * * *

"Art. 307. The rules laid down in the preceding articles of this chapter, relating to the amount of the bail, the number of sureties, the person who may be surety, the property which is exempt from liability, the form of bail bonds, the responsibility of parties to the same, and all other rules in this chapter of a general nature, are applicable to bail taken before an examining court."

It will be observed that article 260 of the Code of Criminal Procedure of this state expressly authorizes the examining magistrate to postpone the examination for a reasonable time to afford the opportunity of procuring testimony, but, employing the words of the statute, "the accused shall in the meanwhile be detained in the custody of the sheriff or other duly authorized officer, unless he give bail to be present from day to day before the magistrate, until the examination is concluded, which he may do in all cases, except murder and treason." Examining magistrates in Texas, therefore, having power to admit accused persons to bail for their appearance from day to day pending the examination, commissioners of the circuit court of the United States have like powers in this state. To avoid being misunderstood, it is deemed not inappropriate to here repeat what has, in effect, been already said, that the statutes of the state should govern commissioners in the matter of arresting, imprisoning, and admitting to bail accused persons, so far as they may be applicable to the federal courts, but in no case should they be held applicable where the federal statutes have prescribed a rule upon the same subject.

The remaining question to be considered is specifically pointed out by the special demurrer of defendants, although included within the general demurrer, and it challenges the sufficiency of the bond. It is objected to the bond that it describes no offense against the laws of the United States, in that it fails to recite want of knowledge on the part of Sauer that the smuggled goods, in his possession and concealed, had been smuggled or imported contrary to law. The bond, as before shown, is conditioned for the appearance of Sauer "to answer the United States in a complaint filed against him, the said George Sauer, in said commissioner's court, charging him with having and receiving into his possession and concealing smuggled goods."

The statute upon which the complaint is predicated reads as follows:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell or in any manner facilitate the transportation, concealment or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars, or be imprisoned for any term not exceeding two years, or both." Rev. St. U. S. § 3082.

The third clause of article 288 of the Texas Code of Criminal Procedure, hereinbefore set out, provides:

"That the offense of which the defendant is accused be distinctly named in the bond, and that it appear therefrom that he is accused of some offense against the laws of the state."

Does it appear from Sauer's bond that he is accused of an offense against the laws of the United States? Manifestly not. Guilty knowledge is the gist and essence of the offense attempted to be described in the bond. Section 3082 of the Revised Statutes does not make the mere receipt or concealment of smuggled goods an of-

fense. There must be, on the part of the person receiving or concealing the goods after their importation, knowledge of their illegal importation. Cases falling under this section of the statutes have been repeatedly before this court, and the ruling has been uniform that the jury was not authorized to convict unless the possession or concealment of the goods was accompanied with knowledge on the part of the possessor that they had been smuggled or imported contrary to law. It is evident that it does not appear from the bond that Sauer is charged with any offense against the laws of the United States, and hence the bond is not binding upon him or his sureties. See *U. S. v. Hand*, 6 McLean, 274, Fed. Cas. No. 15,296; *U. S. v. Goldstein's Sureties*, 1 Dill. 413, Fed. Cas. No. 15,226; and the four Cases of *Horton*, *Rundlett*, *Case*, and *Keiver*, *supra*.

The conclusion reached by the court is sustained by the supreme court and court of criminal appeals of this state, as a reference to the authorities will clearly show. Thus, in *Dailey v. State*, 4 Tex. 419, the supreme court says:

"The undertaking of the party contained in the recognizance or bond is to appear and answer to a charge simply of 'having in his possession stolen goods,' and the scire facias follows the recognizance in its description of the charge. We know of no law which makes this an indictable offense, or which authorizes the taking of a recognizance to answer this charge. The mere fact of having in possession stolen goods is not a crime. The possession may be lawful, and would not be criminal unless accompanied with a criminal sinister or felonious intent. The possession of stolen goods may be evidence to support a charge of larceny, but it does not, of itself, constitute that crime. As evidence, it is by no means conclusive, but is but presumptive, and is stronger or weaker according to the circumstances attending the possession. 2 Starkie, Ev. 449, 480; 1 Phil. Ev. 168. It is manifest that the present is a very different charge from that of receiving stolen goods knowing them to be stolen. And, in a word, it is not a crime known either to the common or statute law of this state. It is perfectly clear that neither a recognizance nor the scire facias upon it will be sufficient to authorize or support a judgment against the principal or surety, when the charge does not appear to be such as may be the subject of a criminal prosecution, and which requires bail. 'It is not necessary to recite the specific charge. To answer a charge of felony would be sufficiently explicit, because for every felony an indictment will lie.' *West v. Com.*, 3 J. J. Marsh. 642, 643. But no indictment can be maintained on the charge of having in possession stolen goods. The recognizance, therefore, was unauthorized and invalid, and will not support a judgment."

Stancel v. State, 6 Tex. App. 460; *Morris v. State*, 4 Tex. App. 554. See, also, *State v. Cotton*, 6 Tex. 426; *Cotton v. State*, 7 Tex. 548; *Tousey v. State*, 8 Tex. 174; *McDonough v. State*, 19 Tex. 293; *Foster v. State*, 27 Tex. 236; *State v. Gordon*, 41 Tex. 510; *Sively v. State*, 44 Tex. 274; *McLaren v. State*, 3 Tex. App. 680, citing numerous authorities; *O'Bannon v. State*, 9 Tex. App. 465; *Kramer v. State*, 18 Tex. App. 13; *Edwards v. State*, 29 Tex. App. 452, 16 S. W. 98; *Allison v. State*, 33 Tex. Cr. R. 501, 26 S. W. 1080.

It is said by Mr. Chief Justice Roberts in *State v. Gordon*, *supra*, that:

"The Code of Criminal Procedure on this subject prescribes that the bond shall require the defendant to appear before the proper court 'to answer the accusation against him.' And in order that the accusation may be shown to be such as to authorize the bond, it is further prescribed 'that the offense of

which the defendant is accused be distinctly named in the bond, and that it appear therefrom that he is accused of some offense against the laws of the state.'"

In the early case of *Dailey v. State*, supra, it was ruled, as shown above, that a recognizance would not be sufficient to authorize or support a judgment against the principal or surety "when the charge does not appear to be such as may be the subject of a criminal prosecution, and which requires bail," and in the opinion it is also stated not to be necessary to recite the specific charge. "To answer a charge of felony would be sufficiently explicit, because for every felony an indictment would lie."

The distinction recognized and enforced by the courts of this state seems to be this:

"If an offense is one *eo nomine*, then it is only necessary, in the recognizance, to recite it by its name, as theft, etc. * * * When an offense is not one *eo nomine*, then the rule is well settled that the recognizance must state the essential elements of the offense, so that it will appear that a particular offense against the law is charged against the principal." *Edwards v. State*, supra; *Allison v. State*, supra; *Morris v. State*, supra.

The offense of receiving or concealing smuggled property, with knowledge that it had been unlawfully imported, as prescribed by section 3082 of the Revised Statutes, is not an offense *eo nomine*, and, according to the rulings of the Texas courts from the earliest cases to the present time, the offense must be described in the bail bond by giving substantially the statutory ingredients necessary to constitute it, in order that it may appear therefrom that the defendant is accused of some offense against the laws of the United States.

The cases cited pointedly support the view taken by the court touching the sufficiency of Sauer's bond. But the district attorney claims that *U. S. v. Evans*, 2 Flip. 605, 2 Fed. 147, and authorities there cited, announce a different rule, and that, upon the authority of those cases, the bond of Sauer is a valid obligation. By reference to the *Evans* Case it will be observed that Judge Hammond holds, as already shown, that the federal courts are bound, in the matter of taking bail in criminal cases, by the state laws, and it will be further seen that *Evans' Case* arose in the state of Tennessee, where it is held, by the supreme court of that state, that a bail bond is good "without even a specification of the offense charged against the defendant." *State v. Adams*, 3 Head, 261; *State v. Rye*, 9 Yerg. 386. *U. S. v. Stien*, 13 Blatchf. 127, Fed. Cas. No. 16,403, has no application to this case. The questions passed upon here were not decided in *U. S. v. Reese*, 4 Sawy. 629, Fed. Cas. No. 16,138, and hence the decision of Mr. Justice Field, whose opinions are entitled at all times to great consideration, cannot be considered as a guide for the court in this case. The other cases referred to by the district attorney were decided by state courts, and have no reference to the questions which have been considered by this court. The ruling upon Sauer's bond is based distinctly upon the statutes of Texas and the decisions of the highest courts of this state, and the rulings of other state courts as to the suffi-

ciency of bail bonds at common law would scarcely be pertinent to the inquiry.

Had a special exception been interposed by the defendants on the first ground discussed by the court, it would be overruled, for the reason that the commissioner had the power to take bail from Sauer conditioned for his appearance from day to day pending his examination. But the general demurrer not only raises that question, but also goes to the sufficiency of the bond upon the objection embraced in the special demurrer. In a word, all objections urged to the bond might have been properly presented by general demurrer; and, as the bond must be adjudged insufficient and a void obligation, the general demurrer, as well as the special demurrer, should be sustained, and the suit dismissed, and it is so ordered.

UNITED STATES v. DE RIVERA et al.

(Circuit Court, S. D. New York.)

CUSTOMS DUTIES—LIQUIDATION BY COLLECTOR—LIMITATION OF ACTIONS.

Iron ore was imported in 1881, a certain sum being then paid as duties, after the appraiser had raised the valuation. In 1890 the collector decided that an additional amount was due, and an action was brought to recover the same. The importers claimed that their original payment was a liquidation, and that the action was barred within one year thereafter. *Held*, that the liquidation was not complete until the collector had acted in the matter, and that there was no provision of law requiring him to liquidate within any particular time, or to give notice to the importer thereof.

Action for balance of duties.

On September 20, 1881, and September 22, 1881, defendants imported certain iron ore in the United States by the vessels Samuel Welsh and Mary C. Hale, respectively, and entered same at the port and collection district of Philadelphia, paying, at the time of such entry, the sums of \$299.80 on each consignment as duties. Subsequently, on the 14th day of March, 1890, the collector decided that the amount of duties to be paid on said goods was, respectively, \$754 and \$750.40, leaving a balance due the United States from the defendants of \$904.80, to recover which this action was brought. The defendants admitted the importation and entry of the said iron ore, but denied their liability for balance of duties, claiming that the payment made by them at the time of entry of such goods was a liquidation, and that, as more than a year since such liquidation had expired, the same was final and conclusive.

Wallace Macfarlane, U. S. Atty., and James R. Ely, Asst. U. S. Atty.

William H. Blain, for defendant.

LACOMBE, Circuit Judge (orally charging jury, after stating the case as above). I have examined this matter with great care since Friday, in the hopes that, in some way or other, I could find some means for relieving the defendant, in whole or in part, from this claim; but, gentlemen of the jury, it is impossible to do so. The laws of the United States in regard to the liquidation and collection of duties upon imports are evidently constructed upon the

theory that the citizen who imports goods has no rights at all, or, at least, that the federal government need not be under the slightest concern about them. Under the statutes and the authorities, it is clear that there was no liquidation until the collector himself acted. The mere act of the appraiser in raising the value was a step towards liquidation, but liquidation was not complete until the collector had performed his act. Under the statute, moreover, the collector may "liquidate" whenever he pleases. It may be a week after the goods arrive, or it may be eight years, as it was in this case; and, under the law, he is under no obligation to notify the merchant of his liquidation. The merchant, apparently, has got to keep watch from the time he gets the goods until the collector acts and liquidates, and he takes the risk of not being advised of that action when it occurs. Under the laws as they stand, there is absolutely nothing to do in this case but to direct a verdict in favor of the plaintiff for the full amount claimed, with an exception to the defendant.

The jury rendered a verdict for the plaintiffs, in accordance with the direction of the court, for \$904.80, with interest from March 14, 1890.

KENT v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 6, 1896.)

1. CUSTOMS DUTIES—CLASSIFICATION—BURLAP BAGS REIMPORTED.

The provision in the act of February 8, 1875 (section 7), amending the tariff laws so as to admit free, on their return to the United States, foreign-made bags in which American grain has been exported (thus placing them on the same footing with similar American bags), was superseded by the provisions of the tariff acts of 1883 and 1890, from which this provision was omitted; and under the latter act (paragraph 365) such foreign bags were dutiable at 2 cents per pound. 68 Fed. 536, affirmed.

2. REPEAL OF STATUTES.

When a later act is a complete revision of the subject to which an earlier statute relates, and is manifestly intended as a substitute for the former legislation, the prior act must be considered as repealed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application to review a decision of the board of general appraisers affirming the action of the collector of the port of New York in respect of the classification for duty of certain merchandise. The circuit court affirmed the decision of the board (68 Fed. 536), and the importer appealed.

Stephen G. Clarke, for appellant.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In June, 1893, Percy Kent, the appellant, imported into the port of New York 75 bales of grain bags made of burlaps, which had been used in the exportation of Amer-

ican grain, and were imported, after such use, as secondhand bags, being, for the most part, known as "cental bags." Such cental bags are made in very large quantities in foreign countries. Two bales, which were selected and agreed upon as representative bales, were found to contain 1,613 bags of foreign manufacture and 387 of American manufacture. The collector classified them for duty under paragraph 365 of the tariff act of October 1, 1890, which is as follows: "Bags for grain made of burlaps, two cents per pound." As to the bags of foreign manufacture, the importer protested against this classification, upon the ground that they were entitled to free entry, under the provisions of section 7 of the act of February 8, 1875 (18 Stat. 307), which provided as follows: "That bags, other than of American manufacture, in which grain shall have been actually exported from the United States, may be returned empty to the United States, free of duty, under regulations to be prescribed by the secretary of the treasury." The board of general appraisers affirmed the action of the collector upon the bags of foreign manufacture, and upon appeal the circuit court affirmed the decision of the board.

The sole question in the case is whether the quoted proviso in section 7 of the act of February 8, 1875, was in force at the time of the importation. If it was, the bags were exempted from duty. Schedule C of title 33 of the Revised Statutes—the title which related to duties upon imports—imposed a duty of 40 per centum ad valorem upon bags (except bagging for cotton) composed wholly or in part of jute, the material of which grain bags are made; but grain bags, the manufacture of the United States, if exported containing American produce, and if declaration was made of intent to return the same empty, were exempt from duty (Rev. St. § 2505). The act of February 7, 1875, was in part an amendment of the existing statutes, and the provision which has been quoted was for the purpose of placing empty grain bags of foreign and home manufacture, when returned to this country after having been used in the exportation of grain, in the same dutiable condition. Section 6 of the comprehensive tariff act of March 3, 1883 (22 Stat. 489), provided that on and after July 1, 1883, "the following sections shall constitute and be a substitute for title thirty-three of the Revised Statutes." The previously existing provision in regard to empty returned bags of American manufacture was re-enacted in substance in the free list, but the provision in section 7 of the act of 1875 was omitted, and bags, except bagging for cotton, were made dutiable at 40 per cent. ad valorem. Paragraph 493 of the tariff act of October 1, 1890, retained the same exemption from duty upon returned empty bags of American manufacture, and was silent in regard to returned empty foreign-made bags which were filled when exported. Thus, since 1875, two comprehensive revisions of the title in the Revised Statutes relating to duties upon imports have taken place, and the amendment of the act of 1875, in regard to foreign-made bags, has been omitted, while the subject of the dutiable rate upon bagging has received the usual consideration. These successive acts show a plain intention to substitute their respective provisions

in regard to bagging in the place of all prior legislation on that subject. In *re Straus*, 46 Fed. 522. It is a general rule that when a later statute is a complete revision of the particular subject to which the earlier statute related, and the new legislation was manifestly intended as a substitute for the former legislation, the prior act must be held to have been repealed. *U. S. v. Claffin*, 97 U. S. 546; *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. 434. But it is said that *Russell v. Worthington*, 23 Fed. 248, shows that certain dutiable features of the act of 1875 were not repealed by the tariff act of 1883. The statutory facts upon which that case turned were quite different from those which are here involved, and showed, in the opinion of the experienced judge who tried it, that the new act was not intended to apply to the particular provision which was the subject of the controversy. The vital facts in the two cases are different. The judgment of the circuit court is affirmed.

MILLER v. DONOVAN et al.

(Circuit Court of Appeals, Second Circuit. April 6, 1896.)

1. PATENTS—EXTENT OF CLAIMS—ROAD CARTS.

The Miller patent, No. 371,090, for an improvement in road carts, is restricted, as to claims 1 and 2, by the prior state of the art, to combinations having longitudinal springs of the precise form shown; and those claims are not infringed by a cart not having the two-part springs described in the patent. 62 Fed. 923, affirmed.

2. SAME.

The Miller patent, No. 459,098, for an improvement in road carts, designed to give to the longitudinal springs an increased longitudinal motion, is limited, as to claims 1 and 2, to a combination having the precise form of spring shown; for it was old in the art to give play to a spring by running one or both ends through an eye or slot with rubber packing, washers, etc., to prevent rattling, or too free play of the ends of the spring. 62 Fed. 923, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by Henry J. Miller against James Donovan and James J. Fitzgerald for alleged infringement of certain patents for improvements in road carts. The circuit court dismissed the bill for want of infringement (62 Fed. 923), and complainant appeals.

Herbert Knight and Edmund Wetmore, for appellant.

Henry Bacon, for appellees.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The complainant brought a bill in equity in the circuit court of the United States for the Southern district of New York, which was founded upon the alleged infringement by the defendants of claims 1, 2, and 5 of letters patent No. 371,090, dated October 4, 1887, issued to Henry J. Miller, and of

claims 1, 2, 7, 8, 9, and 10 of letters patent No. 459,098, dated September 8, 1891, also issued to said Miller. Each of said patents was for improvements in road carts. Upon final hearing the circuit court found that claims 1, 2, and 5 of No. 371,090 were valid, but contained narrow improvements upon previously known road carts, were therefore entitled to a narrow construction, and were not infringed; that claims 1 and 2 of No. 459,098 were valid, but were not infringed; that the invention of claim 7 had been anticipated, and that the other claims of the patent were invalid for lack of patentable invention. The bill was therefore dismissed. Upon this appeal the complainant relies upon the infringement of claims 1 and 2 in each of said patents. The objects of the improvements, and a sufficient description of the patented and the defendants' wagons, were given in the opinion of the circuit judge. 62 Fed. 923. The claims which are now in issue in each of said patents are as follows:

"(1) In a road cart or other vehicle, the combination of the transverse spring attached at the ends of the shafts, and supporting a centrally-located seat, the said shafts resting upon other springs, as shown and described.

"(2) In a road cart or other two-wheeled vehicle, the springs for supporting the shafts, constructed and arranged substantially as shown and described, in combination with said shafts, the transversely-arranged spring extending between and attached to them, the centrally-located seat upon said spring, and the downwardly and forwardly extending braces and supporters connected directly to the seat and pivotally to the shafts; all arranged as and for the purposes set forth."

"(1) In a light sulky or road cart, the combination of the axle, the shaft extending over and to the rear thereof, the bent plate or bar springs bolted at their forward ends directly and rigidly to the shafts forward of the axle; thence bent down slightly, and resting on the axle; thence passing to the rear thereof, and the sockets or eyes fixed to the shafts' rear ends, having a gum or rubber cushion within it with a hole to receive cushion and permit longitudinal motion of said springs, substantially as set forth.

"(2) In a road or other cart, the combination of the shafts, the axle, the spring fixed at one end of the shafts, and at an intermediate point to the axle, eyes fixed to the shafts, and adapted to receive the other ends of said springs, and resilient cushions in said eyes, surrounding the ends of said springs, the greater portion of the body of said resilient cushions being above the springs, substantially as herein set forth."

The complainant was of opinion that claim 1 of 371,090 was intended to specify the combination of a main transverse spring attached at its ends to the shafts, and so arched that the seat may be supported upon its center, and with supplementary springs interposed between the shafts and the axle; and that claim 2 included the same features, but limited the longitudinal springs to a construction having the sliding movement, and having the braces connected directly to the seat and pivotally to the shafts. The arched character of the transverse springs has a more important patentable office in the mind of the complainant's expert than it apparently had in the mind of the patentee, either in the specification and claims which were first presented to the patent office or which were finally allowed. The transverse spring was pressed upon the patent office, not as an arched spring, but as a transverse spring in combination with the longitudinal spring. We agree with the circuit judge that:

"An examination of the various patents put in evidence to show the prior art discloses the fact that it was old to support the shafts above the axle by springs extending longitudinally beneath them, and that such a device was used in combination with a transverse spring supporting the seat. Reference to the patents of Bach, No. 288,757, November 20, 1883; Bach, No. 299,319, May 27, 1884; Barber, No. 316,934, May 5, 1885; Barber & Croft, No. 342,993, June 1, 1886; not to mention others,—shows that the field of invention was much restricted when the complainant entered it, and that the combination claimed by him can be sustained only when the patent is construed so as to confine them to the particular form of longitudinal spring which he has described, and which, in the precise form shown in his specification and drawings, seems not to have been used in road wagons. As the defendants use no such two-part spring, the bill as to this patent is dismissed."

The improvement shown in patent No. 459,098 consisted in a construction of the longitudinal springs, which permitted increased longitudinal motion. The specification says:

"As customary in such carts, the seat is supported from the axle through the medium of the shafts and suitable springs. * * * The connection of the shafts to the axle is clearly shown in Figs. IV, V, and VI. 5, 5, are heavy plate springs, bolted or otherwise clamped at their forward ends to the shafts. Their rear ends run loosely through eyes, 6, 6, bolted to the shafts. A cushion, 7, preferably of soft rubber, surrounding the end of spring, 5, in each eye, and having the greater portion of its body above said springs, prevents rattling, and also takes up the jar. The springs, 5, 5, are clamped to the axle."

The circuit judge sufficiently points out the precise and narrow character of this improvement, and the defendants' construction, which avoids infringement, as follows:

"It was old in the art to give play to a spring by running one or both of its ends through an eye or slot with rubber packing, washers, or cushions in the eye to obviate rattling or noise, and prevent too free play of the ends of the spring. Such a device is found applied to a spring supporting a wagon seat in the patent to Naramore,—No. 174,288, February 29, 1876. The defendants' structure has plates or bars, bolted to the shafts forward of the axle, bending downward to the axle, where they are clamped, and thence bending upward with their ends inserted into boxes which are secured to the rear ends of the shafts. The interior of each box is packed with rubber, which acts as a cushion for the plate or bar. The bar impinges rearwardly upon this rubber cushion, which permits a slight vibration, sufficient to prevent granulation or fracture consequent upon shock, but does not admit that free play through the box, and consequent longitudinal movement, which is the characteristic of the complainant's device. The differences between defendants' and complainant's shaft supports are slight, it is true, but the field of invention was a very narrow one, and complainant's claim can be sustained only under a construction which will restrict it closely to the precise combination of his patent."

The decree of the circuit court is affirmed, with costs.

OFFICE SPECIALTY MANUF'G CO. v. COOKE & COBB CO.

(Circuit Court, S. D. New York. April 14, 1896.)

1. PATENTS—VALIDITY—PAPER HOLDER.

The Smith & Shannon patent, No. 217,909, for a paper holder, *held* valid and infringed (following prior adjudication).

2. SAME—LIMITATION OF FOREIGN PATENT—COMPRESSOR FOR PAPER FILES.

The Cleague patent, No. 312,086, for a compressor for paper files, *held* to have expired with a previous German patent, obtained, not in the

name of the inventor or the owners, but in connection with the interests of the owners.

3. SAME—INVENTION—ALPHABETICAL INDEX.

There is no patentable invention in extending every other letter of an alphabetical index, outward from, instead of in front of, the one above, making two rows instead of one, and thus shortening by one-half the length of the exposed parts of the sheets.

4. SAME—INDEX FOR PAPER FILES.

The Shannon patent, No. 331,259, for an index for paper files, *held void* for want of invention.

This was a suit by the Office Specialty Manufacturing Company against the Cooke & Cobb Company for alleged infringement of three patents relating to paper files.

Frederick F. Church, for plaintiff.

Wilton C. Donn, for defendant.

WHEELER, District Judge. This suit is brought upon patents Nos. 217,909, granted July 20, 1879, to Frederick Smith and James S. Shannon, for a paper holder; 312,086, granted to W. H. H. Cleague, February 10, 1886, for a compressor for paper files; and 331,259, granted to James S. Shannon, November 24, 1885, for an index for paper files. The first has been thrice adjudged valid. *Shannon v. Jones*, 9 Fed. 205; *Schlicht & Field Co. v. Chicago Sewing-Mach. Co.*, 36 Fed. 585; *Office Specialty Manuf'g Co. v. Winternight & Cornyn Manuf'g Co.*, 67 Fed. 928. Nothing new that appears sufficient to have changed those results has been brought in here, and those decisions are followed.

The invention of Cleague appears to have been made while he was in the employ of Schlicht & Field, and to have belonged to them, and to have been patented in Germany, not in his or their name, but in connection with their interests, by a patent which had expired before this bill was brought. This was not done adversely, nor by a stranger, and nothing surreptitious about it appears; and by force of the statute, which is not confined to the inventor, this patent would expire with the foreign patent. Rev. St. U. S. § 4887.

The third patent is for extending every other letter of an alphabetical index outward from, instead of in front of, the one above, making two rows down instead of one, whereby, as the patent states, "the index-characters upon each two adjacent sheets appear side by side, so that the total length of the exposed parts of the sheets bearing the index-characters is twice as wide, but only half as long, as in similar indexes as heretofore usually constructed." This bringing of the letters into two rows to shorten the length of a single row seems to be too common and mechanical to be patentable.

Decree for plaintiff as to first patent only.

THE FRANK GILMORE.

WALTON et al. v. THE FRANK GILMORE.

(District Court, W. D. Pennsylvania. March 10, 1896.)

1. ADMIRALTY JURISDICTION—CROSS CLAIM—UNLIQUIDATED DAMAGES.

In a suit in rem to recover damages resulting from a collision, admiralty has no jurisdiction of a cross libel for unliquidated damages caused by an entirely different collision.

2. SAME—SET-OFF—INDEPENDENT ACCOUNT.

The admiralty has no jurisdiction of an independent set-off, and hence, in a suit in rem for collision, a so-called "cross bill," seeking to set off a running account, cannot be maintained.

This was a libel in rem for collision. Libelants have excepted to a "cross bill" filed by the claimants.

Watson & McCleave and C. P. Davis, for libelants.

Knox & Reed and Edwin W. Smith, for respondents.

BUFFINGTON, District Judge. Joseph Walton & Co. file this libel against the steamboat Frank Gilmore to recover \$733 damages alleged to have been sustained by the sinking of their coal barge No. 457 on May 20, 1893, in a collision caused by the negligence of the Gilmore. The respondents filed a paper indorsed an "answer and cross bill." They deny the allegations of the libel, and set up that libelants are indebted to them upon a running account in a balance of \$192.93 as of June 14, 1893. They further allege that on September 12, 1890, their coal flat No. 135 and cargo was negligently sunk by libelants' steamboat the Samuel Clark, to their damage \$586; that the aggregate of said items, less a credit of \$70, viz. the net sum of \$516, is due respondents from libelants and for it they pray a decree. Exceptions are filed to the cross bill, alleging it sets up causes of action separate and distinct from the one set forth in the libel, and praying its dismissal.

Upon argument respondents' counsel concede there could not be a balance decreed in respondents' favor under rule 53 of the admiralty, but claim to offset their damages sustained and account due as stated. So far as the damages in the Samuel Clark collision are concerned, no reason is shown for their allowance here. The principle is well settled, both in law and equity, that unliquidated damages are not a subject of set-off (*The Zouave*, 29 Fed. 298); and where they are not connected with the accident on which a libel is based they cannot be the subject of a cross bill. This principle is set forth in *The Dove*, 91 U. S. 385, in which it is said:

"New and distinct matters, not included in the original bill or libel, should not be embraced in the cross suit, as they cannot be properly examined in such a suit, for the reason that they constitute the proper subject-matter of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross suit, and no others, as the cross suit is, in general, incidental to and dependent upon the original suit. *Ayres v. Carver*, 17 How. 595; *Field v. Schieffelin*, 7 Johns. Ch. 252; *Shields v. Barrow*, 17 How. 145."

The account here sought to be set off covers some seven years' mutual dealings between the parties. It embraces a variety of

items, some of which are and some are not subjects of the admiralty jurisdiction. Thus we find services in pumping, fuel furnished, service of boats, "sundries" not specified and aggregating considerable amounts, sales of coal, and cash advanced on the respondents' side and on complainants', "sundries" not itemized, coal furnished, towing services, etc. The subject-matters of the account are in no way connected with the collision charged in the bill.

Respondents cite the case of *The C. B. Sanford*, 22 Fed. 863, as justifying the use of this account as a set-off. A careful examination of the many authorities, both prior and subsequent to that case, lead us to an opposite conclusion. The text-book authorities seem to be unanimous that the admiralty has no jurisdiction of an independent set-off, and those usually allowed are where advances have been made on the credit of the debt or demand for which the plaintiff sues, those which operate by way of diminished pay for maritime service by reason of negligence, imperfect performance or misconduct as damages sustained in consequence of gross violating of the contract. See 2 Pars. Mar. Law, 717. "The respondent cannot, in the admiralty, make a defense of an independent claim by way of set-off." Ben. Adm. 264. And in 2 Pars. Shipp. & Adm. 433, we find the law stated that "a set-off founded on contract, express or implied, is no defense to a libel in a cause of damage." These conclusions are supported by the adjudicated cases. In *Willard v. Dorr*, 3 Mason, 171, Fed. Cas. No. 17,680, Justice Story said:

"The remaining questions respect the set-offs asserted by the defendant as matters of counterclaims. Some of these are properly before the court, as partial payments of wages and advances in the voyage; but others are debts and claims of a wholly independent nature. Now, in respect to the latter, I am utterly at a loss to know how they can be properly brought within the cognizance of this court. Most of them are not of a maritime nature; and, even if they were, as they do not grow out of the maritime contract on which the libel is framed, it is difficult to perceive how they are founded in point of jurisdiction. Courts of admiralty are not invested by statute with any authority to hold plea of set-offs generally. Whenever they do entertain such claims, it is upon general principles of equity, where the claims attach to the particular maritime demand, submitted to their cognizance by the libel, and not upon any notion of a right to enforce such set-offs as are now recognized and enforced in courts of common law under statutable provisions."

This case was followed in *Bains v. The James & Catherine*, Baldwin, 544, Fed. Cas. No. 756; Mr. Justice Baldwin saying that he concurred fully in the conclusions therein arrived at as to set-off in the admiralty. That there is no general doctrine of set-off being recognized in the admiralty is stated or assumed in *Snow v. Carruth*, 1 Spr. 326, Fed. Cas. No. 13,144; *Kennedy v. Dodge*, 1 Ben. 311, Fed. Cas. No. 7,701; *Nichols v. Tremlett*, 1 Spr. 361, Fed. Cas. No. 10,247; *Dexter v. Munroe*, 2 Spr. 39, Fed. Cas. No. 3,863; *The Two Brothers*, 4 Fed. 158; *The Tom Lysie*, 48 Fed. 692; and *O'Brien v. 1,614 Bags of Guano*, Id. 730, where it is said: "Set-off is a statutory right, unknown to the admiralty, except as a credit on the particular transaction which is the subject of the libel."

It will thus be seen the decided weight of authority is against the use as a set-off of an account involving dealings in no way connected with the collision to recover damages for which the libel is filed. The exception will therefore be sustained, and it is so ordered.

GUTHRIE v. CITY OF PHILADELPHIA.

(District Court, E. D. Pennsylvania. April 21, 1896.)

1. COLLISION—STEAMER WITH MOORED VESSEL.

The fact that a vessel propelled by steam runs into a schooner properly moored at a dock is sufficient proof of fault on her part.

2. SAME—DAMAGE BY CITY ICE BOAT.

The city of Philadelphia is liable for damage caused by a collision of its ice boat with a vessel moored at a dock in the state of Delaware, while the ice boat is engaged in private service for the owners of such dock.

This was a libel by the master of the schooner Robert A. Snyder against the city of Philadelphia to recover damages caused to the schooner by a collision of the city ice boat with her.

Curtis Tilton, for libellant.

Leonard Finletten and John L. Kinsey, for respondent.

BUTLER, District Judge. On February 10, 1895, the schooner was moored in the Marcus Hook Oil Dock in the state of Delaware. At the instance of the owners of the dock the city ice boat undertook to break the ice within the dock, and in doing it ran into her, without excuse, and inflicted injury. Soon after the boat towed the schooner out and down the bay, charging \$107 for the service. For breaking the ice inside the dock the boat made no charge, but was entitled to compensation under the statute and the city ordinance relating to the subject. The libellant's charge of fault is sufficiently established by the fact that the ice boat, propelled by steam, ran into the schooner while moored. *The Granite State*, 3 Wall. 310; *The F. C. Latrobe*, 28 Fed. 377; *Engle v. Mayor*, 40 Fed. 51, note.

The only defense urged is, in substance, that the city was engaged through its agents, in discharging a public municipal duty, and consequently that it is not responsible for the negligence which caused the injury. The answer to this, in my judgment, is twofold, first that the city owed no municipal duty in Delaware, and second that it was engaged in a private service for the benefit of the owners of the dock, for which it was entitled to compensation. It is unimportant that it performed the service gratuitously. Besides the service was a necessary incident to that rendered the schooner for which the city charged compensation. The subject does not call for discussion; it is sufficient to cite the following authorities: *Western Saving-Fund Soc. v. City of Philadelphia*, 31 Pa. St. 175; *City Council v. Hudson (Ga.)* 15 S. E. 678; *The F. C. Latrobe*, 28 Fed. 378; *The Giovanni*, 59 Fed. 304, and 10 C. C. A. 552, 62 Fed. 619; *Sherlock v. Alling*, 93 U. S. 108.

The boat was liable to seizure on the lien arising from her fault, and the owner's liability in admiralty is a necessary consequence.

CASTO v. PHISTER et al.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 288.

CANCELLATION OF DEEDS—SUFFICIENCY OF EVIDENCE.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

This was a bill in equity by Elizabeth Casto against Anne M. Phister and John P. Phister, her husband, Matthew M. Gasser, and Richard Dawson, to cancel and annul two deeds conveying certain lands in Wisconsin. The circuit court dismissed the bill, and complainant has appealed.

A. L. Sanborn and Thos. M. Wood, for appellant.

W. C. Silverthorn and F. C. Ryan, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This bill was brought on the 20th day of December, 1890, to annul two deeds of conveyance of real estate situate near Superior City, in Douglas county, Wis., both purporting to have been made the 28th day of July, 1862, but executed, as indicated by the certificates of acknowledgment, on the 29th day of July, 1862, and on the 11th day of July, 1863, respectively. The same lands are described in both deeds, the purpose of the second having been to supply a defect in the certificate of acknowledgment of the execution of the first. Both were recorded in due time, and they purport and are certified to have been executed by Emily Cune, Franklin Casto and his wife Elizabeth Casto, who is the complainant in the bill, as grantors, to Anne M. Phister, wife of John P. Phister. Emily Cune and Franklin Casto were the surviving sister and brother, and sole heirs at law, of William T. Casto, of Maysville, Ky., who fell in a duel, and died intestate, on the 8th day of May, 1862, seised of the lands described in these deeds. Franklin Casto died in 1869, intestate, leaving the complainant his sole heir. The grounds alleged for relief are, in substance, that the complainant did not execute, authorize, or know of the execution of, either of the deeds in question; that Franklin Casto was a lunatic, and incapable of executing the deeds; that he was unduly influenced to part with the lands by Richard Dawson, who had a secret personal interest in the purchase, and who, by reason of being administrator of the estate of William T. Casto, and holding a power of attorney, executed by Emily Cune and Franklin Casto, authorizing him to sell a part of the lands described in the deeds, was in a position of trust and confidence, which he betrayed; and that the consideration recited in the deeds was less than the value of the lands, and was not paid. As an excuse for the long delay in bringing the action, it is alleged that the complainant was ignorant that William T. Casto ever owned the lands in question, or any land in Wisconsin; that she did not know of the execution of either of the deeds; and

that her first knowledge on the subject was received in 1890, when the report came to Maysville, and was brought thence to her, of the contract between Mrs. Phister and Matthew M. Gasser for the sale to the latter of one piece of the land for the sum of \$86,000, which, excepting \$1,000, it is alleged, had not been paid. Gasser was made a party to the original bill. Dawson was brought in by an amendment permitted at the hearing. The testimony is voluminous, and no good purpose would be subserved by rehearsing or summarizing it. It fails, in all essential particulars, to establish the charges of the bill. We are satisfied that Franklin Casto was not incapable of making, and that the complainant joined in executing, the deeds; that the consideration recited was paid, and was equal to the value of the land at that time, and at any time for many years thereafter; and that Dawson had no interest in the purchase. The decree of the circuit court is affirmed.

RICKETTS v. MURRAY et al.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 269.

MORTGAGE TO INDIVIDUAL—TRUST IN FAVOR OF FIRM—PAROL PROOF.

Where a bond and mortgage have been made payable to one individually, who is a member of a firm, and there is ample proof of sufficient consideration as well as motive for their being so drawn, it is only upon very clear and convincing proof that the assertion of a trust in favor of the firm, of which there is no trace in those instruments or in any other writing, should be allowed to prevail.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

Chas. Rushmore, for appellant.

Wm. George, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The appellees, Robert I. Murray, Richard F. Pearsall, and Effingham C. Haight, as executors of the will of Charles Haight, brought this suit to foreclose a mortgage on real estate executed on the 28th day of May, A. D. 1880, by Alfred A. Freeman to secure the payment to Charles Haight, since deceased, of the sum of \$75,000, in accordance with the terms of a penal bond for double that amount executed by the mortgagor to the mortgagee. The appellant, William H. Ricketts, as receiver of the assets of Charles Haight & Co., upon leave to intervene in the suit, filed an answer to the effect that the mortgage was executed to secure an indebtedness of Freeman & Ruyter to Charles Haight & Co., and upon no other consideration; that it was made payable to Charles Haight in trust for the firm, of which he was a member, and therefore was an asset of which, as receiver, the intervener was entitled to possession and control,—concluding with an affirmative prayer that the intervener be declared to be the owner and entitled to possession of the bond and mortgage, and that the other parties to the

action, some of whom were also interveners who had filed cross bills attacking the validity of the mortgage as having been made in fraud of the creditors of Freeman & Ruyter, be declared to have no right, title, or interest therein. There was a finding and decree in favor of the appellees against all other parties, but the appellant alone prayed an appeal, without showing a refusal of other parties to join therein, and without an order of severance. See *Estis v. Trabue*, 128 U. S. 225, 9 Sup. Ct. 58; *Dolan v. Jennings*, 139 U. S. 385, 11 Sup. Ct. 584.

On the authority of *Collumb v. Read*, 24 N. Y. 505; *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. 924, and other cases, it has been urged that in certain particulars the burden of proof was upon the appellees; but, upon the view which we take of the facts, the cases are not applicable, and if they were the result would not be different, because the decree rendered is supported by a preponderance of the evidence so clear and unmistakable as to make unimportant any question of the burden of proof. It would serve no good purpose to attempt a full presentation and analysis of the evidence, which, in so far as it is not documentary, consists in the testimony of conflicting witnesses, who are evenly balanced in numbers, and, upon the most favorable view to the appellant, evenly balanced in credibility and weight. The written evidence and undisputed circumstances leave no room for reasonable doubt where lies the truth. The firm of Charles Haight & Co., composed of Charles Haight, Alfred A. Freeman, Henry Koper, and Albert I. Freeman, was formed September 1, 1885, and, by its articles of copartnership, was to continue for five years from that date in the business of "buying and selling flour, and selling flour on commission," in the city of New York. Alfred A. Freeman was at the same time a member of two independent firms, namely, A. A. Freeman & Co., millers at La Crosse, and Freeman & Ruyter, millers at River Falls, Wis. These firms sold their flour through Charles Haight & Co., and, by reason of advances received from time to time, each became largely indebted to that firm, and in order to secure its liability the firm of A. A. Freeman & Co., in the year 1885, executed a mortgage upon its property at La Crosse to the individual members of Charles Haight & Co., excepting Alfred A. Freeman, who, being a mortgagor, was not named as a mortgagee. In 1887 Albert I. Freeman died, but the business of Charles Haight & Co. was kept going by the surviving partners. Charles Haight, besides his contribution of \$50,000 to the capital invested, loaned the firm money and securities to a large amount, for which in 1889 he was demanding security; and to that end, in December, a contract and mortgage, to be executed by Alfred A. Freeman, were drawn, but were not signed. In May, 1890, an understanding was reached whereby the partnership was to be extended for another term of five years; Effingham M. Cock, who afterwards changed his name to Haight, being admitted to membership at the instance of his uncle Charles, who promised to make a further investment of \$20,000 in the business, and to make additional loans if required. As a result of these negotiations the bond and mortgage in question were executed, the acknowledgment being

dated May 28, 1890, and the new partnership agreement, bearing date June 5, 1890, was signed. On July 28, 1890, after making further loans to the firm exceeding \$30,000, Charles Haight died at his home, in New York City, where his executors were appointed. The survivors continued the business of the firm until June 8, 1891, when an assignment for the benefit of creditors was made; but in March, 1893, the supreme court, sitting at New York, vacated the assignment, and appointed the appellant, Ricketts, receiver of the property of the firm.

Two witnesses (Freeman, the mortgagor, and Henry Koper, member of the firm) have testified to the effect that the mortgage was intended solely to secure the debt of Freeman & Ruyter to Charles Haight & Co. Two others, who had at least equal knowledge of the facts, have testified that an individual security to Haight for his loans to the firm was intended. The circumstances and probabilities of the situation corroborate the latter view, and the documentary evidence, the bond and mortgage themselves, and other writings, exclude all reasonable doubt about it. Freeman's situation was such as to compel his acquiescence in the demands of Haight. The unsigned contract which was prepared in December, 1890, demonstrates that an individual security was then contemplated. The bond and mortgage then prepared were afterwards executed without change in their terms, and, that having been done, there was no longer, on the part of Haight, any necessity for insisting that the contract, which had been drawn at the same time with the bond and mortgage, should be executed. The second contract of partnership, like the first, bound the members of the firm, except Haight, to assume and pay, and to indemnify Haight against, all losses and debts of the firm; and it follows that by executing the bond and mortgage to Haight, for his individual benefit, Freeman assumed no new or additional personal liability. It is to be observed, too, that in the twelfth article of the agreement of June 5, 1890, express reference is made to the debt of A. A. Freeman & Co., and to that of Freeman & Ruyter; the former being described as "secured by a mortgage on certain mill property at La Crosse," and the other simply as "due from the firm of Freeman & Ruyter." If the contention of the appellant were true, that the mortgage in suit was given as a security for the latter debt, why was it also not described as secured by mortgage? Another circumstance, which, unexplained, is significant, is that the debt of Freeman & Ruyter to Charles Haight & Co. was, and for a long time had been, for a much larger sum than \$75,000, and at the date of the mortgage was for more than twice that amount. If, therefore, the security had been intended for that debt, presumably it would have been made to cover the whole of it. If, as has been urged, there was trouble with the representatives of Albert I. Freeman because the mortgage upon the La Crosse property did not show upon its face the trust in favor of Charles Haight & Co., the greater the improbability that the second mortgage would be made to Haight alone without expressing the trust, if a trust was intended. The bond and mortgage being in terms payable to Charles Haight personally, and there being ample

proof of sufficient consideration as well as motive for their being so drawn, it is only upon very clear and convincing proof that the assertion of a trust, of which there is no trace in those instruments or in any other writing, should be allowed to prevail. The decree below is affirmed.

BURT v. BAILEY et al.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1896.)

No. 659.

NATIONAL BANKS—WHO ARE SHAREHOLDERS—ASSESSMENTS—ESTOPPEL.

Stock of a bank was purchased by defendants, of the president thereof, at a time when there was no overissue, and when the amount purchased was credited to him on the books. At the time, or shortly afterwards, the stock, by his direction, was transferred from his account to theirs, on the stock journal and stock ledger, and new certificates were issued to them. Thereafter they were treated by the bank as the lawful owners of the stock, and were allowed to vote the same and receive dividends thereon. The bank having failed, suit was brought to collect an assessment made against defendants as shareholders. *Held*, that they were estopped from claiming that they were not stockholders, although the president neglected to cancel the old certificates, and afterwards hypothecated part of them, thereby creating an overissue.

Appeal from the Circuit Court of the United States for the District of Kansas.

John C. Nicholson (Samuel R. Peters was with him on brief), for appellant.

J. G. Slonecker (Bennett R. Wheeler and John F. Switzer were with him on brief), for appellees.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an appeal from a decree entered by the circuit court of the United States for the district of Kansas, dismissing a bill of complaint which was filed by the appellant, Frank I. Burt, as receiver of the First National Bank of Alma, Kan., against the appellees, Joseph H. Bailey, Anna M. Bailey, William W. Speakman, Abigail S. Worrell, and Anna F. Worrell. The action was brought to recover the amount of an assessment that had been levied by the comptroller of the currency on certain shares of stock of the First National Bank of Alma, Kan., which stock, as the bill charged, belonged to the several defendants when the bank became insolvent and a receiver of its affairs was appointed. The defendants filed separate answers to the bill of complaint, but the defense interposed by each defendant was the same, and to the following effect: They averred, in substance, that they, respectively, bought from the First National Bank of Alma, in the years 1888 and the early part of 1889, the number of shares of stock which they were charged to own, and that the bank issued to them, respectively, certificates of stock for the amount of their several purchases, but that at the time such stock was purchased by them said bank had already issued to other persons the full amount of stock which it was entitled to issue under

its charter, and that it had received payment therefor, and that none of the certificates for such outstanding stock so issued to third parties were returned to the bank and canceled when certificates were issued to the several defendants. In view of the premises, the defendants claimed that the stock by them held was part of an over-issue, and for that reason was void stock, within the rule announced in *Scovill v. Thayer*, 105 U. S. 143. Whether this defense was sustained by the proof is the principal question to be considered on this appeal.

The testimony contained in the record establishes, without much contradiction, the following facts: John F. Limerick was the president of the First National Bank of Alma, Kan. (hereafter termed the "Bank"), from the date of its incorporation, on August 3, 1887, until it suspended business, on November 10, 1890. A portion of that time his wife, Mary Limerick, acted as assistant cashier. The bank was organized with a capital of \$50,000, the shares being \$100 each; but the capital was increased on August 21, 1888, to the sum of \$75,000, which was divided into 750 shares of \$100 each. On December 22, 1888, said John F. Limerick stood charged on the stock ledger of the bank as the owner of stock to the amount of 275 shares, and there is no evidence in the record that he was not the owner of that amount of stock at that time. The stock journal and the stock ledger that were kept by the bank show that on that day, and on the succeeding 2d day of January, 1889, 25 shares of the stock thus owned by said Limerick were by him sold and charged to the defendants Joseph H. Bailey and Anna M. Bailey, his wife. Twenty shares were thus sold and charged on the stock ledger to Joseph H. Bailey, and the remaining five shares to his wife. The stock ledger and stock journal show similar sales of stock by said John F. Limerick to the following named defendants on the following days, to wit: To Anna F. Worrell, 10 shares on February 10, 1889; to William W. Speakman and to Abigail S. Worrell, 10 shares each on April 11, 1889; to Anna M. Bailey, 10 shares on June 15, 1889. At all of these dates, John F. Limerick appears to have been the owner of stock largely in excess of the amount sold and transferred from his account to the account of the several defendants. The purchases made by the defendants were negotiated by correspondence, which was conducted by Limerick, either as president of the bank, or in his individual capacity; and stock certificates duly executed by him, as president, under the seal of the bank, were transmitted to the defendants at the dates of their several purchases. Subsequent to the aforesaid transactions, John F. Limerick, as president of the bank, made a sworn return to the comptroller of the currency, pursuant to section 5210 of the Revised Statutes, showing who were stockholders of the bank on July 1, 1889. In such return the defendants were reported as holding stock to the amount above stated. The defendants Joseph H. Bailey and wife voted their stock at a stockholders' meeting held in January, 1889; and, prior to the suspension of the bank, all of the defendants appear to have received dividends on the stock that they had acquired in the manner aforesaid. The stock-certificate book, which was introduced in evidence on the trial below, showed that

22 stock certificates, representing stock to the amount of 692 shares, were originally issued to John F. Limerick. The stubs of 15 of these certificates, representing stock to the amount of 447 shares, were indorsed "Canceled," although the old certificates were not found attached to the stubs. The stubs that were thus indorsed bore the following numbers, to wit: 14 to 22, both inclusive; 24 to 28, both inclusive; and No. 34. Whether some of these stubs were thus indorsed "Canceled" contemporaneously with the sale of stock to the several defendants was not proven by the testimony. Such may have been, and probably was, the fact. At least, there is nothing to show the contrary. The certificates that were issued to the defendants when they, respectively, purchased their stock, bore the following numbers, to wit: Nos. 103, 105, 108, 115, 116, 122; all of which certificates may have been issued in lieu of some of the certificates marked "Canceled" on the stock-certificate book. On June 6, 1889, John F. Limerick hypothecated stock certificate No. 55, for 35 shares of stock in the First National Bank of Alma, to secure a note in the sum of \$2,500 that was executed by himself. Between July 8, 1889, and November 15, 1889, he hypothecated 12 other stock certificates, representing altogether 420 shares of stock, to secure other notes which he had either executed or indorsed. The 12 certificates thus hypothecated bore the following numbers, to wit: 19, 21, 22, 25, 27, 32, 33, 35, 36, 40, 235, and 240. It appears that the number of stock certificates that were outstanding when the bank failed, including the 13 certificates thus held as collateral, which were then outstanding, represented more stock than the bank was entitled to issue; but it admits of no doubt, under the testimony, that when the last sale of stock was made to the defendants, to wit, on June 15, 1889, Limerick had only hypothecated 35 shares of stock up to that time, and that he still owned, and stood credited on the stock journal and stock ledger with, 125 shares of stock over and above the 35 shares which he had then hypothecated.

The foregoing facts—and they are, substantially, all that the record discloses—are not sufficient, in our opinion, to warrant the conclusion that the stock held by the defendants is overissued stock, and for that reason is void and unassessable. The burden of showing that the bank had issued more stock than was authorized by its charter when certificates were issued to the defendants clearly rests upon them; and the evidence, we think, wholly failed to establish that contention. The excessive issue complained of seems to have been occasioned by the hypothecation, subsequent to July 1, 1889, of old certificates that were in the custody of the president of the bank. The stock that was bought by the defendants was stock that was owned by John F. Limerick, with which he stood credited on the books of the bank, and there had been no overissue when the several purchases were made. At or about the time when the stock was purchased, it was transferred, by direction of John F. Limerick, on the stock journal and stock ledger that appear to have been kept by the bank, from his account to the account of the several defendants; and they were thereafter treated by the bank as the lawful

owners thereof, and were accorded all the rights and privileges of shareholders, including the right to vote the stock and to participate in the distribution of net profits. Under these circumstances, it is no concern of the defendants whether the president of the bank violated his duty, in neglecting to cancel the old certificates representing the stock that he had sold to the defendants, and had caused to be transferred to their account on the stock journal and stock ledger. The certificates in question were in his possession. The defendants were not present when the new certificates were executed and issued. It was the duty of the vendor of the stock, as president of the bank, to see that the old certificates were duly canceled; and if he failed to discharge his duty in that respect, and subsequently negotiated a part of the old certificates, the defendants cannot be made to suffer for his misdeeds. As between the bank and the defendants, the former is clearly estopped from asserting that the defendants are not stockholders, and this estoppel is mutual. *Bank of Commerce v. Bank of Newport*, 27 U. S. App. 486, 11 C. C. A. 484, 63 Fed. 898, and cases there cited; *National Bank v. Watsontown Bank*, 105 U. S. 217; *Horton v. Mercer*, 18 C. C. A. 18, 71 Fed. 153. Nor is it any concern of these defendants that the holders of some of the certificates that were hypothecated by Limerick in the summer of 1889, to secure his notes, may have received the certificates under such circumstances as will enable them to maintain an action against the bank for damages, under the doctrine announced in *Bank v. Lanier*, 11 Wall. 369. This is not a controversy between the defendants and the holders of the hypothecated certificates, as to who has the superior title to certain shares of stock; but it is a controversy between the bank, represented by its receiver, and the defendants, as to whether the latter were stockholders when the former became insolvent. The bank is not disputing the defendant's title to the stock, and, for the reasons already stated, it would be estopped from so doing if it made the attempt. Nor is any third party asserting a superior title to the stock, nor is it probable that a claim of that kind will ever be asserted. Moreover, the defendants, by their several answers, only attempted to avoid liability on the ground that the stock by them held was part of an overissue; and that defense, as we have seen, was not established by the evidence. The decree of the circuit court will accordingly be reversed, and the case will be remanded to that court, with directions to enter a decree in favor of Frank I. Burt, as receiver of the First National Bank of Alma, and against the several defendants, for the respective amounts claimed in the bill of complaint.

BENNETT v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, N. D. Iowa, E. D. April 28, 1896.)

1. DEDICATION—PUBLIC USE.

The town of D., Iowa, was originally laid out under the provisions of an act of congress of July 2, 1836, which directed that a strip of land, of proper width, running with the Mississippi river the whole length of the town,

should be reserved from sale, for public use, and remain forever for public use, as a public highway, and for other public uses. This strip was used at first as a river landing, but, after a change in the river channel, lines of railway were constructed along it. *Held*, that such act of congress dedicated the reserved strip to the public for the purposes of a public highway and other public uses, which included its use for a railway, and that it is not within the power of the state of Iowa to authorize the city of D. to forbid the location of a railway along the strip, or to impose burdens upon the proper use of the strip by requiring damages to be paid to owners of lots abutting thereon.

2. SAME—RIGHTS OF OWNER OF LAND ON HIGHWAY.

Held, further, that a purchaser of land abutting on the strip took the same subject to the right of the public to use the strip, and had no legal or equitable ground of complaint in the use of the strip for railway purposes.

Bill to restrain the defendant from operating so much of its line of railway as lies adjacent to the property of complainant, in the city of Dubuque, until complainant's damages have been ascertained, and compensation has been made therefor. Submitted on pleadings and proofs.

Lyon & Lenahan and Henderson, Hurd, Daniels & Kiessel, for complainant.

W. J. Knight, for defendant.

SHIRAS, District Judge. The town of Dubuque was originally laid out under the provisions of an act of congress approved July 2, 1836, which, among other requirements, directed:

"That a quantity of land of proper width, on the river banks, at the towns of Fort Madison, Bellevue, Burlington, Dubuque, and Peru, and running with said river, the whole length of said towns, shall be reserved from sale (as shall also the public squares), for public use, and remain forever for public use, as public highways, and for other public uses."

When the town of Dubuque was laid out under the provision of this act, the Mississippi river flowed through an outer and an inner channel in front of the town, there being a number of islands in the river; and the commissioners appointed under the act located the so-called "reserved strip" upon the inner channel, which for years thereafter constituted the steamboat landing of the town. Subsequently, the place of landing was changed to the outer or main channel, and a large part of the inner channels has been filled up, and streets have been built out to the main channel. Since the reserved strip has ceased to be used as a river landing, lines of railway have been constructed by different companies, and are now operated, along a large portion of the strip; but part thereof has been divided up into lots, and buildings have been erected upon different parts thereof. In the year 1874, the track which now constitutes the main line of the defendant company was constructed along the reserved strip, and within the limits thereof; and in 1881 a side track was built by the defendant within the limits of the reserved strip, which side track passes in close proximity to a barn and other buildings erected and owned by the complainant. In effect, the purpose of the bill filed in this case is to compel the defendant company to pay damages to the complainant for thus constructing the side track upon such strip.

In the case of *Simplot v. Railway Co.*, 16 Fed. 350, the question came before this court whether an owner of lots adjacent to this strip could recover damages for the construction of the main line of the defendant's road along said strip, the same having been built in the year 1874, and the conclusion was reached that such damages were not recoverable. In that case it was stated that under the decisions of the supreme court of Iowa in *Milburn v. City of Cedar Rapids*, 12 Iowa, 247, *Clinton v. Railroad Co.*, 24 Iowa, 455, and *Chicago, N. & S. W. R. Co. v. Mayor of Newton*, 36 Iowa, 299, it was the law, previous to the adoption of the Code of 1873, that in cities and towns laid out under the general incorporation law of the state, wherein the title of the lot owners extended only to the side lines of the streets, the ownership of the soil underlying the street being in the public, the abutting owner could not recover damages for the construction and operation of a railroad along the street, but that in cases where towns or cities had been laid out under special charters, by whose provisions the title of the abutting lot owner went to the center of the street, damages might be awarded upon the theory that the building and operation of a railway imposed an additional burden upon the property of the lot owner, and the damages were not therefore consequential, but direct; the latter doctrine being settled by the decision in *Kucheman v. Railway Co.*, 46 Iowa, 366. It was further held by this court that the provisions of section 464 of the Code of Iowa of 1873 were not applicable in 1874 to cities acting under special charters, of which Dubuque was and is one, and that *Simplot*, the plaintiff in that case, could not claim any rights under that section of the Code. In the present case it is shown that by chapter 96 of the Acts of the 18th General Assembly of the State of Iowa, adopted in 1880, the provisions of section 464 of the Code are made applicable to all special charter cities; and the contention of the complainant is that, under this section, he is entitled to damages for the construction of the side track which was built after the adoption of the act, bringing special charter cities within the purview of section 464, which reads as follows:

"They shall have power to lay off, open, widen, straighten, narrow, vacate, extend, establish, and light streets, alleys, public grounds, wharves, landings and market places, and to provide for the condemnation of such real estate as may be necessary for such purposes. They shall also have power to authorize or forbid the location and laying down of tracks for railways, and street railways, on all streets, alleys, and public places; but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public places upon which such railway track is proposed to be located and laid down, has been ascertained and compensated in the manner prescribed for the taking private property for works of internal improvement, in chapter four of title ten of the Code of 1873."

If the contention of complainant is well founded,—to wit, that the provisions of this section, in their entirety, are applicable to the so-called "reserved strip,"—it follows that it is now within the power of the city of Dubuque, not only to forbid the construction of any other lines of railway along this strip, but it may vacate the same as a public highway or place, and thus, in effect, nullify the act of

congress under the provisions of which it was originally reserved for public use.

In the case of *Simplot v. Railway Co.*, supra, this court held that the act of congress of 1836 expressly reserved this strip from sale to private parties, and dedicated the same to the public, to be used as a public highway, and for other public uses, which included its use for railway purposes, as was expressly ruled in *Cook v. City of Burlington*, 30 Iowa, 94. In that case the supreme court of Iowa, in ruling upon the effect of the reservation contained in the act of congress of 1836, held as follows:

"This statute operated as a qualification upon the title of the government. Before its passage, this title was absolute, uncontrolled, and the *jus disponendi*, for any and all purposes, was unaffected. After its passage and the sale of lots thereunder, the public acquired a right in this reserved strip for a highway and other public uses; and, to the extent of the right acquired by the public, that of the government was limited and controlled. The absolute power of disposition was gone. The use was dedicated to the public. The act of congress making this dedication was in the nature of a contract, which could not afterwards be abrogated or repealed. Vide *Barclay v. Howell's Lessee*, 6 Pet. 498; *City of Cincinnati v. White's Lessee*, Id. 430; *New Orleans v. U. S.*, 10 Pet. 711, 721. The title still remained in the government, but it was held in trust, and burdened with conditions. The government had the power to grant this title, but could confer no greater interest than itself possessed. The grantees must take it with the same qualifications, subject to the same conditions, and burdened with the same trusts, which attached to it in the hands of the grantor. This being the tenure by which the property was held, the United States, by act of congress of February 14, 1853, relinquished the title of said property to the city of Burlington, on the condition that 'it should in no manner affect the rights of third persons therein, or the use thereof.' The effect of this statute was to subrogate the city to the rights of the government in this property; and, as the power of absolute disposition did not reside in the government, such power did not pass to the city. The city took it for the same purposes for which the government held it, subject to the same trusts, and affected by the same conditions. The city acquired the right to dispose of it for public uses, because it was reserved to such uses by the government."

In the *Simplot Case*, this court pointed out that by the express provisions of the act of congress approved March 3, 1845, under which Iowa became a state, and the act of the general assembly of January 15, 1849, it was declared that the state should never interfere with the primary disposal of the soil within the state by the United States. And this court held that the dedication of the so-called "reserved strip" by the act of congress of 1836, for the purposes of a public highway and other public uses, was a primary disposal thereof, within the meaning of the restriction contained in the act providing for the admission of Iowa as one of the states of the Union; and, therefore, that it was beyond the power of the state of Iowa to change, defeat, or restrict the dedication of the strip to public uses. And following the ruling of the supreme court of Iowa in the case of *Cook v. City of Burlington*, supra, this court further held that the transfer of the legal title to the strip from the United States to the city did not in any way affect the public right to the strip, nor change the public uses to which it was subject. I now see no good reason for changing the views expressed in that case, and I therefore hold in this case that as the act of congress of

1836 dedicated this reserved strip to the public, for the purposes of a public highway, and for other public uses, which includes its use for the building and operation of a railway, it is not within the power of the state of Iowa to authorize or empower the city of Dubuque to forbid the location of a railway line along the same, nor can the state empower the city to impose burdens upon the proper use of the strip for public purposes, by requiring damages to be paid to owners of lots abutting thereon, nor can the state directly impose a burden of this character upon the public; and I further hold that the complainant has no legal or equitable ground for complaint in that the strip in question is used for railway purposes. When the complainant purchased the property abutting on this strip, he took the same subject to the right of the public to use the strip for a public highway and for other public uses. The title of complainant does not extend to the soil underlying the strip, as is expressly held in *Cook v. City of Burlington*, supra; and there is no ground for holding that the property of complainant has been subjected to a new burden by the laying down of a railway track thereon. The situation is simply this: When the complainant bought the property now held by him, it abutted upon a strip of land which had been dedicated by the United States to public use, for highway and other public uses; and the complainant, therefore, bought his property subject to the right of the public to use the reserved strip, for the purposes to which it had been dedicated; and he is not now entitled to demand compensation or damages by reason of the fact that the strip is being used for one of the public purposes for which it was originally dedicated.

On behalf of complainant, it is strongly urged in argument that, unless the provisions of section 464 of the Code of Iowa are held applicable in their entirety to this reserved strip, the right of the state and city to exercise, in the interest of the general public, proper control over the strip when used for railway purposes, must be denied; but this does not follow. The affirmation of the right to use the strip for railway purposes under the original dedication contained in the act of congress, without being liable for consequential damages to abutting owners, is not a denial of the right and power of the state and city to enact and enforce all proper rules and regulations for the government of the companies in the use of the strip for railway purposes. The police power of the state may be exercised over the strip, within proper limits, subject to the paramount right conferred upon the public by the act of congress to use the strip for a public highway and other like purposes; but this power of limited control does not confer upon the state the power to wholly forbid the use of the strip for a purpose within the scope of the original dedication, or to burden such use with the condition that damages must be paid to abutting owners as a condition precedent to its exercise.

Bill dismissed, upon the merits, at cost of complainant.

COOK et al. v. LASHER et al.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1896.)

No. 151.

1. WHO MAY APPEAL—PERSONS NOT PARTIES.

One who is named as a party to the bill, but who is never served with process, and does not appear, is not a party to the record, and cannot be heard on appeal.

2. EQUITY JURISDICTION—ABSENT PARTIES.

A decree canceling the deed of a commissioner of school lands in a suit against the commissioner's grantee does not affect the right of one to whom the grantee conveyed before the commencement of the suit, and who was never served with process, and never became a party.

3. TAXATION—SALES OF FORFEITED LANDS—VALIDITY.

A tract of 36,750 acres, set off by a resurvey in 1852 out of two tracts of 480,000 and 320,000 acres, respectively, granted to Robert Morris in 1795, and several times sold and conveyed as a separate tract, cannot be affected by proceedings in the West Virginia courts for the sale, as forfeited school lands, of the original Robert Morris tract of 480,000 acres.

4. SAME—DELINQUENT TAX SALE.

Failure of the sheriff to make out and return, within 10 days, a list of the lands purchased on behalf of the state, as required by the statute (Code W. Va. c. 31, § 31), renders the tax sale null and void. *De Forest v. Thompson*, 40 Fed. 375, approved.

5. LACHES—DELAY IN ATTACKING VOID TAX SALE.

Delay of a landowner in bringing suit to annul a tax deed, which is utterly void for failure to comply with the requirements of the statute, and which consequently does not affect his title, is not imputable to him as laches.

6. TAXATION—SALES OF FORFEITED LAND—WEST VIRGINIA STATUTES.

The West Virginia statute of March 18, 1882, providing for service of process, by publication, on claimants of land alleged to be forfeited for nonentry on the county tax books, in proceedings for the sale thereof, did not apply to proceedings already commenced; and, as the prior statute in relation to such sales did not provide for summoning persons interested in the land (Acts 1872-73, p. 449), an attempted service of process by publication, under the old statute, was a mere nullity.

In Error to the Circuit Court of the United States for the District of West Virginia.

This was a bill by George T. Lasher and others against L. B. Cook and others to annul certain deeds made by the commissioner of school lands for Wyoming county, W. Va. The circuit court made a decree in accordance with the prayer of the bill, 66 F. 834, and the defendants have appealed.

C. C. Watts, of Watts & Ashley (Okey Johnson, on the brief), for appellants.

S. L. Flourney, of Couch, Flourney & Price (J. R. Sypher, on the brief), for appellees.

Before SIMONTON, Circuit Judge, and HUGHES and PAUL, District Judges.

PAUL, District Judge. This is an appeal from a decree of the circuit court of the United States for the district of West Virginia. The suit was brought by the plaintiffs below to set aside and annul

certain deeds made to the appellants by W. B. McClure, commissioner of school lands for Wyoming county, W. Va., conveying certain lands claimed by the plaintiffs. These lands were sold by said McClure, commissioner of school lands, under an order of the circuit court of Wyoming county, in a proceeding in that court in the name of said commissioner of school lands against a tract of land of 480,000 acres, granted by the commonwealth of Virginia to Robert Morris, by a patent dated the 23d day of March, 1795. The land involved in the controversy is a tract containing 36,750 acres, and the bill alleges that it is part of two grants from the commonwealth of Virginia, to wit, the above grant for 480,000 acres, and another grant for 320,000 acres, dated March 4, 1795. These lands, when patented, were situated in Wythe county, Va., but in 1799 the county of Tazewell was formed, and they were embraced in the boundaries of that county. In the year 1824 the county of Logan was formed, and part of the lands were embraced in that county, leaving the balance in Tazewell county. In 1850, Wyoming county was formed out of Logan county, and embraced that portion of these lands which before was situated in Logan county. McDowell county was formed out of Tazewell county in 1858, and embraced the greater part, if not all, of these lands, then situated in Tazewell county. By deed bearing date March 13, 1797, Robert Morris conveyed both the 480,000-acre tract and the 320,000-acre tract to William Cramond, and from William Cramond the title to both tracts passed, by mesne conveyances, to Henry Cramond. The two tracts, prior to 1842, became forfeited in the name of Henry Cramond to the state of Virginia, for the non-payment of taxes thereon prior to that year; and in 1843 the lands embraced in both grants were sold under proceedings had by the commissioner of forfeited and delinquent lands for Tazewell county, in the circuit court for Tazewell county, and were purchased by William Cramond. This sale was confirmed by the court; and on July 20, 1846, a deed was made to the heirs of said William Cramond, he having died intestate after the confirmation of the sale. By deed dated November 5, 1846, three of the grantees in the last-mentioned deed conveyed said tracts of land to their co-grantee, Henry Cramond, who on the same day conveyed them to Charles Freinour; and Freinour, on the 22d of November, 1846, conveyed 50,000 acres, by metes and bounds, to Thomas Beck; and on March 1, 1847, he conveyed the residue, 750,000 acres, to John Herman. In 1847, Herman conveyed undivided parts of said tracts of land to Michael Bouvier and several other distinct purchasers. Bouvier and the other purchasers of undivided interests conveyed the whole 750,000 acres to John Telford, to secure a debt of \$6,000. In 1848, said Telford assigned the mortgage and debt to M. Bouvier, and said Bouvier brought a chancery suit in the circuit court of Tazewell county to foreclose the mortgage; and under a decree in said suit, in 1851, the lands were sold, and purchased by M. Bouvier, and were conveyed to said Bouvier by Stras, special commissioner of the circuit court of Tazewell county, by deed dated October 10, 1852. Bouvier, in 1852, had a resurvey made of the lands, and it was ascertained that

the two tracts, after deducting the 50,000 acres conveyed by Freinour to Beck, contained only 157,500 acres, instead of 750,000 acres. Bouvier had the two tracts, now found to contain only 157,500 acres, divided by metes and bounds into six tracts, varying in quantity, one of which contained 36,750 acres, and another 8,400 acres. Bouvier, by deeds dated March 9, 1853, conveyed four of said parcels to other persons, and retained the parcel of 36,750 acres and the 8,400 acres, aggregating 45,150 acres. By deed dated January 7, 1865, Bouvier conveyed the 36,750-acre tract by metes and bounds to Jonathan Patterson, Jr., and others. Patterson and his co-grantees, by deed dated January 7, 1865, conveyed the same to the appellees; and the tract of 36,750 acres is the land in controversy in this suit.

In November, 1881, W. B. McClure, commissioner of school lands for Wyoming county, filed his report in the circuit court of that county, stating that there was situated in said county a large survey of land, containing 480,000 acres, granted to Robert Morris on the 23d day of March, 1795; and that the same was forfeited, under the laws of West Virginia, for failure of the owner to cause the same to be entered on the land books of Wyoming county, and assessed with taxes thereon. He further reported that this tract of land had never been on the land books of Wyoming county, nor on the land books of McDowell county, where a small portion of the said land is situated. He further reported that within the said 480,000 acres were several large tracts, claimed by various parties, among them the tract in controversy, for 36,750 acres, claimed by Francis Lasher; but that these parcels had been forfeited for nonentry along with the 480,000-acre tract out of which they had been taken. On the filing of this report, a decree was entered ordering a rule to be awarded against the unknown heirs of Robert Morris, and all persons claiming title by, through, or under the said Morris, and against the said Francis Lasher and other persons named, and against all persons whomsoever who set up or claimed any right or title to the said 480,000 acres, or any portion thereof, summoning them to appear at the first day of the next term of said court to show cause why said tract of 480,000 acres should not be sold as school lands for the benefit of the school fund of the state. At the April term, 1882, a decree was entered directing a sale of said 480,000 acres of land, the same to be sold in parcels and sections not exceeding 640 acres each. In pursuance of said decree, said commissioner sold a large number of tracts, 47 of which, amounting to 18,000 acres or more, are claimed by the plaintiffs as their land; and deeds were ordered to be executed to the purchasers, the defendants below, and the same were subsequently executed by said McClure, commissioner of school lands.

The plaintiffs filed their bill in this cause in June, 1890, attacking the sales made in said forfeiture proceedings and the deeds made by said McClure, commissioner, to the purchasers; and on February 25, 1895, a decree was entered by the court below, annulling the forfeiture, and the proceedings thereon, the sale made therein, and the deeds made to the purchasers of said lands. This is the decree from which the appeal is taken.

The first assignment of error is that the court erred in canceling the deed from William B. McClure, commissioner of school lands, to A. J. Ellis, made on the 29th day of January, 1883, because the said land was by the said A. J. Ellis conveyed to the petitioner Nicholas B. Keeney and others, on the 18th day of January, 1888, as appears by Exhibit 7, with the answer of defendants, which deed was made to said Keeney and others more than two years before the institution of said suit; and the said Keeney was not therefore a pendente lite purchaser, and, at the time the decree was rendered in this cause, was not before the court, no process having been served upon him, and he having made no appearance in the cause, by answer or otherwise. The record shows that "—— Keeney" was named a party defendant in the original and amended bills, but that process was not served on him, the return being, "—— Keeney not found." The first appearance of said Nicholas B. Keeney in the proceedings in the court below is as one of the petitioners for an appeal to this court. As he was not a party to the record, he has no right of appeal to this court, and cannot be heard. It is well settled that no one but a party to the record has the right to an appeal or a writ of error. 2 Fost. Fed. Prac. § 482; Bayard v. Lombard, 9 How. 530; Godfrey v. Terry, 97 U. S. 171; Ex parte Cutting, 94 U. S. 14; Ex parte Cockcroft, 104 U. S. 578.

Section 737, Rev. St., provides:

"When there are several defendants in any suit at law or equity, and one or more of them are neither inhabitants of, nor found within, the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of, nor found within, the district as aforesaid, shall not constitute matter of abatement or objection to the suit."

Under the provisions of the statute, and under equity rule 17, which is to the same effect, Keeney would not be concluded or prejudiced by the decree against the parties properly before the court. The parties to the record are not affected by the absence of Keeney. Their rights are distinct from his, and all the defenses they were entitled to make could be made as well as if Keeney had been a party to the record.

In *Elmendorf v. Taylor*, 10 Wheat. 152, the supreme court said:

"Wherever the case may be completely decided as between the litigant parties, an interest existing in some other person, whom the process of the court cannot reach, as if such party be a resident of some other state, will not prevent a decree upon the merits."

The second assignment of error is that the court erred in the decree of February 25, 1895, and in not entering a decree dismissing the plaintiff's bill, first, because, at the time of entering said decree, the lands conveyed by the deeds canceled by said decree were forfeited to the state of West Virginia by the laws thereof. This claim of forfeiture is based on the ground that the record shows that prior to 1842 the two tracts of land of 480,000 acres and of 320,000 acres,

respectively, were forfeited to the commonwealth of Virginia for the nonpayment of taxes thereon; and that the title remained in that state until the formation of the state of West Virginia, in 1863, and then the title vested in the latter. The argument is that the evidence does not show that the proceedings in the tax sale made in 1843, under a decree of the circuit court of Tazewell county, of the said two tracts of land, were regular in all essential requisites. We have with some particularity traced the title to these lands, both before and since the said tax sale, and we are satisfied that by that sale the state of Virginia parted with her title to said lands, and that the same vested in William Cramond, the purchaser, and his successors. As to the regularity of the tax sale made so long ago as 1843, we agree with the learned District Judge Jackson in the able opinion filed in the record:

"It is, however, of little or no moment, at this time, to investigate the history of this title prior to the delinquent sale of 1843. We must, at this late day, presume that the proceedings which resulted in the sale of the land were regular."

By regular conveyances, the title to the 36,750 acres of land in controversy has been transmitted from the purchaser at the tax sale to the plaintiffs below in this cause. This tract of 36,750 acres had formed a part of the two tracts, containing together, as was supposed, 750,000 acres; but when Bouvier made a resurvey of these lands, in 1852, ascertained that there were only 157,500 acres, and divided the same into six tracts, this tract was one of the six tracts so severed; and it has remained a separate and distinct tract, in the hands of its various owners, from that time to the present, and could not be affected by the proceedings in the state court against the Robert Morris tract of 480,000 acres. In this connection, we again quote from the opinion of the court below:

"It does not appear that any proceedings were had directly against the tract in controversy, but, if affected by the proceedings, it is only by reason of the fact that it was originally a portion of one of these two tracts, or both of them. At the threshold of this investigation, we are met with the fact that Robert Morris had conveyed all of his interest in the two tracts long before the institution of these proceedings. In fact, the plaintiffs claim under a deed made by Robert Morris to William Cramond in 1797, more than 80 years before the commissioner instituted his proceedings. This statement of facts puts at rest the right of the state, through her commissioner of school lands, to move against these lands. The title to them had passed out of Morris, and he was no longer chargeable with them for taxes on them after their alienation by him. From all that appears in this case, the lands in the name of others had all been charged with and taxes paid. It does appear that, so far as the tract in controversy is concerned, the plaintiffs, and those under whom they claim, have been assessed with and paid all their taxes on their lands from 1847 down to the institution of this suit, except 1869, and three years during the war, when no taxes were assessed against the land. What right, then, had the commissioner to proceed against the Morris land? I answer, none whatever. The lands in the name of Morris having been long before transferred to others, they were not liable to entry in his name, nor had the state any legal claim against them for taxes assessed in his name. The action of the commissioner was based upon facts supposed to exist, but for which, in reality, there was no foundation, and, as a consequence, was illegal, and of no binding effect upon those who claimed the lands under those who had acquired title thereto more than eighty years before. We

must, therefore, hold that these proceedings were *exram non judice*, and that the decree of the court declaring a forfeiture was void."

But it is claimed by the defendants that the lands in controversy belonged absolutely to the state of West Virginia, by its purchase of the same at a tax sale in 1871, and that the subsequent sale made by the commissioner of school lands transferred the state's title to the purchasers. We have already seen that the proceedings in the state court by the commissioner of school lands were not against the tract of 36,750 acres in controversy, but against 480,000 acres, for nonentry on the land books. The decree was not for the sale of the land involved in this suit, for nonentry on the land books, but for the sale of a tract of 480,000 acres, which, as such, had long since ceased to exist.

The plaintiffs further contend that the sheriff making the tax sale of the land failed to comply with the law regulating sales of lands delinquent for nonpayment of taxes in such material respects as to render such sale absolutely void. In the argument of counsel, several omissions to comply with the requirements of the statute on the part of the sheriff are presented; but it is unnecessary to consider all of these. The Code of West Virginia (chapter 31, § 31), relative to sales of lands delinquent for nonpayment of taxes, provides that:

"When any real estate is offered for sale as aforesaid, and no person present bids the amount to be satisfied to the state from the sale, the sheriff or collector shall purchase the same on behalf of the state for the taxes thereon, and the interest and damages on the same, and shall make out a list thereof under the following caption: 'List of real estate within the county of —, sold in the month of (or months of) —, eighteen hundred and —, for the nonpayment of taxes thereon for the year (or years) —, and purchased by the state of West Virginia.'"

Then follow certain provisions as to the form in which such lists shall be made, and then this provision:

"The officer making out the said list shall make oath that it contains a true account of all the real estate within his county purchased by him for the state during the year —, and return the list with a certificate of the oath attached to the recorder (clerk) of the county within ten days after such sale, who shall within ten days after such return make an accurate copy thereof in a bound book, and transmit the original to the auditor."

The record in the office of the county clerk of McDowell county fails to show affirmatively that the sheriff returned within 10 days after the sale to the clerk of the county a list under oath of the lands sold by him, and purchased for the state of West Virginia. The circuit court held that this failure on the part of the sheriff to comply with the requirements of the statute rendered the tax sale null and void. The court repeated, in the opinion already quoted, what it had previously said in *De Forest v. Thompson*, 40 Fed. 375:

"That the former owner had a right to call at the recorder's office after the sale of his lands, and demand the production of the sheriff's report for his examination. If he discovered that there was no evidence when the report was filed, he could rest upon his rights, for the statute required the list to be filed within ten days after the sale. It must in some way affirmatively appear, and not be left to presumption, that the sheriff has discharged his duty, which ordinarily, in this class of cases, would be a violent one."

Counsel for defendants contend that the provisions of the statute requiring the sheriff to return the list of sales within 10 days applies where the land is sold to an individual, and not where it is purchased by the state. A careful examination of the statute fails to disclose to us the distinction. It is not found in the language of the statute, and we see no reason for the distinction, and why the return within ten days after the sale is not as important in the one case as in the other.

The decision of the circuit court that the officer making a tax sale must follow strictly the provisions of the statute giving him the power, and that the failure of the sheriff to return the list within the time prescribed by the statute is such an irregularity in the proceedings of the tax sale as to render the sale invalid, is sustained by numerous decisions, state and federal. It is so held by the supreme court of West Virginia in *Barton's Heirs v. Gilchrist*, 19 W. Va. 223, *McCallister v. Cottrille*, 24 W. Va. 173, and in other decisions of that court.

In *Wilsons v. Bell*, 7 Leigh, 22, in which the question was the validity of a sale of land for the nonpayment of taxes, the court said:

"These sales and purchases founded on forfeitures deserve no indulgence from the court. It is therefore the well-settled law that he who claims under a forfeiture must show that the law has been exactly complied with."

In *Thacher v. Powell*, 6 Wheat. 119, Chief Justice Marshall, delivering the opinion of the court, said:

"That no individual or public officer can sell and convey a good title to the land of another unless authorized to do so by express law is one of those self-evident propositions to which the mind assents without hesitation; and that the person invested with such a power must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this court."

The same doctrine is laid down in *Ronkendorf v. Taylor's Lessee*, 4 Pet. 349; *Slater v. Maxwell*, 6 Wall. 269.

The only remaining assignment of error is that the plaintiffs below had been guilty of laches in asserting their rights. We do not think the doctrine of laches can apply to this case. Counsel for appellants contend that it applies in consequence of the tax sale made in 1871, by which, it is claimed, the state of West Virginia acquired title to the land in litigation, and that no steps were taken by the plaintiffs in the court below to quiet their title for 21 years after such sale. But we have seen that this tax sale was null and void, on account of the failure of the sheriff making the sale to follow strictly the provisions of the statute touching the sale of delinquent lands, and that the title of the plaintiffs was not affected by such sale. It remained in the plaintiffs, and they and their predecessors, the record shows, had paid regularly the taxes assessed against the land for 30 years before, with the exception of the year 1869, and they have paid the taxes every year since 1870. As to the taxes for 1869, the record does not show that they were paid; but, the state having received the taxes for every year since, it is safe to presume

that the taxes for that year were collected also. At any rate, no legal steps have been taken to forfeit the land. The whole tract of 36,750 acres remained on the land books, and was charged with the taxes, which were paid by the plaintiffs, who were nonresidents of the state; and the land was treated by the officers of the state as the land of plaintiffs, and not as the land of the state. Under these circumstances, there was nothing that the plaintiffs were required to do, or that they could have done, to keep clear their title, except to pay the taxes from year to year, which they did.

But it is further contended by appellants that the plaintiffs were guilty of laches in not bringing their suit for eight years after the sale made by McClure, commissioner of school lands, to set aside the deeds made to the defendants for part of the land in controversy. They claim that the plaintiffs were made parties defendant to the proceedings in the circuit court of Wyoming county, in which these lands were decreed to be sold, and that they were duly summoned by order of publication to answer the petition filed in that proceeding. The report of the commissioner of school lands for Wyoming county of the nonentry of the 480,000-acre tract on the land books was made to the circuit court of Wyoming on the 21st day of November, 1881, in accordance with the statute of West Virginia of 1872-73. This act made no provision for summoning persons interested in the land proceeded against. It was held by the supreme court of West Virginia that no claimant or person interested in the lands could be allowed to enter himself on the record as a defendant in such proceeding. *McClure v. Maitland*, 24 W. Va. 561; *Auvil v. Iæger*, Id. 583; *McClure v. Mauperture*, 29 W. Va. 641, 2 S. E. 761; *Poteet v. Commissioners*, 30 W. Va. 73, 3 S. E. 97; *Wakeman v. Thompson*, 32 W. Va., Append. 5, 40 Fed. 375.

The act providing for summoning persons having an interest in the land claimed to be forfeited for nonentry was not passed until March 18, 1882, and went into effect June 18, 1882, and it applies to lands "as to which proceedings have not been previously commenced for the sale thereof." Acts W. Va. 1882, c. 95, § 5. The proceedings under which the land in controversy was sold having been commenced before the passage of this act, the order of publication was a nullity. It was made without authority of law. But, apart from the order of publication, if it constituted valid summons, the proceeding in the circuit court of Wyoming county was against a tract of land of "480,000 acres, formerly owned by Robert Morris." Such a summons could not be notice to the plaintiffs that this was a proceeding to sell their tract of land, containing 36,500 acres, which had been a separate tract, clearly defined by metes and bounds, since 1852, on which the taxes had been regularly paid, and which had at no time been subject to forfeiture for nonentry on the land books.

There were other questions made and argued in the brief of counsel for plaintiffs in error, but these do not appear in the assignments of error, and have been disregarded. We find no error in the decision of the circuit court, and the same is affirmed.

CONNECTICUT RIVER BANKING CO. et al. v. ROCKBRIDGE CO.

(Circuit Court, W. D. Virginia. December 12, 1895.)

RECEIVERS—TIME OF APPOINTMENT—APPROVAL OF BONDS.

Where receivers of the property of a party to an action are appointed, the order of appointment requiring such receivers to give bonds, to be approved by the court, before they are authorized to act, and enjoining the commencement or prosecution of suits against the party, the appointment of such receivers and their title to the property in question date from the entry of the order of appointment, and not from the time of the approval of their bonds; and a judgment obtained against the party, between the entry of such order and the approval of the receivers' bonds, is invalid, and creates no lien on the property.

On Exceptions to the Master's Report.

Letcher & Letcher, for complainants.

Winburn & Batchelor, for exceptants.

PAUL, District Judge. The question presented for decision in this case is raised by exceptions to the report of the master filed in this cause. On the 26th day of February, 1894, on application of the plaintiffs, who are holders of certain mortgage bonds of the defendant, in which application a number of general creditors of said defendant company joined, receivers were appointed to take charge of the property of the company. The receivers each were required to execute bonds as such officers, the decree providing:

"And before said J. Lewis Bumgardner and F. T. Glasgow, receivers, shall be authorized to act under this decree, they shall each execute and file before the clerk of this court their bonds, with approved personal security, and to be approved by this court, in the penalty of ten thousand dollars, each separately, payable to the United States of America, and conditioned for the faithful discharge of his duty under this and all future orders and decrees of the court in this cause."

In the same decree an injunction order was entered, restraining the officers and agents of the said company—

"From exercising any rights or control over the property, assets, books, and papers of the said company, and from interfering in any manner whatever with the control and management of the receivers over and with the same."

And in the same decree it is also adjudged, ordered, and decreed that:

"All persons who are or claim to be creditors of the said company are hereby enjoined and restrained from instituting any suit or suits against the said company; and, in case any such suit or suits has or have been heretofore instituted against the said company, the further prosecution of the same is hereby enjoined and restrained."

In the same decree the cause was referred to a special master to take an account and make a report showing—First, the property and assets of the said Rockbridge Company; second, the debts and liabilities of the said company, and the order of their priorities. The special master's report was filed on June 3, 1895. It shows the property owned by the defendant company, the liens thereon, and the general or unsecured debts. Among the debts reported in the unsecured class, and as not being liens on the real estate of the de-

defendant company not covered by the deed of trust or mortgage, are two judgments,—one in favor of Annie E. Temple, and the other in favor of William E. Bain. These judgments constitute the basis of the exceptions to the master's report. Following is the ground of exceptions of both exceptants:

"Because the commissioner finds, in his report, that the judgment reported in favor of William E. Bain against the defendant Rockbridge Company has no priority on the property owned by said defendant, and not embraced in deed of trust securing the mortgage bonds held by the plaintiff and others; said judgments having been obtained in the circuit court of Rockbridge county on the 1st day of March, 1894."

To sustain this exception to the master's report, the exceptants show, from the record, this state of facts: At the time the decree was entered appointing receivers, to wit, on the 26th day of February, 1894, actions were pending in the circuit court of Rockbridge county, Va., on the claims of said Annie E. Temple and William E. Bain against the defendant company. That a term of that court commenced on the 1st day of March, 1894, at which term the said judgments were obtained. That on the fifteenth day of the term, to wit, March 15, 1894, these judgments became final, and, in their operation, related to the first day of the term, to wit, March 1, 1894. This effect, it is claimed, is given to the judgments by sections 3287 and 3576 of the Code of Virginia (Ed. 1887), which provide as follows:

"Sec. 3287. Every judgment entered in the office in a case wherein there is no order for an inquiry of damages, and every nonsuit or dismissal entered therein shall, if not previously set aside, become a final judgment, if the case be in a circuit court, of the last day of the next term, or the fifteenth day thereof (whichever shall happen first)."

"Sec. 3576. * * * Where a judgment has relation in law to the commencement of the term on which it was rendered, or becomes final, its date (within the meaning of this section) shall be deemed to be as at such commencement."

The record shows that the receivers were each required, by the decree appointing them, to execute a bond in the penalty of \$10,000, to be filed with the clerk of the court, and to be approved by the court. F. T. Glasgow, one of the receivers, executed his bond, with sufficient sureties, on the day the decree was entered, to wit, on the 26th of February, 1894, and filed the same with the clerk on the same day. The other receiver, J. L. Bumgardner, executed his bond, with sufficient surety, on the 28th day of February, 1894, and filed the same with the clerk on the 1st day of March, 1894. Both bonds were approved by the district judge on the 2d day of March, 1894.

The exceptants contend that the appointment of the receivers only became operative on the approval of their bonds on the 2d day of March, 1894, and that, as the judgments in favor of the exceptants in the circuit court of Rockbridge county, Va., became final on the 15th day of March, 1894, and by virtue of the Virginia statute quoted related back to the first day of the term, which was the 1st day of March, 1894, their said judgments became liens, before the receivers were appointed, on the property of the defendant company not covered by the deed of trust to secure the mortgage bonds, because, they say, the appointment of the receivers dates, not from the day

of the entry of the decree appointing them, February 26, 1894, but from the day their bonds were approved, March 2, 1894.

The court cannot sustain this contention of the exceptants. It is of opinion that the appointment of the receivers dates from the entry of the decree appointing them, the 26th day of February, 1894, and not from the date of the approval of their bonds, the 2d day of March, 1894. When the court entered the decree of the 26th of February, 1894, it took control of all the property of the insolvent corporation for the benefit of its creditors, and designated the receivers as the hand of the court to take possession of and manage the property in accordance with the orders and directions of the court. The same decree restrained the officers and agents of the defendant company from exercising any further authority over its property. A decree appointing receivers, in the language of the supreme court of appeals of Virginia, in the case of *Beverley v. Brooke*, 4 Grat. 187, "levies upon the property an equitable execution." "A court of equity, by its order appointing a receiver, takes the subject-matter of the litigation out of the control of the parties, and into its own hands, and ultimately disposes of all questions, legal or equitable, growing out of the proceeding." High, Rec. § 4. The status of the property, and the relations towards it of all parties interested in it, are fixed by the order appointing a receiver; and the conditions are not changed by an order providing that the receiver shall give bond for the faithful discharge of his duties in order that the property may be secured and the rights of creditors therein secured.

The doctrine is thus laid down in *Gluck & Becker on Receivers*, where an order is entered for the appointment of a receiver:

"The order amounts to a sequestration, by act and operation of law, of such property; and, when the receiver is subsequently appointed, the title to such property vests, by relation, from the date of the order, and has the same effect as if such receiver was named in and appointed by such order. Indeed, the general rule is that, while the receiver cannot take possession of the property of the corporation, or be deemed vested with the estate, before he is appointed, yet, when his appointment is completed, the estate vested in him relates back to the time of granting the order, and from that moment no act can be done affecting the property of the corporation, either by the corporation or its creditors."

Again, in a note to this text, it is said:

"The estate to the property of the corporation vested in a receiver attaches at the time of the order appointing him. It is not deferred until he gives bond in compliance with the order; and garnishee process to reach property of the corporation in the hands of third parties, instituted intermediate between his appointment and giving a bond, is void."

To the same effect see 2 Lewin, *Trusts* (8th Ed.) 1091 (*814).

The reason of this rule is clear. The object of the appointment of a receiver is to preserve equality among the creditors by preventing a multiplicity of suits, and some creditors from obtaining advantages over others. If the jurisdiction of the court over the property did not attach contemporaneously with the order appointing a receiver, the purpose of the court in appointing a receiver might be defeated by the failure of the person appointed receiver to accept the posi-

tion, or of his inability to give the bond required, or, in the interim between the order appointing a receiver and his giving the required bond, a creditor might obtain an advantage by securing a confession of judgment, and in innumerable other ways.

In the case before the court there is a decree appointing a receiver, an order restraining the officers of the insolvent company from exercising any authority or control over the property of the company, and restraining the creditors of said company from instituting suits against said company, and from prosecuting any suit or suits already instituted, and an order referring the cause to a master to take an account. This being the condition of this cause at the time the judgments of the exceptants were obtained in the circuit court of Rockbridge county, Va., such judgments are invalid. 27 Myers' Fed. Dec. "Receivers," § 86; Gluck & B. Rec. pp. 23-25.

The exceptions must be overruled, and the report of the master confirmed.

FARMERS' LOAN & TRUST CO. v. CAPE FEAR & Y. V. R. CO. et al.

In re MT. AIRY GRANITE CO.

(Circuit Court, W. D. North Carolina. April 3, 1896.)

RAILROAD MORTGAGES—RECEIVERSHIP—PRIORITY OF CLAIMS.

The M. Co. made a contract with the C. Ry. Co. to pay for the construction of a branch from the railway company's line to the M. Co.'s quarries, the amount advanced by the M. Co. to be repaid to it by crediting it with one-half the freight collected on merchandise shipped by it over the branch. The contract was performed substantially as agreed, until the railroad was placed in the hands of a receiver in a suit for the foreclosure of mortgages which were placed on the railroad before the contract was made, and which covered after-acquired property. At this time there was a balance due the M. Co. of over \$4,000. *Held*, that neither the corpus of the property in the hands of the receiver, nor the funds in his hands, derived from the operation either of the branch constructed under the contract, or of the other lines of the railroad, were responsible for the payment of this balance to the M. Co. before the payment of the mortgage debt.

Turner, McClure & Rolston, for Farmers' Loan & Trust Co.

Cowan & Cross, Ricaud & Weill, and James E. Boyd, for receiver.

Dillard & King and J. T. Morehead, for Mt. Airy Granite Co.

SIMONTON, Circuit Judge. This case comes up upon the report of Robert M. Douglas, Esq., standing master, and the exceptions thereto. On 28th August, 1889, a contract was made between the Mt. Airy Granite Company, hereafter called the "Granite Company," and the Cape Fear & Yadkin Valley Railroad Company, hereafter called the "Railway Company." Under this contract the granite company covenanted to secure the right of way, grade, bridge, and cross-tie a branch from the railway track to the rock quarry. When that was done, the railway company contracted to iron and operate the branch. If any right of way was desired, the railway company

agreed to have it condemned, and the granite company agreed to pay the damages. The railway company agreed to contract for the work and material necessary for the branch, and have the work done under the supervision of their own engineers, and to draw on the granite company for the amount of the monthly estimates as the work progressed. It was further agreed that the amount so paid by the granite company should be credited to it on the books of the railway company, and when the granite company commenced to ship it would pay in cash one-half of the freight over the railway and the other half of the freight was to be charged against their account with the railway company, until the amount advanced by them was paid in full. This branch was built by the North State Improvement Company at the instance of and under contract with the railway company. The granite company did not pay the monthly estimates. There is no evidence that any monthly estimate was ever rendered to it. Nor did the granite company pay the damages for the right of way. Nothing was paid by the granite company in the course of construction. At the completion of the work the granite company, not being able to pay in cash, gave to the North State Improvement Company, at the request of the railway company, its acceptances for \$14,174.86, which was the entire cost of the construction. These acceptances were payable at short dates, and when they became due were renewed from time to time, being reduced in amount by payments of the railway company. The railway company attended to all the renewals. In this way the amount of \$8,942.98 was paid by the railway company. These payments by the railway company were made by using one-half the freight received from all shipments by the granite company over the road. Although the contract provided that the granite company should pay the freight on one-half of these shipments in cash, this was never done. The railway company collected the entire freight from the consignees, crediting the granite company with one-half, and charging their construction account with the other half. The acceptances above spoken of were renewed, as has been said, from time to time, until the North State Improvement Company went into the hands of a receiver. At that time there were two of the acceptances in the hands of the Bank of Fayetteville, aggregating \$6,579.95, and one in the National Bank of Greensboro for \$1,495.58; in all \$8,015.53. When the North State Improvement Company went into the hands of a receiver the granite company was compelled to take up these acceptances. On 1st February, 1894, the railway company paid the granite company \$500, on 21st February of the same year another sum of \$500; which, deducted from the \$8,015, leaves \$7,015. The master reports that under this contract there is due to the granite company this sum of \$7,015.53, with interest from February, 1894.

There were many exceptions taken to the master's report, but at the hearing the only questions raised and discussed were as to the proper amount due to the granite company under this contract, and whether the claim has priority over the mortgage debt. In ascertaining this amount, the first question is as to interest. Was the

granite company entitled to charge interest on the \$14,174.86, the cost of construction? It will be observed that the contract says nothing about interest. The total cost of construction was to be paid by the granite company, and it was to be reimbursed by the one-half of the freight charges for the shipments made by it from time to time over the road. Interest, when not a matter of special contract, is allowed in the nature of damages for the detention of money after it is due and payable. *U. S. v. North Carolina*, 136 U. S. 211, 10 Sup. Ct. 920. In this case the parties agreed that the money should be advanced by the granite company, and repaid by the railway company in a certain way. The evidence shows that up to February, 1894, this was regularly done. Up to this time the cost of construction was paid in the mode in which the contract had provided. Again, the contract provided that the cost of construction should be paid by the granite company in cash. At the conclusion of the work the bill for the entire cost of construction was presented to the granite company. They were unable to pay it in cash. For their accommodation acceptances were taken, and from time to time these acceptances were renewed. The discount on these acceptances so taken for the accommodation of the granite company should be paid by the granite company, otherwise the railway company would not only be made responsible for the interest, which was not within its contract, but would also be called upon to pay for that which was for the accommodation of the granite company. It appears that the last payments were made on this account by the railway company to the granite company in February, 1894, aggregating \$1,000. Since that time no payments whatever have been made to the granite company. If the account be therefore stated as of February, 1894, it would result thus:

Entire cost of construction.....	\$14,174 86
Paid up to June 1st, '93, by the railway company.....	\$8,942 98
Up to February, 1894.....	1,000 00
	<hr/>
	9,942 88
Balance	\$ 4,231 88

The next question, and, indeed, the controlling question, is, are the funds in the hands of the receiver responsible for this amount, and has it a priority over the mortgage debt? There were two mortgages on the property of the Cape Fear & Yadkin Valley Railway. One—the first mortgage—covered all the main line. The other—the consolidated second mortgage—had a second lien on the main line. The first mortgage had no lien whatever upon the branch lines, of which this granite branch is one. Over this and the other branch lines the consolidated mortgage has the first lien. The funds in the hands of the receiver are derived from the operation of all the lines,—the main line and the branches. The mortgage creditors, having been put into possession, as it were, by an equitable execution in the appointment of a receiver, are entitled to the net proceeds of operation, subject to such claims as the courts have allowed from considerations of equity. *Bridge Co. v. Heidelbach*, 94 U. S. 800. It is manifest that this claim of the granite company,

arising entirely upon the construction of this branch line only, can have no claim upon either the earnings or the corpus of the other lines, main line, and branches of the railway company. Nor does this claim for construction come within the equities allowed by *Fosdick v. Schall*, 99 U. S. 235, and the cases following, elucidating, and enlarging this case. *Wood v. Safe-Deposit Co.*, 128 U. S. 421, 9 Sup. Ct. 131. Even were the granite company placed in the position of a contractor who built this branch, it would have no preference over the mortgage. "A mortgage by a railway company of their road, built and to be built, the company at the date of the mortgage having built a part of their road, but not the residue, has precedence, even as regards the unbuilt portion, of a claim of a contractor, who, in the inability of the company to finish the road, had himself finished it under an agreement that he should retain possession of the road, and apply its earnings to the liquidation of the debt due him, and who had never surrendered possession of the road to the company. *Dunham v. Railroad Co.*, 1 Wall. 254. See, also, *Commissioners v. Tommey*, 115 U. S. 122, 5 Sup. Ct. 626, 1186.

The precise question in this case is settled in *Express Co. v. Railroad Co.*, 99 U. S. 191. "A contract between the Western North Carolina Railroad Company and the Southern Express Company stipulated that the latter should lend the former \$20,000, to be expended in repairing and equipping its road, and that in consideration thereof the railroad company would grant the express company the necessary privileges and facilities for the transportation of all the express business over the road, the sum found to be due to the railroad therefor upon monthly settlement of accounts to be applied to the payment of the loan and the interest thereon. The contract was to continue for one year, when, if the money and interest thereon was not paid, it was to continue in force until payment should be made. After the express company had advanced the money and entered upon the performance of its contract, the railroad company conveyed all its property, including its franchises, to a trustee, in trust to secure the payment of certain bonds issued by it. Default having been made in their payment, the trustee brought suit for foreclosure, and obtained a decree placing the road in the hands of a receiver and ordering its sale. The receiver having declined to carry out the contract with the express company, it brought suit for specific performance. Held, that the transaction between the railroad company and the express company is not a license, but simply a contract for transportation, creating no lien, the specific performance whereof would be a form of satisfaction or payment which the receiver cannot be required to make." This is the rubric of the case. The court, in its opinion, after declaring this doctrine, add: "As well might he be decreed to satisfy the appellant's demand by money as by the service sought to be enforced. Both belong to the lienholders, and neither can be thus diverted." It is manifest that the funds in the hands of the receiver cannot be used to pay the intervener. Nor has it a lien or equity superior to that of the mortgage creditor. It is so ordered.

LOUISVILLE TRUST CO. v. CITY OF CINCINNATI

(Circuit Court, S. D. Ohio, W. D. April 4, 1896.)

No. 4,797.

1. STREET-RAILWAY COMPANIES—ACQUIRING RIGHTS IN STREETS—CONSENT OF AUTHORITIES.

The C. Inclined Plane Ry. Co. was organized under the general incorporation act of Ohio for the purpose of constructing a railway in the city of C. Such railway was constructed chiefly on land owned in fee by the company, and the company acquired the right to cross certain streets of the city by an ordinance which limited such right to 20 years. The act under which the company was organized gave it power to acquire by condemnation the right to cross such streets, but the company never took proceedings to condemn the same. *Held*, that though the franchise of the company to exist as a corporation and to operate its railway might be perpetual, and though it owned the land on which its road was constructed except at the street crossings, and the land on both sides of such crossings, none of these facts gave it the right to operate its road across the streets in perpetuity, without the consent of the city; and, upon the expiration of the 20 years to which the city's grant of such right was limited, it became a trespasser, and lost the right to operate its road.

2. SAME—CONDITIONS—CONSTRUCTION OF STATUTE.

Subsequent to the organization of the C. Inclined Plane Ry. Co., an act was passed by the legislature providing that any inclined plane railway company organized as said company was organized should have power to hold, lease, or purchase, and maintain and operate, any street railroad connecting with its inclined plane, upon the same terms and conditions on which it held and operated its inclined plane, such lease or purchase to be made upon the consent of the stockholders of both companies. Under this act, the C. Inclined Plane Ry. Co. acquired a connecting street railroad which had previously been constructed by other parties, under contract with the city granting it the use of the streets on certain conditions for a limited term, and requiring the payment of a license fee for each car operated. *Held* that, the terms of the statute not having given to the C. Inclined Plane Ry. Co. the right to operate a leased or purchased line in perpetuity, no such right could be implied, nor could such statute require the city to grant the use of its streets, except on its own terms, and that the C. Inclined Plane Ry. Co. took the connecting line which it acquired subject to the terms on which such line was permitted to use the streets, and, upon the expiration of the term for which that right was granted, lost the right longer to operate such road.

3. RES JUDICATA—STATE AND FEDERAL COURTS—STATE STATUTES.

The city of C. brought an action in a state court against the C. Inclined Plane Ry. Co., to recover license fees for the operation of cars on the connecting line acquired by the C. Inclined Plane Ry. Co., and to enjoin that company from operating such connecting line; and the state court, upon construction of certain state statutes conferring powers on municipal corporations, and imposing limitations thereon, gave judgment in favor of the city for the license fees, and for the injunction sought, which judgment was affirmed by the state court of last resort. *Held*, that such judgment was conclusive as to the right of the C. Inclined Plane Ry. Co. to continue the operation of the connecting line, and binding upon the federal court, in a suit afterwards brought by the trustee under a mortgage of the C. Inclined Plane Ry. Co.'s lines against the city of C., to enjoin interference with the operation of such lines.

4. ESTOPPEL—USE OF STREETS BY RAILWAY COMPANY.

Held, further, that the city of C. was not estopped to assert its right to terminate the operation of the line acquired by the C. Inclined Plane Ry. Co., at the termination of the limited period, either by the fact that the C. Inclined Plane Ry. Co., immediately after the passage of the permissive statute, acquired the connecting line upon a lease extending beyond the

period for which it had the right to use the streets, or that license fees were neither paid to nor demanded by the city, or that the C. Inclined Plane Ry. Co. had made mortgages of its property, or that an administrative board of the city had consented, at the request of the company, to its altering its tracks and motive power.

5. FEDERAL COURTS—INJUNCTIONS—REV. ST. § 720.

The federal courts are prohibited by Rev. St. § 720, from issuing an injunction staying a party at any stage of the proceedings in a state court, and therefore from enjoining a party from proceeding to enforce a judgment obtained by him in a state court.

The complainant, a Kentucky corporation, sues as trustee under a mortgage executed January 1, 1889, by the Cincinnati Inclined Plane Railway Company, to secure the payment of its negotiable bonds to the amount of \$500,000, with 6 per cent. interest.

The mortgage covers the inclined plane railway of the mortgagor, including the machinery, engines, boilers, and fixtures connected therewith, and the real estate and right of way upon which the same are situated, in the city of Cincinnati, Ohio; also, the street railway known as "Route No. 8," in said city, and all the street railways owned and held by the mortgagor, together with the electric plant, poles, wires, and machinery connected therewith, and all cars and other rolling stock, tracks, easements, right of way, animals, rights, privileges, and franchises; also, all real and leasehold estate, and all other property, rights, privileges, and franchises then owned, or which might thereafter be acquired, by the mortgagor, as well as all tolls, rents, income, profits, claims, and demands, of every nature, to be thereafter acquired by the mortgagor. The trusts created by the mortgage were accepted by the complainant on the 23d of January, 1889.

The Cincinnati Inclined Plane Railway Company was organized on the 31st of April, 1871, under the general corporation act of the state of Ohio, of May 1, 1852, for the purpose of constructing a railroad, the termini of which were to be in the city of Cincinnati and the village of Avondale, in Hamilton county, Ohio. On February 23, 1889, the Avondale terminus was, by proceedings in accordance with the laws of the state of Ohio, extended to the village of Glendale, Hamilton county, Ohio.

In 1871 said railway company constructed an inclined plane railway upon the land held by it in fee, and upon a portion of Locust street, the occupancy of which and the crossing of Miami, Baltimore, and Dorsey streets, so as not to obstruct the ordinary passage along the same, was granted by the proper city authorities of the city of Cincinnati, under the twelfth section of the act of May 1, 1852. The company, since the construction of the inclined plane railway, has maintained and operated, and now maintains and operates, the same. At the time of the making and delivery of said mortgage, and of the bonds therein described and secured, i. e. in January, 1889, the railway company owned and held, and was maintaining and operating,—under and by virtue of certain ordinances of the city of Cincinnati, and under a perpetual lease from Smith, Hill, and Doherty, the original proprietors and the constructors of said railway, and under and by virtue of an act of the general assembly of the state of Ohio, passed March 30, 1877 (74 Ohio Laws, 66), entitled "An act relating to inclined plane railway companies organized under the act of May 1, A. D. 1852, entitled 'An act to provide for the creation and regulation of incorporated companies in the state of Ohio,'"—a street railway from the foot of the inclined plane railway, at the head of Main street, Cincinnati, by a double track, to Court street; thence west, on Court street, by a single track, to Walnut street; thence south, by a single track, on Walnut, to Fifth street; thence east, by a single track, on Fifth street, to Main street; thence north, by a single track, on Main street, to the intersection with its track at Court street; and also a street railroad extending from the head of its inclined plane railway, by a double track, along Locust, Mason, Auburn, and Vine streets, to the Zoölogical Garden, in Avondale, a distance of two miles.

The bill sets forth: That prior to January, 1889, the cars of the street railways were drawn by horses or mules; and that on September 24, 1885, the

board of public works of the city of Cincinnati, under and by virtue of said act of March 30, 1877, by resolution, consented to the use by said railway company of electricity, cable, or compressed air as a motive power "upon the highways in which the street railroads connected with its inclined plane, held and operated by it, are laid," on condition that the railway company should give bond in \$25,000 to indemnify the city against damage to persons or property by reason of the use of such motive power, which bond was duly given and accepted. That on October 10, 1888, the railway company recited the resolution of September 24, 1885, stating, in writing, to the board of public affairs of the city (the successor of the board of public works), that it had decided to use electricity as a motive power on its road, and requested permission to erect along its lines the poles, wires, and other appliances necessary for such use. That on October 24, 1888, the board of public affairs, under and by virtue of said act of March 30, 1877, and in furtherance of the grant made by the board of public works, gave said railway company the permission requested, in accordance with plans and specifications of the Sprague system submitted to and approved by said board, and said permission applied to the entire line of said company's road, from Fifth and Walnut streets, in Cincinnati, to the Zoological Garden.

That on November 23, 1888, said railway company entered into a contract with the Sprague Company for the construction of the Sprague system. That in December of the same year the copper-wire rail connections were made, and in the spring of 1889 the poles and wires were erected, all under the supervision of the civil engineer of said city, and of said board of public affairs; and about the beginning of June, 1889, said company put its street railways in successful operation under the Sprague system so far as the Zoological Garden. That on the 23d day of March, 1891, the board of county commissioners of Hamilton county, Ohio, the public authority which owned and controlled the Carthage turnpike, in due form granted said railway company authority to use and occupy said turnpike with double tracks, with the necessary appendages and appurtenances, including poles and wires, of an overhead electric street-railroad system, and to run its cars thereon in the same manner and by the same system as that under which they were run and operated upon its existing tracks. This resolution was reaffirmed, with certain temporary modifications, by resolution of said board of county commissioners passed September 7, 1889. By resolution of the trustees of the Zoological Land Syndicate, passed April 6, A. D. 1889, said railway company was granted the right to construct and extend its double tracks, with the necessary appendages and appurtenances of an overhead electric street-railroad system, from its then northern terminus, at the Zoological Garden and Erkenbrecker avenue, and thence along said avenue, of which said syndicate were owners, to the Carthage pike, at or near its intersection with Ludlow avenue.

The bill further avers that said railway company, in the year 1889, under and by virtue of the grant and resolution above set forth, and with the consent of the villages of Clifton, St. Bernard, Elmwood, and Carthage, constructed and extended its railway upon Erkenbrecker avenue and the Carthage turnpike to the County Fair Grounds, adjoining the village of Carthage, a distance of five miles, and subsequently equipped the same with the Sprague electric system, and an additional power house, with the machinery for generating electricity, located on the banks of Ross run, just north of the village of St. Bernard.

In the year 1889, in order to comply with the requisitions of the board of public affairs of October, 1888, and to operate the railway by electricity so that the cars could be run from Fifth and Walnut to the Zoological Garden without change, certain streets were regraded and filled, at great expense. All the tracks were relaid. The inclined plane railway and the tracks run thereon were reconstructed, as was also the power house at the head of the inclined plane. New engines and boilers and the machinery necessary for generating an electric current were put therein.

It is further averred that the defendant, the city of Cincinnati, in the year 1886, repaved Court street, from Main street to St. Clair alley, with asphalt, and thence to Walnut street with granite; also, Fifth street, from Walnut to Main, with asphalt. In the year 1887, the city repaved Walnut street, from Court to Fifth, and Main street, from Fifth to Court, with asphalt. By

reason of such repaving, the railway company found it necessary to, and did, reconstruct and relay, at great cost, expense, and inconvenience, all its tracks on said streets; and said reconstruction and relaying were done with the knowledge and under the supervision of the defendant, and the expense thereon created part of the floating debt which was provided for by the issue of said mortgage bonds.

The complainant further avers that by deeds duly recorded on the 11th of October, 1889, and on the 11th of July, 1890, there was conveyed to said railway company, for an aggregate consideration of \$61,462.50, that portion of the street railroad which is known as the "Mt. Auburn Street Railroad," and which had been leased, as above stated, perpetually by Smith, Hill, and Doherty to said railroad company; and that said purchase was made in pursuance of the privilege of purchase contained in said lease.

It is further averred that all the said \$500,000 of bonds secured by the mortgage above referred to, excepting \$125,000 thereof, reserved for exchange for a like amount of bonds secured by a mortgage to Henry Peachy and William A. Goodman, trustees, were issued and sold at par prior to July 1, 1890, in accordance with the provisions of said mortgage, and are now outstanding and unpaid in the hands of innocent holders, who are not residents or citizens of the state of Ohio; that the proceeds arising from the sale of said bonds were duly applied by said railway company for the purposes specified in resolutions of the stockholders of said railway company, as set forth in said mortgage, and especially to defray the expenses incurred in reconstructing, extending, and equipping with electric motive power the line of railway of said company as hereinbefore stated.

The complainant then proceeds to state, upon information and belief, that by virtue of proceedings duly taken under the laws of Ohio, in addition to the \$500,000 of common stock theretofore issued and outstanding, there was authorized on the 1st of December, 1890, to be issued, and there was issued and sold, \$150,000 preferred stock of said railway company, and the proceeds of the sales thereof were to be, and were, used for the purpose of extending said company's road, increasing its machinery and rolling stock, making improvements, and paying its unfunded debts.

The complainant then sets forth that notwithstanding said railway company constructed said inclined plane railway in the year 1871, and at the time of making the mortgage and issuing the bonds, as hereinbefore stated, owned and held, and was maintaining and operating, the same and the street railways hereinbefore described, without any question as to its right so to do being made by the state of Ohio, or by the defendant, or by any other public authority, the defendant, by its officers and agents, is giving out and asserting in the public prints, by public speech and otherwise, that said railway company has no right to hold, maintain, and operate said inclined plane railway and said street railways leading to and connected therewith; and that said railway company is a trespasser upon the streets where its tracks are located, and is unlawfully maintaining the necessary poles, wires, and other appliances for the operation of the same by electricity as a motive power; and that the defendant, by its officers and agents, threatens to remove said tracks, with said appliances, or to grant the right to use the same to a rival company holding and operating a parallel and competing line in said city, and known as the "Cincinnati Street-Railway Company," and to thus usurp and take away the property, rights, and franchises of the said inclined plane railway company; and that all said actings and doings of said defendant are unlawful, and contrary to equity and good conscience, hurtful to said railway company's credit and business; that they tend greatly to depreciate its bonds in the market, and to destroy the security thereof, and to delay and stop said company in the work of extending, equipping, and improving its lines, and thereby greatly cripple it in its service of the public, as well as in its revenues, and render it unable to earn sufficient to pay the interest and principal of said bonds.

The bill then charges that "the charter of the said railway company, and the rights and franchises acquired thereunder, and under the laws of the state of Ohio, constitute contract rights between the said state and city, on the one part, and the said railway company and your orator, on the other; and that these contract rights still exist, and give the said railway company a perpetual right to maintain and operate its said inclined plane railway and its said lines

of railway in the streets of said defendant, subject to the amending powers of the legislature of the state of Ohio; and that the proposed action of said defendant will impair, annul, and destroy the obligation of said contract rights, in violation of section 10, art. 1, of the constitution of the United States."

The prayer is that, pending the suit, "the defendant, its officers, agents, servants, and attorneys, be enjoined from in any way interrupting or interfering with said railway company, its agents and servants, in the lawful use of said streets, or the lawful operation of its said lines, or from in any way interfering with, interrupting, or disturbing the said railway company in the construction, operation, and maintenance of its lines and system in the city of Cincinnati; that, on the final hearing, said injunction be made perpetual;" and that complainant may have all such further relief as may be consonant with equity and good conscience, and that the nature of the case may require.

The city of Cincinnati, by its answer, denies that the relaying and reconstruction of the tracks of the inclined plane railway company on the streets named in the bill was done with its knowledge and under its supervision, and declares that it does not know and cannot set forth as to its belief whether said relaying and reconstruction created the floating debt, and provided for by the use of bonds, as averred in the bill; nor whether the said \$500,000 of bonds were issued and sold prior to July 1, 1890, or whether they are now outstanding and unpaid, or whether the proceeds were applied to defray the expenses incurred in reconstructing, extending, and equipping with electric motive power the line of railway of said company, as averred in the bill; nor whether \$150,000 of the preferred stock of said company was issued and sold, or whether the proceeds of the sale thereof were to be, and were, used for the purpose of extending said company's road and otherwise, as averred in the bill.

The answer further denies that the charter of said railway company, and the rights and franchises required thereunder, and under the laws of Ohio, constitute contract rights between the state and city and said railway company and the complainant, or that those rights still exist, and give said company a perpetual right to maintain and operate its inclined plane railway and its line of railway in the streets, subject to the amending powers of the legislature of the state of Ohio, as averred in the bill, or that the proposed action of the defendant will impair, annul, and destroy the obligation of said contract rights, in violation of section 10, art. 1, of the constitution of the United States. The defendant says that it had no knowledge or notice of the making of the mortgage described in the bill, or of the issue or sale of any bonds secured thereby, until long after the execution of said mortgage.

Further answering, the defendant sets up the following city ordinances: July 1, 1859, prescribing the terms and conditions of street passenger railroads within the city of Cincinnati. By section 4, it was made the duty of any company or individuals to whom any privileges thereunder should be granted to keep in repair the streets occupied by their tracks; and on failing to do so, the city council reserved the right to remove the rails, and prevent the use of said streets for railway purposes. By section 15 all contracts for the construction and operation of street railroads under its provisions were to be for the term and period of 20 years. November 6, 1863, amending said section 4, and releasing the several street-railway companies having roads then in operation from the obligation to bowlder any unbowldered streets. October 20, 1865, supplementary to and amendatory of said ordinance of July 1, 1859, and repealing the fourth section thereof. It also provided that all street passenger railroad companies to which the right to construct and operate any route had been granted by the city, whether theretofore constructed or to be constructed under grants theretofore made, should, upon agreeing to pay annually a car license of \$100 for each car run upon the respective roads, during the term for which the license should be granted, be released from all obligation to repair streets or gutters, and that the city should assume entire control thereof and responsibility therefor. February 7, 1879, providing for the construction, operation, and government of said street railways; and, by section 14, that the right to operate any road constructed under its provisions, or coming thereunder by filing a written acceptance and bond, as therein provided, should continue for a period of 20 years only from the date of any such grant or acceptance. August 19, 1864, fixing Route No. 8 for street pas-

senger railroads, and requiring the board of city improvements to advertise for bids for the same. Route No. 8 is described in the ordinance. It covers the line of the roads operated by the inclined plane railway company within the city limits. The person or company awarded the route was made subject to the provisions of the general ordinance prescribing the terms and conditions of street railroads in the city of Cincinnati, passed July 1, 1859, excepting that such person or company should not be required to purchase any omnibus line or stock, and that section 8 of said general ordinance should not be held to apply to said route; and it was provided that should the person or company to whom said route should be awarded fail to comply with the terms and conditions of said section 13 of the ordinance of July 1, 1859, the mayor of the city should have full power to cause the stoppage or running of cars upon said railroad until said terms and conditions were complied with. October 11, 1864, supplementary to the ordinance fixing Route No. 8, etc. This ordinance awarded to Porteus B. Roberts the grant to operate the same, it being found that he was entitled to said grant under the terms of said ordinance. May 5, 1865, granting the contractor of said Route No. 8 authority to construct, lay, and use a double track on Main street, between Fifth and Liberty streets. September 22, 1885, to amend the ordinance fixing Route No. 8, by providing for the addition of certain other streets of the route. August 10, 1866, supplementary to the ordinance fixing Route No. 8, and giving the proprietors of said route to occupy streets therein named. September 13, 1867, granting another extension of contract. November 14, 1873, authorizing the proprietors of Route 8 to lay an additional track on Main street, from Liberty street to Court street, upon the same terms and to expire at the same time as the grant of the original Route No. 8.

The answer further sets forth that in pursuance of the ordinance of October 11, 1864, awarding to Roberts the right to construct Route No. 8, the contract was formally awarded to him by a commission consisting of the city auditor, city solicitor, and the president of the city council. On the 29th of October, 1864, the proper authorities of the defendant granted to said Roberts permission to construct and operate said street railroad on said route for the term and period of 20 years only, subject to all the provisions and requirements and conditions of said ordinance of August 19, 1864, and of the general ordinance hereinbefore referred to, passed July 1, 1859. On August 18, 1865, the defendant, by resolution duly passed, authorized said Roberts to transfer all his rights and interests in Route No. 8 to the Mt. Auburn Street-Railway Company. On April 13, 1868, the board of directors of the Mt. Auburn Street-Railway Company, by resolution, authorized the acceptance of the provisions of section 2 of the ordinance of October 20, 1865, relieving the street passenger railroads from the obligation to repair streets upon their agreement to pay a license fee of \$100 annually for each car run upon their road. On April 30, 1868, said company formally accepted the modification of said contract with the defendant, in accordance with said resolution. The defendant admits that Route No. 8 was subsequently leased, and thereafter conveyed to the Cincinnati Inclined Plane Railway Company, but says that, if said company thereby acquired any right to hold and operate Route No. 8, it was subject to the terms and conditions of the original grant to Roberts, with only such modifications as were made therein by the ordinance above referred to, and that the grant to operate Route 8, by its terms, expired in 1884. The defendant says that neither the Cincinnati Inclined Plane Railway Company nor any other person or company has any right to operate said route, or to occupy the streets of the city of Cincinnati with the tracks of said Route No. 8.

Defendant, admitting that the general assembly of the state of Ohio passed an act relating to inclined plane railway companies organized under the act of May, 1852, entitled "An act providing for the creation and regulation of incorporated companies in the state of Ohio," alleges that said act is unconstitutional and void, being in conflict with article 13, § 1, of the constitution of the state of Ohio.

The defendant further avers that the Cincinnati Inclined Plane Railway Company acquired under said act no right to lease, purchase, or operate any street railway or lines or street railways in the streets of the defendant.

Defendant further answers that the resolution of the board of aldermen and

of the common council of the said city of 1871, which granted permission to the inclined plane railway company to cross Main, Baltimore, and Dorsey streets, and to occupy part of Guilford and Locust streets, by its terms limiting the grant to 20 years from the date of its passage; that said grant has expired, and that, therefore, said company has no right to maintain and operate its tracks or over such streets; that such company occupies a part of Guilford and Locust streets, between Dorsey and Saunders streets, in such a manner as to totally deprive the public of the use of the parts of said streets so occupied; and that said company has no right to occupy said portion of said streets under said resolution.

Defendant further says that the part of the street railway route operated by said inclined plane railway company, between Mulberry street and Liberty street, is operated under a pretended grant made by the common council of the city of Cincinnati to the inclined plane railway company, under an ordinance passed December 1, 1871; and that said grant was illegal and void, for the reason that the grant was made without competition, due advertisement, and letting to the lowest bidder, as required by law; and that said portion of said route is not an extension of any street railway.

Defendant further says that that portion of the route operated by the inclined plane railway company extending, by double tracks, from the inclined plane, on Locust street, thence northerly to Mason street, on Mason to Auburn street, with a single track, from Mason northerly to Vine, and, by double track, to the corporation line of the city and Avondale, is operated under a pretended grant made under an ordinance of the city of Cincinnati passed October 27, 1875; and that said grant and said ordinance were illegal and void, for the reason that said grant was made without competition, due advertisement, and letting to the lowest bidder, as required by law, and because said grant is not an extension of any street railway.

Defendant further says that the inclined plane railway company acquired no right to operate the street railways operated by it, or to operate an inclined plane railway, by the resolutions referred to in the bill of complaint, and passed by the board of public affairs October 24, 1888, because the common council of the city of Cincinnati did not concur in said resolutions, and the same were not proven and signed by the mayor of said city; that said resolutions did not purport to, and did not, make a grant of the right to operate any railway, or a grant extending or renewing any of the rights of the inclined plane railway company to operate any street railway route the grant for which had theretofore expired. The defendant says that said resolutions were passed by said boards upon the application and at the request of said inclined plane railway company.

Defendant further answers: That on the 12th of December, 1890, it brought an action in the superior court of Cincinnati, which court had jurisdiction of the cause and of the parties, against the inclined plane railway company, to recover certain license fees alleged to be due from said company to defendant, and praying that said company be enjoined from maintaining and operating its cars upon more than one track on Auburn street, between Mason and Vine streets, and from maintaining its tracks or operating its cars upon any of the tracks on Main, Court, Walnut, and Fifth streets, and for such other relief as plaintiff might in equity be entitled to. That said company filed its answer in said court, and a supplemental answer; and on May 3, 1892, the cause was heard at the special term of said court, and reserved for hearing by the general term of said court. That it was heard by the general term, and that on October 21, 1893, a final decree was rendered by said general term of said court, and judgment rendered therein that the inclined plane railway company be, and the same was, perpetually enjoined from maintaining any of its tracks, poles, wires, or other appliances on Main, Court, Walnut, or Fifth street, and from operating any of its cars over any of said tracks, and was perpetually enjoined from maintaining and operating more than one street-railway track on Auburn street, between Mason and Vine streets; and finding, further, that the inclined plane railway company was indebted to the city for license fees of \$100 per annum for each car operated over any of the tracks of said railroad Route No. 8, as described in said plaintiff's petition in said cause, from the year 1877, to and including the year 1884, reserving for

future ascertainment the liability of the plaintiff for unpaid license fees and percentage of gross earnings. That on the 23d of October, 1894, a judgment was rendered by the supreme court of the state of Ohio affirming the judgment and decree of the said superior court in general term (44 N. E. 327); and on the ——— day of October, 1894, a mandate was sent from said supreme court to said superior court, in general term, to carry into effect said decree of affirmation.

Wherefore the defendant claims that under and by virtue of said judgment and decree, as well as for the other reasons in the answer and above stated, it has the right to remove the tracks, poles, wires, and other appliances maintained by said inclined plane railway company on Main, Court, Walnut, and Fifth streets, and to prevent said company from operating any of its cars over said tracks, and also the right to remove one of said railway company's tracks from Auburn street, between Mason and Vine streets, and to prevent said company from operating its cars on more than one track on Auburn street, between Mason and Vine; and that the use and occupancy by said inclined plane railway company of its tracks, and the operation of its railway, on the streets named in said judgment, are in violation of the injunction granted by said court; that said railway company has been, and now is, in contempt of said court for disobedience of said injunction.

The defendant, further answering, claims the right to prevent said railroad company from holding, maintaining, and operating said inclined plane across, over, or upon the streets mentioned in the said resolution of June 16, 1871, because the right to do so was never lawfully acquired by said company, and has, moreover, by its terms, expired; also, that the defendant has the right to prevent said railway company from maintaining and operating said double tracks between Mulberry and Liberty streets, and Locust and Mason streets, and also its single track on Auburn street, also its tracks on Vine street, to the corporation line of the city of Avondale, because said inclined plane company never lawfully acquired the right to maintain and operate said tracks, or any of them, for the reasons in the answer and above stated. The defendant says that any and all orders by it made to require said inclined plane railway company to remove its tracks, with the electrical appliances, from the streets aforesaid, are lawful, and within the rights of this defendant, for the reason that said inclined plane railway company, as in the answer and above set forth, has no right whatever to use and occupy any part of the streets of the defendant for any purpose, and is a trespasser therein.

Finally, the defendant denies all and all manner of unlawful combination and confederacy, etc., and prays to be dismissed, with its reasonable costs.

The facts in this case are not in dispute. The inclined plane railway company was organized as set forth in the bill. The railway was constructed, afterwards leased, and subsequently transferred, to the inclined plane company, as stated in the bill, which also sets forth correctly the construction, by the proprietors, of a street railway known as "Route No. 8," extending from the foot of the inclined plane railway, at the head of Main street, to Fifth and Walnut, thence returning via Fifth and Main, to the place of beginning, and its subsequent acquisition and operation by the inclined plane railway company, under and by virtue of an act of the general assembly of the state of Ohio, passed March 30, 1877, relating to inclined plane railway companies organized under the general corporation act of May 1, 1852; also, a street railway extending from the head of the inclined plane railway to the Zoölogical Garden, in Avondale. Subsequent extensions were made and operated, as set forth in the bill. By stipulation, the ordinances set up in the answer are made part of the record. The execution of the mortgages set forth in the bill is admitted, and a statement of sales of bonds secured thereby is included in the stipulation. Other facts will be stated in the opinion.

E. A. Ferguson, Alex. P. Humphrey, and St. John Boyle, for complainant.

Outcalt, Granger & Hunt, for intervener.

Fred. Heitevestein and J. D. Brannon, for respondent.

SAGE, District Judge. Before discussing the question whether the decision of the supreme court of Ohio, referred to in the answer, in the case of *City of Cincinnati v. Inclined Plane Ry. Co.*, 52 Ohio St. 609, 44 N. E. 327, is binding on this court, the force and effect of the statute of Ohio passed March 30, 1877, will, independently of that decision, be considered. The act is as follows:

"Section 1. Be it enacted by the general assembly of the state of Ohio, that any inclined plane railway or railroad company heretofore or that may hereafter [be] organized under the act of May 1, A. D. 1852, entitled, 'An act to provide for the creation and regulation of incorporated companies in the state of Ohio,' shall have power to hold, lease or purchase, and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains and operates its inclined plane: provided, that no other motive power than animals shall be used on the public highways occupied by such street railway company without the consent of the board of public works, in any city having such a board, and the common council or the public authority or company having charge or owning any other highway in which such street railroad may be laid; and provided, that no inclined plane railway or railroad company shall construct any track or tracks in any street or highway without first obtaining the written consent of a majority of the property holders on the line of such proposed track or tracks, represented by the feet front of lots abutting on the street or highway along which such track or tracks are proposed to be constructed.

"Sec. 2. No such purchase or lease shall be made without the consent of the holders of the stock in the company purchasing or leasing, and in the company leasing or selling such street railroad, or of the owners thereof.

"Sec. 3. This act shall take effect on its passage."

The contention for the complainant is that inasmuch as the inclined plane company was organized under the act of May 1, 1852, it had perpetual existence, with the franchise to build, maintain, and operate its inclined plane and railway, and that these franchises were likewise perpetual. The greater part of the inclined plane was built on property the fee of which was vested in the company. It, however, occupied a part of Locust street, and crossed above grade, and at such a height as not to obstruct travel, Miami, Baltimore, and Dorsey streets, under permission granted by resolution of the board of aldermen and the common council of the city of Cincinnati in 1871, which limited the grant to 20 years from the date of its passage. This limitation, it is contended, did not constitute one of the terms and conditions upon which the company held, maintained, and operated its inclined plane, any more than if the company had leased from some private individual, for a limited term, part of the property upon which it built its inclined plane. The argument is that in either case the corporate existence would not terminate when the time of the grant or of the lease expired, but the corporation would still have the power either to have the lease renewed for another definite term, or perpetually, or, failing in that, to condemn the right in perpetuity under the express power granted in section 12 of the act of May 1, 1852.

It is, moreover, urged that, as the company acquired the land on both sides where it crossed the streets and built its inclined plane at such a height as not to impede public travel along the highway,

there would be really nothing to condemn, for the reason that the owner of abutting property retains all title to the highway, excepting such as is necessary for the public to secure a passage over it. It may be conceded, for the sake of the argument, that the existence of the company under the act of May 1, 1852, is perpetual, or, at least, without time limit, and that its franchises are of like duration. The weak point in complainant's contention is by reason of the fact that the municipality of Cincinnati is also a corporation, endowed with the control and management of the streets of the city, and that the twelfth section of the general corporation act of May 1, 1852, made it competent for the city as a municipality and any railroad company to agree upon the manner and upon the terms and conditions upon which the streets, or any part thereof, should be used or occupied. The section also contains a provision that if the parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such a railroad company, to use or occupy such street, the company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the tenth section of said act. The provisions of this section define and limit the franchise which is granted to the city as a corporation, and that which is granted to the railroad company as a corporation. The inclined plane railway company recognized the right of the city, under section 12, to prescribe the terms and conditions upon which it should occupy Locust street, and cross the other streets named. The fee of those streets was vested in the public. The company accepted the grant from the city. The grant has terminated, and whatever may be said as to the right of the company to appropriate, by proper proceedings, so much of the streets as may be necessary for the purposes of its inclined plane, the fact is that it has not done so, and is a trespasser. Without a grant from the city, or an appropriation in accordance with the provisions of section 12, the company has no right to use or to occupy any part of any street in the city; and in that predicament it is now, and has been ever since long before the bill in this cause was filed, unless the city is estopped, which will be considered later in the opinion. The ownership by the inclined plane company of the land on both sides of the streets where they are crossed by the inclined plane track, while it might go to the question of the amount of compensation to be awarded, would not dispense with the necessity to institute condemnation proceedings. Referring now to the statute of March 30, 1877, we see that the power of the inclined plane company to hold, lease, or purchase, and maintain and operate, such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, is to be "upon the same terms and conditions on which it holds, maintains, and operates its inclined plane." If, therefore, the inclined plane company has no longer any right to hold, maintain, and operate its inclined plane, it has no right to maintain or operate the street railroads which it has acquired; and this is true whether the franchises of the inclined plane

company are perpetual, or are limited in time. In other words, the power or franchise to acquire the right is not equivalent to possessing the right.

But the defendant denies that the statute gave to the inclined plane company the right to maintain and operate Route 8 perpetually. Passing, for the present, the question whether the decision of the supreme court of Ohio upon this point is binding upon this court, it is clear that the act of March 30, 1877, does not, in express terms, confer any such right on the inclined plane railway company. If such was the intention of the legislature, it would have been easy to express it. Unless expressed, or resulting by necessary implication, it does not exist. The rules of construction do not favor implied grants.

The supreme court of the United States, in *Minturn v. Larue*, 23 How. 436, said:

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived from them by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

In *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S., at page 49, 11 Sup. Ct. 478, the opinion of the supreme court contains the following:

"By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee, and in favor of the public, because an intention on the part of the government to grant the private persons, or to a particular corporation, property, or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant, and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms."

See, also, *Slidell v. Grandjean*, 111 U. S. 437, 438, 4 Sup. Ct. 475; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 26, 27, 9 Sup. Ct. 409; 4 *Thomp. Corp.* p. 4357, § 5659, and cases there cited; *Stein v. Water-Supply Co.*, 141 U. S., at page 80, 11 Sup. Ct. 892, where the supreme court quote with approval from *The Binghamton Bridge*, 3 Wall. 51, 75, that, "in grants by the public, nothing passes by implication"; and "if, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting, and the other extending, the powers of the corporation, that construction is to be adopted which works the least harm to the state." The supreme court refer to this rule as one "in respect to which there is no difference of opinion in the courts of this country," and, applying it, held that a grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of waterworks from

a particular stream or river, does not prevent the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river.

The court of appeals of the state of New York, in *People v. Newton*, 112 N. Y. 399, 19 N. E. 831, said:

"The terms of the grant conferring the right which is asserted are to be strictly construed, and the privilege it confers cannot be extended by inference. If there is any ambiguity, it must operate against the company, the general rule being that the grant shall be construed most strongly against the party claiming under it, and every reasonable doubt resolved adversely to it. Nothing is to be taken as conceded; nothing is to be included in the grant but what is given in unmistakable terms; and, as was said in *Langdon v. Mayor*, 93 N. Y. 145: 'Whatever is not unequivocally granted is deemed to be withheld;' nothing passing by implication. The affirmative must be shown. The court is not to search for any hidden meaning."

The supreme court of Indiana, in *Western Paving & Supply Co. v. Citizens' St. R. Co.*, 128 Ind. 530, 26 N. E. 188, and 28 N. E. 88, declared that it was—

"Settled that such charter is to be strictly construed against the railway company, and that it has no doubtful rights under such charter, for, where there are doubts, they are construed against the grantee, and in favor of the city."

In *Pennsylvania R. Co. v. Canal Com'rs.* 21 Pa. St. 22, Chief Justice Black said:

"When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said. * * * In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation."

The supreme court, in *Fertilizing Co. v. Hyde Park*, 97 U. S. 666, was no less emphatic:

"Every reasonable doubt is to be resolved adversely [to the corporation]. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

The supreme court of Louisiana, in *New Orleans & C. R. Co. v. City of New Orleans*, 34 La. Ann., at page 447, uses the following language:

"Charters and other acts conferring powers and privileges upon corporations, though ostensibly mere ordinary acts of legislation, are usually prepared by the parties interested, and by them submitted for legislative approval. This is one among many reasons why they are always so strictly construed. *Pierce, R. R.* p. 491.

"They are assumed to have been prepared with care and forethought, and to embody clearly all the rights and privileges which it was supposed the legislature would have been willing to grant. To permit such privileges to be cloaked and covered up under ambiguous and equivocal expressions, not distinctly presenting the subject of their extent and propriety to the legislative mind, would be to expose the legislature to deception, and to enable parties, by artful duplicity of language, to claim and enjoy privileges which, it may be, the lawmaking power did not intend to grant, and would have refused had they been directly and clearly asked.

"Against the possibility of the success of such devices, the judiciary sets its face like flint."

Keeping these rules of construction in mind, let us now consider what the effects of the construction claimed by complainant would be. They are fully set forth by Judge Smith, of the superior court of Cincinnati, in the *City of Cincinnati v. Cincinnati Inclined Plane Ry. Co.*, 30 Wkly. Law Bul. 324, 325. Among them are the following, as stated by defendant's counsel in their brief:

"(1) To remove all limitations on the life of any grant for a street railway which an inclined plane railway company might acquire, and to give such company a perpetual right in the streets occupied by such street railways.

"(2) To deprive the city of its stipulated rights to car licenses and percentages on earnings, and of its right to charge the company with part of the expense of repairing the streets, where such rights had been reserved in the ordinances originally creating the grants.

"(3) To give to a class of inclined plane railway companies (those incorporated under the act of 1852) rights which could not be granted to any other companies, whether inclined plane or street railway companies, or to individuals under the laws, since they would be free from the restrictions of the various statutes, beginning with the act of May 14, 1878, which forbade cities to make or renew street railway grants for a longer period than twenty-five years.

"(4) To oblige cities to permit inclined plane railway companies to use the streets for street railways on the companies' own terms, under penalty, in case of the refusal of the city, of having the right of way over any and all streets condemned for the use of the company in perpetuity.

"(5) To enable the inclined plane railway companies in Cincinnati organized under the act of May 1, 1852, to acquire any existing street railroad which leads to or connects with its inclined plane, and thus enable these companies to operate practically all the street railroads in the city in perpetuity, and free from all restrictions except such as the city might, by common-law right, impose independently of any power reserved in the original grants.

"(6) To permit the Cincinnati Inclined Plane Railway Company to charge such rates of fare upon portions of street railroads acquired by it as the company might see fit to charge, there being no limitation as to the rate of fare in the grant by the city to the inclined plane railway company of permission to cross and occupy certain streets with its inclined plane. While it may be admitted that the state could, by subsequent legislation, control the rate of fare to be charged on street railroads by inclined plane companies, yet the city would have no such right, unless it had been reserved by contract.

"(7) As railway companies incorporated under the act of May 1, 1852, are authorized to operate general traffic railroads, which have the right to carry freight as well as passengers, the construction claimed by complainant for the act of March 30, 1877, would authorize inclined railway companies to transport freight over the street railroads acquired by them, and to use for that purpose such large and heavy cars as would increase the wear and tear of the streets, and necessitate more frequent repair of the streets, at the expense of the city."

From these considerations, and upon the application of the rules of construction hereinbefore set forth, it is clear that the Cincinnati Inclined Plane Railway Company did not, by the transfer of Route 8, acquire the right to maintain and operate that route perpetually. This court agrees with the superior court in its opinion, which was affirmed by the supreme court of Ohio, that the true construction of the provision of the act of March 30, 1877, giving the company right to hold, maintain, and operate street railways on the same terms and conditions upon which it held, maintained, and operated its inclined plane, is to regard the provision as having reference only to the terms and conditions spoken of in the twelfth section of the act of 1852, and that the act merely granted to inclined plane railway

companies power to hold, lease, or purchase, and maintain and operate, certain portions of street railroads, but made no grant to the company of any street-railway franchise, nor did it give, or purport to give, to the company permission to use any streets for street railways. The act cannot properly be so construed as to compel the city to make a grant, or to permit the assignment of a grant, to an inclined plane railway company upon any other terms and conditions than those which the city has the right to exact from any grantee of a street-railway route. The argument of counsel for the complainant that inasmuch as section 2 of the act of March 30, 1877, provides that no purchase or lease under section 1 shall be made without the consent of the holders of the stock in the company purchasing or leasing, and in the company leasing or selling, such street railroad, or of the owners thereof, no consent of the city is required, and that, therefore, all rights which the city had against the original owner of the street railroad leased or purchased by an inclined plane railway company are destroyed, is altogether untenable. That section may dispense with the consent of the city to an assignment of an existing grant, by deed of conveyance or by lease, but it does not destroy any of the conditions upon which the grant was made, or release its owners or assignees from any of the burdens imposed by the contract between the city and the original grantee. The conclusion of the court is that, upon a lease to or purchase by the inclined plane railway company, that company would take the street railroad leased or purchased subject to all the terms and conditions imposed by the city, and under which it had theretofore been maintained and operated.

These questions, however, are foreclosed in this court by the opinion of the supreme court of Ohio in the case of *City of Cincinnati v. Inclined Plane Ry. Co.* It is true that the supreme court did not file an opinion in the case, but it did what was equivalent; it affirmed the judgment, for the reasons stated in the opinion below. 52 Ohio St. 609, 44 N. E. 327. That affirmation was an adoption of the opinion of the superior court in general term, in which the matters were fully and ably discussed, and the conclusion reached that the inclined plane railway had no longer any right to maintain and operate the lines of street railway involved in the case. The company was, however, allowed six months in which to apply to the city authorities for a new grant to maintain and operate such lines. The judgment of the court included Route 8, and the tracks on Main street between Liberty and Mulberry, under the ordinance of 1871, and on Locust and Main streets, and one of the tracks on Auburn street, under the ordinance of 1875. The decision is based upon the construction of certain statutes of Ohio conferring certain powers upon municipal corporations, and imposing limitations upon their powers, and the construction put by the state court upon such statutes is binding on the federal courts in Ohio.

In *City of Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, it was held that the local law of a state conferring the right to recover from a municipal corporation for injuries caused by defects in its highways and streets is binding upon courts of the United States

within the state. The court quoted with approval the following language from *Claiborne Co. v. Brooks*, 111 U. S. 410, 4 Sup. Ct. 489:

"It is, undoubtedly, a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state."

To the same effect, see *Norton v. Shelby Co.*, 118 U. S. 440, 6 Sup. Ct. 1121; *Meriwether v. Muhlenburg Co. Ct.*, 120 U. S. 357, 7 Sup. Ct. 563; *Rich v. Mentz Tp.*, 134 U. S. 632, 10 Sup. Ct. 610.

These cases are clearly distinguishable from the cases cited by counsel for the complainant. *Butz v. City of Muscatine*, 8 Wall. 575, was a case in which it was held that, where a question involved in the construction of a state statute practically affects those remedies of creditors which are protected by the constitution, a federal court will exercise its own judgment on the meaning of the statute, irrespectively of the decisions of the state courts. In that case the state statute limited the authority of the counsel to levy a tax upon the property of the state, and the supreme court held that the statute did not apply to a case where a judgment had been recovered against the city. *Chicago v. Sheldon*, 9 Wall. 55, held that a contract having been entered into between parties, valid at the time, by the laws of the state, no decision of the courts of the state subsequently made can impair its obligation. *Township of Pine Grove v. Talcott*, 19 Wall. 673, decided that questions relating to bonds issued in a negotiable form under an act of the legislature of the state involved questions relating to commercial securities; and whether, under the constitution of the state, such securities are valid or void, belongs to the domain of general jurisprudence, and the decisions of the state court are not binding upon the federal courts. In *Block v. Commissioners*, 99 U. S. 699, after negotiable bonds had been issued and negotiated, and after the rights of the holders thereof had become fixed, an opinion was delivered by the supreme court of the state as to their validity; and the supreme court of the United States held that it was at liberty to follow its own convictions of the law, and was not bound by the decisions of the state court. In *Burgess v. Seligman*, 107 U. S. 21, 2 Sup. Ct. 10, the supreme court, recognizing the controlling effect of decisions of the state courts which become rules of property and action in the state, and having all the effect of law, especially with regard to the law of real estate, the construction of state constitutions and statutes, asserted the right and duty of federal courts to exercise their own judgment whether the law has not been thus settled, and with reference to the doctrine of commercial law and general jurisprudence.

The doctrine of estoppel is invoked by counsel for the complainant upon the grounds:

(1) That, immediately after the passage of the act of 1877, the inclined plane company acquired Route 8 by lease for 99 years, renewable forever, with privilege of purchase.

(2) That from the time of this acquisition no percentage of gross

earnings or car licenses which were required to be paid under the ordinance establishing Route 8 was paid to nor demanded by the city, and, on the contrary, the property was taxed under the steam railroad law.

(3) On January 1, 1879, the company executed a mortgage to Peachey and Goodman, trustees, upon all and singular its railways, franchises, and property, including Route 8; and the lessors joined in the mortgage, so that it might be superior to their claim for rent; and there were issued, under it, bonds to the amount of \$125,000, which were used for the purpose of paying the debts of the company, and making improvements on the property. On September 24, 1885, the substitution of electricity, cable, or compressed air as a motive power upon all the roads then held by the inclined plane company was consented to by the board of public works of the city.

(4) That on August 12, 1887, by direction of the board of aldermen and councilmen of the city, its clerk submitted to the board a report upon the street railroads of the city, which informed the board of the routes operated by the inclined plane railway company. That report included a communication from Hon. E. A. Ferguson, representing the owners of the lines, which set forth the acquisition and the action of the board of public works consenting to the substitution of electricity, cable, or compressed air as a motive power, and gave a full history of the franchises at that time held, maintained, and operated by the inclined plane company. In October, 1888, the company, having applied to the board of public affairs (which in the meantime had taken the place of the board of public works) for permission to erect along the entire length of the road the poles, wires, and other appliances necessary to operate and maintain the whole line as an electric road, and to change and relay the tracks, and improve the curves and switches, from Liberty street north to the Zoölogical Garden, so as to better adapt them to the running of cars by electricity, and having obtained the desired permission upon certain conditions, relating to the change and relaying of the tracks, and improving the curves and switches, and fixing the conditions under which the permission should be exercised, proceeded to carry out the terms of this permission, and on January 1, 1889, executed a mortgage to the complainant to secure bonds to the amount of \$500,000, of which \$125,000 were to be reserved against the bonds outstanding under the trust mortgage to Peachey and Goodman and the remaining bonds, \$375,000, were issued, as was also \$125,000 of preferred stock; and the money from the sale of these bonds and stock was used to equip the line with electricity, relay the tracks, reconstruct the inclined plane, and build a power house.

The court adopts the view taken by counsel for the city in answer to the claim that the city is estopped, placing their contention upon the following grounds: The city did not require nor compel the railway company to make any changes. Upon the company's request, not made to the city, but to the administrative board only, that board authorized the change from horse power to electric power. The inclined plane was reconstructed without any permission. The acts of the board of public works and the board of public affairs were

simply permissive. They did not purport to confer any rights upon the railway company, nor anything more than the privilege to make the changes for which the company sought their consent. The boards had the right to suppose that the railway company knew what its title was, and that it assumed all the risks involved in the change of its motive power. A municipal corporation is not estopped by reason of the act of a board not authorized to bind the city by its independent action. 2 Dill. Mun. Corp. (4th Ed.) § 660. The common council of a city can only contract by ordinance, resolution, or order, and an illegal and void contract cannot lay the foundation for an estoppel.

In *Richardson v. Grant Co.*, 27 Fed. 495, it was held that municipal or public corporations are not liable on a quantum meruit for the value of materials furnished under illegal or forbidden contracts when the municipality could not choose whether or not it would retain or reject the benefit of such work or materials. See, also, *McCracken v. City of San Francisco*, 16 Cal. 591, cited by the supreme court of the United States in *Merrill v. Monticello*, 138 U. S. 687, 11 Sup. Ct. 441.

The resolutions consenting to the change of motive power did not create or renew a grant, nor did they constitute either an expressed or implied recognition of any valid existing grant. *State v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262. The cases in which an estoppel in pais may be raised against a municipal corporation are where the defect was formal, and where the other party had relied upon the contract, and the municipal corporation had received money or property under it. See *City of Detroit v. Detroit City Ry. Co.*, 60 Fed. 166, and cases there cited. The reversal of the judgment in that case was upon another ground, and did not affect the proposition here stated. In the case at bar the resolutions relied upon to raise an estoppel do not show any intention to make a contract granting or renewing a right. They were not competent to accomplish that request, because the boards passing them could not lawfully make or renew a grant, nor did the city receive any money or property. *Cincinnati & S. Ry. Co. v. Incorporated Village of Carthage*, 36 Ohio St. 631.

The complainant and the bondholders were bound to know the law of the state, to take notice of the limitations on the power of the board of public works and the board of public affairs, and of the statutory restrictions as to the mode and manner of making contracts by the city. They were bound, also, to know that in *State v. Bell*, 34 Ohio St. 194, it was decided, two years before the first mortgage was made, that the board of public works had no power to make a street-railway grant. It is necessary, upon claiming rights by estoppel, to be able to define the rights claimed. Counsel for the complainant go no further than to claim that the complainant is entitled to have the railway operated until the bonds are paid. But, as is suggested by counsel for the defendant, suppose the company failed to make money enough to pay the bonds; what would happen? And, upon foreclosure proceedings, the road should sell for enough to pay the bonds; what would the purchaser of the road

get? How long would the estoppel operate in favor of the purchaser? The failure to oust the company from the operation of Route 8 after the expiration of the grant therefor, in 1884, gave to the company no new rights. They continued to use the streets only by sufferance. The failure to exact the payment of car license for the cars run upon Route 8 could not work an estoppel against the city, because the neglect of the city to enforce its rights would have no effect, excepting so far as the statute of limitations might come into play. It has been held that a consent to a change of motive power creates no grant or license to use the streets. It is a mere act of regulation. *In re Third Ave. R. Co.*, 121 N. Y. 536, 24 N. E. 951.

As to the report made by the city clerk to the board of aldermen, it was read, ordered to be printed, and no other action was taken upon it. It was never read in the board of councilmen, and it did not, nor did the letter of Mr. Ferguson, which was incorporated in the report, suggest any claim by the railway company the right to operate its street railways in perpetuity. *Mt. Adams & E. P. Ry. Co. v. City of Cincinnati*, 23 Wkly. Law Bul. 68; *Zottman v. San Francisco*, 20 Cal. 97.

The taxation of the property of the inclined plane railway company under the steam railroad law was by the county auditor. The city had nothing to do with it, no authority over it, and it was not shown that the inclined plane railway company was thereby compelled to pay any greater amount of taxation than if it had been taxed as a street-railway company. The application of the company to relay its tracks in certain streets that were repaved was altogether independent of the question whether it occupied the street under a contract or under a license. The authorities in support of the proposition that the company must relay its tracks when the street is improved, and that the obligation exists independently of any express statutory requirement or specific agreement with the municipal authorities, are cited in *Booth on Street Railways*, at section 254, where the law is so stated.

The supreme court of Ohio, in *Railroad Co. v. Defiance*, 52 Ohio St. 262, 40 N. E. 89, held that the—

"Powers conferred on municipal corporations with respect to the opening, improving, and repairing of their streets and public ways are held in trust for public purposes, and are continuing in their nature, to be exercised from day to day as the public interests may require; and they cannot be granted away, or relinquished, or their exercise suspended or abridged, except when and to the extent that legislative authority is expressly given to do so. Such authority is not given by section 3283 of the Revised Statutes."

Section 3283 is section 12 of the corporation act of May 1, 1852, revised. The two sections are identical in substance. The difference is only in the manner of expression. The city was prohibited by statute from making any grant to a street railway for a period longer than 25 years. Can it be possible that, by conduct or silence or acquiescence, it could extend such grant indefinitely or perpetually, or, in other words, accomplish indirectly what it was beyond its power to do directly? The supreme court recognized and applied

in *Railroad Co. v. Defiance* the rule with reference to the construction of grants which has been hereinbefore stated, to wit, that they "will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond their express terms, when not indispensable to give effect to the grant."

The only remaining question to be considered is whether section 720 of the Revised Statutes applies to this case. That section provides that:

"A writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This section, it has been held, must be construed in connection with section 716, which provides that:

"The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*, and to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

These provisions, however, do not affect this case, nor do the provisions of sections 640 and 646 of the Revised Statutes, by which also the interpretation of section 720 is restricted. Those sections relate to cases removed from the state courts to the federal courts, and authorize federal courts, by injunction, to prevent further proceedings therein in the state courts.

Section 720, it has been held, applies not merely to staying proceedings in any court of a state, but is an inhibition against staying a party in the conduct of the proceedings in a state court. *Fisk v. Railroad Co.*, 6 Blatchf. 362, Fed. Cas. No. 4,827. It applies, also, to prevent an injunction staying a party at any stage of the proceedings in a state court, as where the proposition was to enjoin a sale of land under an order of the state court. *Sargent v. Helton*, 115 U. S. 348, 6 Sup. Ct. 78; *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. 799. Property in the hands of a sheriff under process issued by a state court will not be interfered with by injunction from a federal court, nor can a party be restrained from taking possession of property which the judgment of a state court requires to be delivered to him. *Watson v. Jones*, 13 Wall. 679. Section 720 also prohibits the issue of an injunction to restrain the sale of property under an execution issued out of a state court, although application is made by a third person whose property is taken. *Watson v. Bondurant*, 2 Woods, 175, Fed. Cas. No. 17,278; *Perry v. Sharpe*, 8 Fed. 23. It has been held that the holder of a chattel mortgage cannot enjoin the sheriff from selling the property under execution of a judgment against the mortgagor. *Ruggles v. Simonton*, 3 Biss. 325, Fed. Cas. No. 12,120. It follows that this court, even if its opinion upon the merits of this controversy were in favor of the complainant, could not by injunction prevent the city of Cincinnati from reaping the fruits of its litigation in the state court with the inclined plane company.

The validity of the act of March 30, 1877, under the constitution of the state of Ohio, is denied by counsel for defendant. It is not necessary to the decision of this cause to enter upon the discussion

of this question, which belongs, primarily, to the domain of state jurisprudence, and which a federal court will not take up excepting under an imperative necessity.

The equities of this cause are with the defendant. The bill will be dismissed, at the complainant's costs.

COLLINS v. BUBB.

(Circuit Court, D. Washington, E. D. April 7, 1896.)

1. PUBLIC LANDS—OPENING INDIAN RESERVATION—MINING LOCATIONS.

The act of July 1, 1892, opening a part of the Colville reservation, in the state of Washington, annulled from that date the executive order creating the reservation, and restored the lands to the public domain, subject only to the rights of the Indians to make selections for allotments in severalty; but the mineral lands contained therein are not subject to such selection, it being the intent of the law to award to each Indian agricultural land for his home.

2. SAME—INDIAN SELECTIONS—MINERAL LANDS.

For the purpose of giving the Indians the full benefit of the right to select from the whole tract, settlements upon and entries of agricultural lands must be postponed, under the act, until six months after the president's proclamation opening the lands to settlement and entry; but prospectors and miners are not required to wait for the proclamation to open the tract to exploration for minerals.

This was a bill by Charles N. Collins to enjoin John W. Bubb, as agent in charge of the Colville Indian reservation, from interfering with complainant's mining operations.

W. B. Heyburn, for plaintiff.

W. A. Peters, for defendant.

HANFORD, District Judge. The complainant, in his bill of complaint, claims the right to locate a lode claim within the limits of the Colville Indian reservation, and to work his claim, and extract mineral-bearing ores therefrom, on the ground that that part of said Indian reservation which embraces his mining claim was restored to the public domain, and thereby thrown open to exploration, and made subject to the rights of prospectors and miners, under the public land laws of the United States, by the provisions of the act of congress of July 1, 1892, entitled "An act to provide for the opening of a part of the Colville reservation, in the state of Washington, and for other purposes." 27 Stat. 62. And he complains that the defendant, as agent in charge of said reservation, has threatened and intends to forcibly expel him from the limits of said reservation, and prevent his mining operations. The object of the suit is to obtain an injunction to prevent the defendant from such interference, and the case has been argued and submitted upon the application for a temporary injunction, and a demurrer to the bill of complaint.

The parts of the act of congress referred to necessary to be considered at this time are the first, third, fourth, and fifth sections, which are as follows:

"Section 1. That subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville reservation in the state of Washington herein provided for, all the following described tract or portion of said Colville reservation, namely: Beginning at a point on the eastern boundary line of the Colville Indian reservation where the township line between townships thirty-four and thirty-five north, of range thirty-seven east, of the Willamette meridian, if extended west, would intersect the same, said point being in the middle of the channel of the Columbia river, and running thence west parallel with the forty-ninth parallel of latitude to the western boundary line of said Colville Indian reservation in the Okanagon river, thence north following the said western boundary line to the said forty-ninth parallel of latitude, thence east along the said forty-ninth parallel of latitude to the northeast corner of the said Colville Indian reservation, thence south following the eastern boundary of said reservation to the place of beginning, containing by estimate one million five hundred thousand acres, the same being a portion of the Colville Indian reservation created by executive order dated July second, eighteen hundred and seventy-two, be, and is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be open to settlement and entry by the proclamation of the president of the United States, and shall be disposed of under the general laws applicable to the disposition of public lands in the state of Washington."

"Sec. 3. That each entryman under the homestead laws shall, within five years from the date of his original entry and before receiving a final certificate for the land covered by his entry, pay to the United States for the land so taken by him, in addition to fees provided by law, the sum of one dollar and fifty cents per acre, one-third of which shall be paid within two years after the date of the original entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged, except as to the sum to be paid as aforesaid.

"Sec. 4. That each and every Indian now residing upon the portion of the Colville Indian reservation hereby vacated and restored to the public domain, and who is so entitled to reside thereon, shall be entitled to select from said vacated portion eighty acres of land, which shall be allotted to each Indian in severalty. No restrictions as to locality shall be placed upon such selections other than that they shall be so located as to conform to the congressional survey or subdivisions of said tract or country, and any Indian having improvements may have the preference over any other person in and to the tract of land containing such improvements, so far as they are within a legal subdivision not exceeding in area the quantity of land that he or she may be entitled to select and locate. All such allotments shall be made at the cost of the United States, under such rules and regulations as the secretary of the interior may from time to time prescribe. Such selections shall be made within six months after the date of the president's proclamation opening the lands hereby vacated to settlement and entry, and after the same have been surveyed, and when such allotments have been selected as aforesaid and approved by the secretary of the interior, the titles thereto shall be held in trust for the benefit of the allottees, respectively, and afterwards conveyed in fee simple to the allottees or their heirs, as provided in the act of congress entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, and an act in amendment and extension thereof, approved February twenty-eighth, eighteen hundred and ninety-one, entitled 'An act to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes:"' provided, that such allotted lands shall be subject to the laws of eminent domain of the

state of Washington, and shall, when conveyed in fee simple to the allottees or their heirs, be subject to taxation as other property in said state.

"Sec. 5. That all Indians residing in the lands hereby vacated and restored, shall have the right, if they so prefer, under the direction of the Indian agent, to occupy and reside upon such portions of the Colville Indian reservation not hereby vacated as are not occupied by or in the possession of any other Indian or Indians."

The defendant contends that the above act did not restore the tract described to the public domain for any purpose whatsoever, but that the entire tract is still a reservation, and must continue to be a reservation for the Indians until the allotments to the Indians in severalty therein provided for shall have been made, or until the end of the period limited for the making of selections, after the president's proclamation.

The main question now to be decided is whether the tract described was, by the positive words in the first section, restored at once to the general mass of public lands of the United States, and from the date of the act ceased to be an Indian reservation, or whether the purpose of the law as expressed in its title remains to be accomplished at such time in the future as the president may select for issuing his proclamation removing all restrictions upon the rights of citizens to obtain titles by settlement and entries. The enactment of the law under consideration was preceded by appointment of a commission of three persons, to negotiate with the Colville Indians for the cession of such portion of the reservation as they might be willing to dispose of, in order that the same might be thrown open to settlement by white people, pursuant to an act of congress authorizing such commission, approved August 19, 1890 (26 Stat. 355). Said commission made a report to the secretary of the interior, which was transmitted to congress by the president in a message dated June 6, 1892. Said report contains the following statements:

"That of the portion of the territory ceded it is estimated that about three hundred thousand acres are suitable for agricultural purposes. The remainder is very valuable for grazing purposes and for the timber thereon. Much of the territory ceded is mountainous, and abounds in rich mineral deposits. The southern portion of said reservation, it being the portion of said reservation not ceded, contains the largest proportion of agricultural lands, and the grazing lands upon this portion are for the most part fine. The supply of timber here is quite ample. From the best information the commission has been able to obtain, it is believed that there is upon the portion of said reservation not ceded, an acreage of land suitable for agricultural purposes very largely in excess of a hundred and sixty thousand acres, the limitation indicated in department instructions dated October 21, 1891. The commission did not deem it advisable to negotiate with the Indians for the purchase of any greater area of territory than that ceded, and are satisfied that the portion of said reservation not ceded contains ample territory for the comfort, security, support, and maintenance of all the Indians upon said reservation in their various avocations of life. From the best information the commission could obtain without incurring the expense of a survey,—and this was not practicable owing to the scarcity of funds,—there remains of the portion of the Colville reservation not ceded near one million three hundred thousand acres."

The commission also negotiated a treaty with the Indians, extinguishing all their rights and claim to the north half of the Colville reservation, which treaty was to become effective as soon as approved by congress. Said treaty was submitted to congress, together
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with a proposed bill to be enacted to give it effect. The message, with the report of the commission and agreement, was by the house of representatives referred to its committee on Indian affairs, and said committee reported that the necessity for opening at least a portion of the reservation is apparent, because of the following reasons, among others:

A lessening of the dimensions of the Colville reservation, the planting of active, prosperous, and well-ordered white communities on every side of the Indians, the building of railroads, the creation of towns and cities, the opening of mines, and the consequent establishment of markets near at hand, etc. Further, that the reservation is surrounded on two sides by the Columbia river, on one side by the wilds of British Columbia, and on the other by a portion of Washington that has no outlet by rail, because the reservation itself stands as a barrier to all railroad construction from the east. And as a third reason why the reservation should be opened, that the reservation as it stands to-day is a great obstacle to the development of the state of Washington and the general progress of the Pacific Northwest. So long as it continues to be the sporting ground of so sparse, thriftless, and irresponsible a population, its lands will remain untilled, and its mines will remain unopened, being more than the Indians need for sustenance and comfort, yielding no revenue to the general government, and being of no taxable value to the state of which it is an inseparable and essential part. It cuts off communication between the eastern and western portions of the state, and blocks the way to railroads that stand waiting at its boundaries. A railroad company, a local corporation, has constructed a line from the city of Spokane, the metropolis of Eastern Washington to Marcus, a point on the Columbia river, 100 miles distant, at an expense of over two million dollars, and has surveyed an extension through the reservation to the Okanagan country, an extensive region between the Colville reservation and the Cascade Mountains, rich in minerals and agricultural products, but wholly without railroad transportation, etc. The bill upon which this report was made was entitled "An act to ratify and confirm an agreement with the Indians residing on the Colville reservation, in the state of Washington, with certain modifications and making appropriation for carrying into effect the same." This was house bill No. 7,557, introduced in the house and referred to the committee of the whole on April 9, 1892. The bill went to the senate with this title, and was there completely changed, both as to title and character. The title was changed there to read "An act to provide for the opening of a part of the Colville reservation in the state of Washington, and for other purposes." Everything in the original act referring to the treaty entered into by the commissioners and incorporated in the original bill introduced in the house was abandoned in the senate. The senate struck out all reference to the treaty, and substituted the provisions of the law now under consideration. The house of representatives concurred, and the senate bill became a law without the signature of the president.

The title, text, and history of the act shows conclusively that the intention of congress was to lessen the dimensions of the Colville Indian reservation, and to do so at once, but saving to the Indians residing upon the part which was severed from the reservation their improvements, and an option to take lands in severalty within the limits of the tract severed, or to remove, and thereafter reside within the new boundaries of the reservation. After reading the law in its entirety, and giving effect to each of its provisions, I have reached the conclusion that the law must be construed as follows:

First. The law, by mandatory words in the present tense, annuls the executive order creating the reservation as to said tract, and restores the same to the public domain, subject only to the rights of the Indians to make selections of lands to be allotted to them in sev-

erally. The lands valuable for the minerals contained therein are not subject to be selected for allotment to the Indians. It is the intention of the law, in providing for allotments of land in severalty, to award to each Indian agricultural land to be his home.

Second. For the purpose of giving to the Indians the full benefit of the right to select from the whole tract such lands as may be required for allotment, settlements upon and entries of agricultural land must be postponed until a date in the future, to be fixed by the president's proclamation; but prospectors and miners are not required to wait for the proclamation to open the tract to exploration for minerals.

Under the general provisions of the public land laws of the United States, individual rights to acquire title to nonmineral lands can only be initiated by settlement thereon, and improvements to be made, or by entry,—that is, by purchase; but rights to mining claims are initiated by discovery of valuable mineral deposits, and the mode of appropriating mining ground is described by the word "location," and throughout the public land laws the words "settlement" and "entry" are made use of to describe the mode of acquiring nonmineral lands. *Chotard v. Pope*, 12 Wheat. 586. And the words "exploration," "occupation," "location," and "purchase" are used to describe the mode of acquiring rights to mining claims. Section 2319, Rev. St. U. S., provides that:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, and under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

This and the following sections in the same chapter fully authorize the complainant and other citizens to go upon the tract in question, and prospect for minerals, and locate mining claims, without further authorization or permission by executive proclamation, since congress has, by express enactment, removed the restrictions created by the executive order of July 2, 1892, setting apart the Colville reservation. The demurrer to the bill of complaint is overruled, and the complainant's application for an injunction is granted.

HALE v. WHARTON et al.

TOLEDO CONSOL. ST. RY. CO. v. SAME.

(Circuit Court, W. D. Missouri, W. D. April 27, 1896.)

SERVICE OF PROCESS—EXEMPTION OF SUITORS.

One W., a citizen and resident of Pennsylvania, was plaintiff in a suit pending in a federal court in Missouri against a Missouri corporation. Pursuant to the advice of his counsel that his presence was necessary, W. went to Missouri to attend the trial of the case. On the day for which the case was set down for hearing, it was adjourned one day, on account

of the illness of defendant's counsel, and as W. was leaving the courthouse a summons was served upon him in a suit instituted against him, in a state court, by a citizen of Illinois, through the same attorneys who appeared for the defendant in W.'s suit. Another summons in the same case was served upon him later in the day, at his hotel. W. removed the case into the federal court, appearing specially for that purpose, and moved to set aside the service of the summons on the ground that he was exempt from such service. *Held*, that the service should be set aside, notwithstanding the courts of Missouri hold service made under similar circumstances to be good.

Lathrop, Morrow, Fox & Moore, for plaintiffs.
Gage, Ladd & Small, for defendants.

Before ADAMS and PHILIPS, District Judges.

PHILIPS, District Judge. As the above-entitled cases present the same issues, they will be considered and determined together.

On the 12th day of December, 1895, the above-named defendants, resident citizens of the state of Pennsylvania, had pending in this court a suit at law against the Grand Avenue Hotel Company, a Missouri corporation, resident of this district. The defendant Wharton had come here in response to a letter from his counsel advising him of the importance of his presence at the trial of said cause. The cause was set down for trial on the 12th day of December, 1895, but on account of the indisposition of counsel for defendants the trial was postponed one day. Just as the defendant Wharton was leaving the court room on said 12th day of December, 1895, he was served within this building, by the sheriff, with a summons at the suit of plaintiffs, instituted at that time in the state circuit court of Jackson county against said defendants, as partners. Apprehensive that a question possibly might arise as to the legality of a service made within the federal building, on the territory of the United States, plaintiff caused another summons to be served on defendant the same day, at his hotel, in this city. The attorneys for the plaintiff are the same as those of the Grand Avenue Hotel Company in its said suit. On the return day of said writs the defendant Wharton appeared in said court, as expressed in the motion, solely for the purpose of applying for the removal of said cases into this court. The removal was accordingly made, and the defendant has moved here to set aside and vacate the said returns of service, on the ground that he was exempt from such process under the foregoing state of facts. This is the question to be decided.

It is, perhaps, not too much to say that no rule of practice is more firmly rooted in the jurisprudence of United States courts than that of the exemption of persons from the writ of arrest and of summons while attending upon courts of justice, either as witnesses or suitors. *Parker v. Hotchkiss*, 1 Wall. Jr. 269, Fed. Cas. No. 10,739; *Bank v. McSpedan*, 5 Biss. 64, Fed. Cas. No. 7,582; *Bridges v. Sheldon*, 7 Fed. 42; *Plimpton v. Winslow*, 9 Fed. 365; *Larned v. Griffin*, 12 Fed. 590; *Small v. Montgomery*, 23 Fed. 707; *Atchison v. Morris*, 11 Fed. 582; *Nichols v. Horton*, 14 Fed. 329; *Lyell v. Goodwin*, 4 McLean, 39, Fed. Cas. No. 8,616; *Kinne v. Lant*, 68 Fed. 436. The rule in the English courts at first was limited to exemption from arrest in a

criminal proceeding, and as arrest for debt obtained in practice there, as in some of the American states, the rule was extended to process in *indebitatus assumpsit*. Law is a progressive science, and, in its struggle to reach the highest ideal of practical justice, its principles, in the development of civilized society, are constantly being extended to meet the demands of an everincreasing, refining sense of justice. The exemption from criminal process of witnesses while attending court was predicated of the assumption, first, that it was calculated to disturb and divert the witness so that on the witness stand his mind might not possess that repose and equipoise essential to a full and true deliverance of his testimony. It was therefore, on principle, extended to civil process against him. Next in the natural order of development the rule was extended to suitors coming from foreign jurisdictions to attend upon the trial of their causes, for the reason that they "might be deterred from the fearless assertion of a claim, or rightful or fearless assertion of a defense, if they were liable to visits on the instant with writs from the defeated party." As said by Judge Shiras in *Nichols v. Horton*, 14 Fed. 330:

"Experience has shown that in order that causes may be fully heard, and the orderly administration of justice may be assured, it is necessary that parties, witnesses, and jurors shall be protected from service of process in civil actions while they are, in good faith, in attendance upon the trial of causes. If parties or witnesses are liable to be sued when in attendance upon the court in which the cause with which they are connected is pending, and by reason thereof they may be compelled to appear and answer in a foreign tribunal, or in one different and far distant from that wherein they could alone have been sued, had they not been in attendance upon the court, the fear thereof might well deter them from attending at the place of trial; and, if they were beyond the reach of a subpoena, a party might, as a consequence, be deprived of the personal presence and testimony of witnesses whose absence would be fatal to his cause."

A like rule obtains in a great majority of the states of the Union, only a few of which we here cite: *Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Thompson's Case*, 122 Mass. 428; *Person v. Grier*, 66 N. Y. 124; *Matthews v. Tufts*, 87 N. Y. 568; *Halsey v. Stewart*, 4 N. J. Law, 367; *In re Healey*, 53 Vt. 694; *People v. Judge of Superior Ct.*, 40 Mich. 729; *Mitchell v. Circuit Judge*, 53 Mich. 541, 19 N. W. 176; *Massey v. Colville*, 45 N. J. Law, 119; *Miles v. McCullough*, 1 Bin. 76; *Hayes v. Shields*, 2 Yeates, 222; *U. S. v. Edme*, 9 Serg. & R. 147; *Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483; *Hene-gar v. Spangler*, 29 Ga. 217; *Ballinger v. Elliott*, 72 N. C. 596. This rule is buttressed with the high conception that as courts are established for the ascertainment of the whole truth, and the doing of exact justice, as far as human judgment can attain, in disputes between litigants, every extraneous influence which tends to interfere with or obstruct the trial for the attainment of this sublime end should be resisted by the ministers of justice to the last legitimate extremity in the exercise of judicial power. Hence, as "one of the necessities of the administration of justice" (*Person v. Grier*, 66 N. Y. 124), the rule has come to be regarded as the privilege of the court, as affecting its dignity and authority, and rests, therefore, upon sound public policy. *Parker v. Hotchkiss*, *supra*, ap-

proved by Justice Grier and Chief Justice Taney; *Bank v. McSpedan*, supra; *Lyell v. Goodwin*, supra; *Huddeson v. Prizer*, 9 Phila. 65; and authorities supra. Southard, J., in *Halsey v. Stewart*, 4 N. J. Law, 367, has pungently expressed this principle:

"Courts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them. The citizen, in every claim of right which he exhibits, and every defense which he is obliged to make, should be permitted to approach them, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. * * * Now, this great object in the administration of justice would, in a variety of ways, be obstructed, if parties and witnesses were liable to be served with process while actually attending court. It is often matter of great importance to the citizen to prevent the institution and prosecution of a suit in any court at a distance from his home and his means of defense, and the fear that a suit may be commenced there by summons will as effectually prevent his approach as if a *capias* might be served upon him. This is especially the case with citizens of neighboring states, to whom the power which the court possesses of compelling attendance cannot reach. Take the case of the present defendant. He doubtless knew of the plaintiff's claim, and was unwilling to have it tried out of his own state. Had his attendance as a witness been absolutely necessary, would he have come, unless this privilege were thrown around him? Surely not. Either, then, injustice must have been done, or the progress of the court interrupted. Such consequences should be guarded against. Whether a man wishes to attend the court as a party or witness, he should be able to do it under its protection. This privilege of parties and witnesses is alike the privilege of the court and the citizen. It protects the court from interruption and delay. It takes away a strong inducement to disobey its process, and enables the citizen to prosecute his rights without molestation, and procure the attendance of such as are necessary for their defense and support."

It may be conceded, to plaintiffs' contention, that, in most of the reported cases supporting the rule in question, it was where the party complaining of the service of process was a defendant suitor, who had been brought from out of his state to defend suit against him. But, on principle, I am unable to perceive any distinction in the privilege, both of the suitor and the court, between a plaintiff and defendant,—especially so when applied to the facts of this case. The Grand Avenue Hotel Company was a Missouri corporation, domiciled at Kansas City. The plaintiff, Wharton, was compelled to come into this jurisdiction to enforce his claim against the corporation. He had no choice as to the forum. Being both a suitor and a competent witness in the cause, he had to come here to properly protect his interests, in the judgment of his counsel. Nor are these plaintiffs in position to invoke any special equity predicated of mere case law. They are not even in the position of plaintiffs who "found" the defendant by chance in the forum of their domicile. But they are citizens of the state of Illinois, who come out of their own home jurisdiction, under no necessity to do so, with full knowledge, through their attorneys, of the circumstances under which Wharton was in this jurisdiction, and instituted this suit, as if their purpose was to catch the defendant away from his home.

Our jurisdictional system is based, *sub modo*, on the theory that a defendant is an unwilling party to any litigious strife. And in recognition of the privileges and rights of the home, the immunities and safeguards with which the good citizen, by his honorable con-

duct and high character, has surrounded himself in his business and domestic relations, he is entitled to trial by a tribunal of the vicinage. This is as ancient and valuable as the behests of the Magna Charta. The federal judiciary act of 1887 recognizes this by exempting the citizen from suit outside of the district in which he lives. The state statutes, as a rule, require suits to be instituted in the county of the defendant's residence. And every attempt by legislative bodies, and by construction, to encroach upon this high privilege, should be treated with jealousy, and scrupulously guarded. Legislatures and courts lose sight of a great underlying principle of personal liberty as often as they attempt to enlarge the operation of writs by which it is sought to break in upon the sanctuary of the home, and the valuable privileges with which the noblest aspirations of organized civil life have invested it, or to permit process to be used so as to be abused within the very precincts where justice is being administered.

We are confronted, however, with the fact that the supreme court of this state has held that a nonresident defendant, under circumstances like these at bar, is not exempt from process, at the suit of even a nonresident plaintiff, while attending upon the trial of a cause in this state. The first of these state decisions was in *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96. The defendant, a resident of Randolph county, while attending court in the city of St. Louis, as a defendant, at the suit of C. and S., was served with a writ of summons at the suit of the plaintiff, Christian. The statute (section 2009) provides that:

"Suits instituted by summons shall, except as otherwise provided by law, be brought: First, when the defendant is a resident of the state, either within the county in which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found."

The suit was brought in the county of the plaintiff's residence, and where the defendant was found. He was held amenable to the process, notwithstanding he was called into the county as a defendant in another suit, and notwithstanding he was caught there as an unwilling suitor. It is observable, from reading the opinion, that the learned judge was so impressed with the overwhelming weight of authority against such catching of a defendant out of his county that he sought to limit the authority of the rule to the instance where a nonresident of the state was thus served while attending court as a suitor or witness in the local forum. But as the true ground on which the rule of exemption is bottomed, as shown in this opinion, obliterates all attempted distinction between non-residents of the state and nonresidents of the county, he ultimately fell back upon the mere words of the statute prescribing the manner and place of service of such writs. The truth is, it is apparent from the whole trend of the discussion by Judge Sherwood, both in this and in *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29, that the inclination of his mind was against the adoption of the doctrine as maintained by the federal courts, and by the great majority of the state courts; and, to accomplish its rejection, he invoked the statutory prescription as to the mode and manner of serving writs of summons

in personam, without attempting to maintain, by argument or authority, that it was ever in the mind of the legislature, in framing this statute, to cut off the power of the courts of common-law jurisdiction to recall such writs, or vacate the return thereon, if fraudulently issued or used so as to obstruct the due administration of justice. The statute in question has been in force at least since 1835 in this state, and it never had any other office or design than to merely prescribe the manner and place of serving ordinary writs of summons; leaving the service, when made, subject to attack in the court of jurisdiction for any vice affecting its integrity, arising in pais, outside of the face of the writ itself. Having broken through thus far the barriers which a sound public policy had erected around the due administration of justice, it became easy to advance a step further, and apply the statute to the instance where both plaintiff and defendant were nonresidents of the state, as was done in *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29. There both parties were residents of the state of Oregon. The plaintiff had brought suit in attachment against the defendant in Chariton county. While attending court in that litigation, defendant in that suit brought an action of libel against the plaintiff in Chariton county. It presented an extreme case, where the court was greatly tempted, as expressed in its opinion, to hold that, if it was competent for the plaintiff in the attachment suit to recover a general judgment against the defendant, it ought not to be "improper and illegal for the plaintiff [defendant there] to recover a like judgment against him in the libel suit." This very aptly illustrates the force of the maxim that "hard cases are the quicksands of the law." The court based this ruling flatly on the language of the fourth clause of section 2009 of the state statutes (Rev. St. 1889): "When all the defendants are non-residents of the state, suit may be brought in any county in this state." With neither the purpose nor the disposition to review or criticise the opinion of the eminent judge, it is within reason to observe that a nonresident who has to follow the property of his debtor into another jurisdiction is compelled to adopt the forum of the situs of the property. He has no choice in selecting the field of contest. Therefore there was no occasion for the counter action for a libel, other than a purpose to recoup a judgment against him by a claim *ex delicto* against his adversary. And as, in the action of libel, the character, good or bad, of both parties, is more or less involved, the plaintiff should have been remitted to the home court, in Oregon, where the character of each litigant had been established and was best known. Giving, however, to these decisions, "full faith and credit," are they binding on this jurisdiction? Counsel for plaintiffs, recognizing the fact that the binding obligation of the state decision on this court is not predicable in this instance of a line of state decisions constituting a rule of property, and that the state and federal courts are so far distinct, and, in a sense, foreign jurisdictions, that, in the interpretation and construction of common-law rules and statutes affecting proceedings in court, each is entitled to the exercise of its own independent judgment, make the contention, first, that the mode of service pursued in this in-

stance being purely statutory, and inasmuch as the statute has received construction by the state court, the federal court administering justice in the state should conform thereto. It is argued, for instance, that, the state court having construed the word "found" as it occurs in the first clause of said section 2009, this court is bound thereby. The summons in this case was not served, however, under that clause, but under the fourth clause, which does not contain the word "found," unless it is to arise by implication. It is, however, inconceivable to my mind how any sort of technicality could arise as to the import of the word "found." There was no room for construction. The statute is plain enough. So that, independent of the question of exemption from the service of any process (had the requisite diverse citizenship existed), no question could arise as to the legality of the service, had the suit been instituted in this court. It seems to me to be wholly begging the question raised by this motion to say that the defendant was summoned as the letter of the statute directs, and therefore he is bound. The question here presented arises dehors the record of the return. It presents rather the case of an abuse of process,—of an improvident issuing of summons, under a state of facts which, if known to the court at the time, sound public policy requires that the process be not issued, or, if issued, recalled. The objection to the service exists in pais, arising outside of the statute, and superior to the mere words of the writ and the return thereon, which the court could not know until brought to its attention. If, as suggested by the state court, this plea is cut off simply because the mode of service pursued was according to the letter of the statute, the doctrine of exemption from process while attending court could never have had a birth nor a growth. Presumably, on the face of the service of summons in all the adjudicated cases out of which the doctrine in question sprung, it was conformable either to statutory prescription or rule of court directing the method of serving writs of summons. Strangely enough, after flatly placing the right to sue a defendant outside of his state and county, notwithstanding he was at the place of service as a suitor, on the mere words of the statute as to where service might be made, the learned judge, in *Christian v. Williams*, *supra*, said that he wanted it distinctly understood that his remarks did not apply to the case where the party sued was induced by fraud and misrepresentation, or under compulsion of criminal process, "to enter within the boundaries of a county other than that of his residence"; citing a number of state cases where it had been so ruled. Upon what does the exemption thus recognized rest, other than, as repeatedly stated in the decisions of that court, that "it was an abuse of process," and "that no rightful jurisdiction can be acquired by fraud and misrepresentation?" And that court said in *Byler v. Jones*, 79 Mo. 263:

"If the person so proceeded against brings it properly to the attention of the court assuming jurisdiction over him, as the defendant did in this case, the suit must be dismissed, after proof or admission of the fact."

This rule, thus recognized by the state court, is not based on any statute, or legislative exception, but springs from that inherent

power resident in every court exercising common-law jurisdiction, to prevent the abuse of process and the subversion of justice by unnecessary oppression. It is a suicidal contradiction, therefore, to say that the generally recognized exemption of a suitor by the courts from process while attending upon the trial of a cause outside of the jurisdiction of his domicile cannot arise because "the statute makes no exemptions, and we are not authorized to make any," and, in the next breath, say the court will vacate a service of process made under the same statute because it is an abuse of process to inveigle a party from the county or state of his residence. There is no logical escape from the proposition that the same high end of orderly and dignified procedure, demanding noninterference with witnesses and suitors, and the abuse of process, applies equally to both instances. And when it is admitted, as it must be, that the state court, in vacating the service of process in the instance reserved in *Christian v. Williams*, acts on general principles of common-law jurisprudence, it is a confession that such and kindred matters of practice pertain to the domain of general jurisprudence, and therefore the federal court, though sitting in the same state, is entitled to its own independent judgment, and will apply its own rules of decision. It is a misconception, both of the law of comity and the scope of section 914, Rev. St. U. S., to say that this court is concluded by the status which the decisions of the state supreme court gave to the defendant at the time application for removal was made. In *Erstein v. Rothschild*, 22 Fed. 61, it was sought to bind the federal court as to the effect of an attachment issued without an affidavit. The state court had ruled such attachment to be void. The United States court, however, applied to the question of practice its own independent judgment and construction. Mr. Justice Matthews, after quoting said section 914, observed—

"That the conformity required by said statute is 'as near as may be,' not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose. It devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as congress doubtless expected they would do, any subordinate provisions in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals. While the act of congress is, to a large extent, mandatory, it is also, to some extent, only directory and advisory. The act of congress, at any rate, does not require the adoption, with the local statutes, of the local interpretation which may have been put upon them, or which may, from time to time, be enforced. It must be held that the body of the local law thus adopted in the general must be construed in the courts of the United States in the light of their own system of jurisprudence, as defined by their own constitution as tribunals, and of other acts of congress on the same subject."

The court of appeals of this district entertains a like view. In *O'Connell v. Reed*, 5 C. C. A. 586, 56 Fed. 531, it was held by the court that, notwithstanding, under the practice of the state court, the petition, in its form, was bad, the federal court was not bound thereby. Judge Sanborn, *inter alia*, said:

"It may be conceded that it is the settled rule of the federal courts to adopt the construction given by the highest judicial tribunal of a state to its local statutes involving rules of property, and to its state constitution, and tax

or revenue laws, where that construction violates no provision of the federal constitution or of the federal laws."

After reviewing the cases in which the statute in question is applicable, he says:

"They are far from holding that the federal courts are bound to follow any construction of a statute or any practice established by a state court that would affect the jurisdiction of their courts, or hinder or incumber the administration of the law in any of their tribunals. * * * The courts of the United States are not subordinate to the courts of the states. They constitute an independent judiciary system, the judges of which do not derive their powers from the states. Nor can the legislation of the states, or the decisions of their courts, determine the limits of those powers, or prescribe the duties their exercise imposes. One of the objects of the establishment of the federal courts, with jurisdiction to determine controversies between citizens of different states, was to provide a tribunal in each state where the rights of citizens of other states might be determined, unaffected by any possible influence that friendship for, or acquaintance with, a resident defendant might sometimes have in the local courts of his county. It was not the purpose of the act conforming the pleadings and practice of the federal courts to those of the state courts to prevent, or even to hinder, the accomplishment of this, or any other object for which the federal courts were established. It was not the intention of congress to require, by the passage of this act of conformity, the adoption by the circuit courts of any rule of pleading, practice, or procedure enacted by the state statute, or announced by the decision of a state court, which would enlarge or restrict the jurisdiction of the federal courts, or prevent the wise administration of the law in the light of their own system of jurisprudence, as defined by their own constitution, as tribunals, and the acts of congress upon that subject. On the other hand, that act expressly reserves to the judges of those courts the right, and, we think, imposes upon them the duty, in the exercise of a wise judicial discretion, to reject any statute, practice, or decision that would have such an effect."

Following the principles of these rulings, the case of *Railroad Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, brings us nearer still to the case in hand. By statute of the state of Texas, as construed by the court of appeals in that state, the appearance of a party solely for the purpose of objecting to the jurisdiction of the court, and an answer made by him to the merits after ineffectual motion to quash the return, amounts to a general appearance in the case. It was insisted on the part of the plaintiff that this construction of the state statute should control the United States court, sitting in Texas, as to a like appearance, but the supreme court said no. See, also, *Sherry v. Navigation Co.*, 72 Fed. 565.

This brings us to the final contention of plaintiffs, which is that the defendant could have been proceeded against to final judgment in the state court, under the process served upon him, and that this court, on the removal of the cause, must take up the case precisely in the legal attitude it was when the order of removal was made. Abstractly, this is correct. But what was that attitude? The effect of the filing of the petition for removal was to arrest, *eo instanti*, the jurisdiction of the state court. Thereafter it had no power to determine any question connected with the case. It had not even attempted to pass on any question when the order of removal was made. The supreme court of the United States has repeatedly held that, where "the case is properly removed, the party removing it is

entitled to any advantage which the practice and jurisprudence of the federal court gives him"; and again:

"The sole object of the constitutional and statutory provisions conferring jurisdiction upon federal courts in behalf of aliens and citizens of other states is that they may seek a trial and decision in these courts of questions which they are unwilling to submit to the judgment of state tribunals." *King v. Worthington*, 104 U. S. 44; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724; *Bentlif v. Finance Corp.*, 44 Fed. 667.

Conclusively, I think, the supreme court has settled the final question adversely to plaintiffs' contention. In *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, the plaintiff, a citizen of the state of New York, brought suit in the state court against the *Morning News*, of New Haven, a Connecticut corporation. Service was had in the case upon the president of the nonresident corporation, temporarily found in the state of New York. Defendant appeared for the purpose only of the application for removal of the cause into the United States circuit court, where it was accordingly sent. Thereupon the defendant moved to quash the return of service of process. This service was made in conformity with the provisions of the state statute, the validity of which had been affirmed by the highest court of the state. It was insisted by the plaintiff that, after removal of the cause into the federal court, the latter court took up the case as and where it was before it left the state court, and therefore, as the defendant was properly brought into court, as held by the court of appeals of New York, and could have been proceeded against to final judgment, had the cause remained in the state court, the United States circuit court should conform thereto. This contention was overruled by the circuit court, and on error to the supreme court the ruling of the trial court was affirmed. It is true, as suggested by plaintiffs' counsel, that the question there was as to whether or not the state court acquired jurisdiction over the defendant, and that the case turned principally upon the question whether or not the form of process, and the mode of service thereunder, was other than mere constructive service; and as it was only constructive service, as distinguished from personal service, any judgment of the state court thereon would have had no extraterritorial force or recognition. But the language of the learned justice who delivered the opinion, and the very theory on which the court denied the contention of the plaintiff, effectually refute the contention here that because the defendant was in court, and subject to its jurisdiction to proceed to final judgment therein at the time of the removal, the United States circuit court, after removal, must hold the defendant to the status he occupied at the time of removal. Mr. Justice Gray observed:

"The court, the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments. For the same reason, service of mesne process from a court of a state, not made upon a defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the circuit court of the United States after the removal of the cause into that court. * * * Although the suit must be actually pending in the state court before it can be removed, its removal into the circuit court of the United States does not admit that it was rightfully pend-

ing in the state court, or that the defendant could have been compelled to answer therein, but enables the defendant to avail himself, in the circuit court of the United States, of any and every defense duly and seasonably reserved and pleaded to the action, in the same manner as if it had been originally commenced in the said circuit court."

It is manifest from the whole trend of the discussion that Mr. Justice Gray maintains the broader doctrine that from the instant of filing the application, with the necessary bond, for removal of the cause, when such application is seasonably made, the jurisdiction of the state court ceases, both as to the parties and the subject-matter, and that of the federal court attaches, and thereafter, according to the plain language of the act of 1888, "the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court." In other words, no matter what the effect of the process and service may have been, had the case remained in the state court, after its removal into the United States court the rightfulness and justice of that acquired jurisdiction, as well as its binding effect, being raised in the latter court, it must pass on it, and determine such question according to its own settled rules of jurisprudence.

Since writing the foregoing, my attention is directed to the case of *Bergman v. Bly*, 27 U. S. App. 650, 13 C. C. A. 319, and 66 Fed. 40, which is claimed by plaintiffs' counsel to support their contention. The question there was as to the construction of the following statute of limitation of the state of Wyoming:

"When payment has been made upon any demand founded on contract or a written acknowledgment thereof, or promise to pay the same has been made, and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment, acknowledgment or promise."

The question to be decided was whether a payment made on a joint and several promissory note, executed and payable in Wyoming by one of two makers thereof, operated to prevent the running of the statute of limitations of that state as to the other maker, be he principal or surety. The supreme court of the state had recently, in the case of *Cowhick v. Shingle* (Wyo.) 37 Pac. 689, answered this question in the negative; and the United States circuit court of appeals followed that construction, chiefly on the ground that "the construction placed upon the statute by the supreme court of the state is obligatory upon the federal court." We make no question of the correctness of that position, as applied to the facts of that case. But the distinction between the question there and the one at bar is, to my mind, palpable and broad. Were the single question here, can a nonresident defendant found in this state be sued here, and brought into court, by service of process on him in the county where found? and the state court having ruled that he can, this court, in passing on a like service, would follow the ruling of the state court in so construing its statute. But when the question arises, as here, as to whether that process has been fraudulently employed, or improvidently issued, under circumstances which conflict with the privileges of a high court of justice, and the immunity

which public policy throws around the litigant, the issue thus presented is independent of the mere prescription of the statute as to the mode of service, and belongs entirely to the domain of general jurisprudence. And the federal courts, in determining such question, are accorded the exercise of their own independent judgment. This is the very foundation of the ruling of the supreme court of the United States in the cases heretofore noted. The rule of exemption in question stands so like a faithful and venerable sentinel at the very portal of the temple of justice that every consideration of a sound public policy, in my humble judgment, forbids that it should be stricken down. The motion to set aside and vacate the return of service made on the writ of summons herein is therefore sustained.

Note. On general question of exemption of suitors, see 42 Cent. Law J. 398.

IOWA STATE TRAVELING MEN'S ASS'N v. MOORE.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 236.

1. **CONTRACTS—PARTIES—CERTIFICATE IN MUTUAL BENEFIT ASSOCIATION.**

Where an application for membership in a mutual benefit association names a certain person as beneficiary, and the constitution of such association provides for the payment of the benefits secured in case of death to the persons named as beneficiaries by the members in their applications, or, in default of such appointment, to the heirs or legal representatives of the members, the obligation of such association, arising upon the issue of a certificate of membership, is to the person so named as beneficiary, alone, and such person cannot recover in an action brought as administrator of the member.

2. **PLEADING—INDIVIDUAL AND REPRESENTATIVE CHARACTER OF PARTIES.**

Where an action of assumpsit is brought by a plaintiff described as "M., administratrix of J., deceased," the declaration containing a special count which makes profert of the letters of administration, and alleges a promise to pay "the personal representatives of J.," and also the common counts, alleging the cause of action to be an indebtedness to "said plaintiff's intestate," such declaration cannot be construed as showing a cause of action in M. individually, since, even if the words in the special count could be treated as merely *descriptio personæ*, the special and common counts would then be misjoined, and the record would not support a judgment for M. individually.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

The Iowa Traveling Men's Association, plaintiff in error, is an association incorporated under the laws of Iowa, "for the purpose of rendering pecuniary assistance to its members as may be provided by its by-laws and certificates of membership," and for the purpose of raising funds, by assessments on its members, to be paid to the appointees named in the applications for membership. Said association was empowered, by its articles of incorporation, "to establish by-laws and make all rules and regulations deemed expedient for the management of its affairs." Pursuant to this authority, it had for

its government, and for the expression of rights and obligations as between itself and any member or person named as beneficiary by any member, a constitution and by-laws. Sections 2, 3, and 4 of article 2 of its constitution are as follows:

"Sec. 2. All applications for membership shall be referred to the board of directors, who shall require such proofs as to them may seem proper, as to the applicant's qualifications and eligibility.

"Sec. 3. All applications for membership must be accompanied by two dollars (\$2.00) as a membership fee, and two dollars (\$2.00) for first assessment, which fees will be returned in case the applicant is rejected.

"Sec. 4. Each member of this association shall receive a certificate of membership, and also a traveling card, bearing the autograph of the president and secretary of the association."

Section 3 of article 5 is as follows:

"Sec. 3. Upon receiving notice of an assessment, it is the duty of each member to remit the amount promptly to the treasurer of the association. A notice sent to the last address given shall be considered a legal notification. Any member who shall not remit the amount of his assessment within thirty days from the date of notice forfeits his membership, and his name shall be stricken from the roll by the secretary, unless the board of directors extend the time fifteen days, at their option, after which fifteen days all his rights of every kind are forfeited; but any such person may again become a member, upon payment of all dues and assessments, subject, however, to the approval of the board of directors."

Sections 1 and 5 of article 6 are as follows:

"Sec. 1. Whenever the death of a member of this association, in good standing, shall occur from an accidental cause (except while said member shall be under the influence of intoxicating liquors or narcotics), and suitable proofs of the same shall be furnished the board of directors, they shall order an assessment to be made from all members of this association of \$2 apiece, and the amount of said assessment, not exceeding the sum of \$5,000, shall be paid to the beneficiary named in the certificate of such deceased member, or to his heirs or legal representatives, in full satisfaction of said claim: provided, that if, when a death occurs as aforesaid, the sum of money in the treasury of the association, not otherwise appropriated shall exceed the sum of \$5,500, then such loss shall be paid out of the treasury, not to exceed \$5,000. But no claim for death loss shall be made against the association after six months from the time the deceased member is known to have died. Neither shall any claim for a death loss be made against this association after the expiration of eighteen months from the date of accident, it being the intention that the liability of this association shall cease after eighteen months from the date of accident, and shall not, in case of any loss, exceed the sum of \$5,000; and, in case of a death claim arising under any certificate of membership, any sum or sums previously paid as indemnity within twelve months after the accident shall be deducted from the principal sum granted in case of death."

"Sec. 5. The board of directors may order an assessment of not over two dollars (\$2.00) upon each member of the association, for funds, when needed."

Section 1 of article 1 of the by-laws is as follows:

"Every application for membership shall be in such form and manner as the board of directors shall prescribe, and shall set forth, over the signature (in his own handwriting) of the applicant, as follows: His full name, place of residence, and post-office address; address and business of the firm he represents or of which he is a member, and in what capacity he is employed; also the full name and address of the person or persons to whom he desires, in case of decease, by accident or accidental causes, to have his death loss paid; the relation such person or persons sustain to himself, together with answers to such other questions bearing upon the identification of such persons as may be propounded,—and his application must be signed by two members of the association."

tion on the estate of said Moore were issued to his wife, under the name of Margaret Moore, by the county court of McDonough county, Ill. On May 3, 1893, said administratrix, named in the præcipe "Maggie M. Moore, administratrix of the estate of John H. Moore, deceased," commenced this action of assumpsit against this plaintiff in error in the circuit court of McDonough county. The cause was removed, on petition of the defendant corporation, to the circuit court of the United States for the Northern district of Illinois. On October 23, 1894, after a jury trial, judgment was rendered in favor of plaintiff (defendant in error) for \$5,000 and costs.

W. A. Park, W. E. Odell, and Sherman & Tunncliffe, for plaintiff in error.

J. A. Bailey and W. H. Holly, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

By section 1 of article 6 of the constitution, above quoted, the \$2 assessment, not to exceed \$5,000, "shall be paid to the beneficiary named in the certificate of such deceased member, or to his heirs or legal representatives," etc. Under the section quoted from the by-laws, the directors are to prescribe the form of the application for membership. The applicant is required to state in such application, among other things, "the full name and address of the person * * * to whom he desires, in case of decease, * * * to have his death loss paid," and "the relation such person sustains to himself, together with answers to such other questions bearing upon the identification of such person as may be propounded." In the proposition, application, or declaration submitted by Moore, and which, according to its terms, formed "the basis of membership between" himself "and the said association," besides his promise to "comply with the requirements of the constitution and by-laws" and his warranty as to the facts stated, he, pursuant to the section quoted from the by-laws, nominated his wife, Maggie M. Moore, as the person to whom, in the event of his death by accident, the sum, not to exceed \$5,000, as provided in section 1 of article 6 of the constitution of said association, should become due and payable. The record shows no provision fixing the terms of the certificate to be issued to a member. The document set forth in the statement which precedes this opinion, being in form a certificate by the association that Moore is a member, and entitled to all the benefits accruing from such membership under the constitution and by-laws, must, of course, be read in connection with the constitution and by-laws, and also in connection with the application for membership made pursuant to the by-law quoted, in order to manifest the contract. In consideration of the member's engagement as to the facts stated in his application, and his promise therein "to comply with the requirements of the constitution and by-laws," one of which requirements is that he will pay assessments as they may thereafter be levied, the association agrees to make to him certain periodical payments of money in case of his disablement by accidental hurt, and, within certain limitations, in the event of his

death as the result of accident, to pay a sum, to be ascertained in a specified way, but not exceeding \$5,000, to the beneficiary appointed by him, or, in default of such appointment, to "his heirs or legal representatives." What is meant by the words "heirs or legal representatives," in section 1 of article 6 of the constitution of said association,—whether said words mean anything other than that the widow and next of kin shall be the beneficiaries in case the member survive the appointee specified in his application,—is not a question here. Since Maggie M. Moore was in fact named as the beneficiary, and since she has survived the member who so appointed her, the obligation of the association, touching the \$5,000, if such obligation be otherwise made out, is to her, and to her alone. By the very terms of the contract, that fund, if recovered, could not be assets of, nor can the cause of action to recover it belong to, the estate of John H. Moore. Said cause of action did not vest in his personal representative. Without theorizing on the matter, the rule to this effect in such case is settled. Out of the many decisions which might be cited, *Highland v. Highland*, 109 Ill. 366, 375, in connection with the text and citations in 1 Chit. Pl. pp. 203-205, will be sufficient.

Counsel for this plaintiff in error do not seriously contest the proposition that Maggie M. Moore is the person in whom the cause of action, if there be any, is vested. They seek to avoid the point. They urge, for instance, that the declaration may be construed as showing Maggie M. Moore in her own right to be plaintiff, and this on the ground that in the special count she is called "Maggie M. Moore, administratrix of the estate of John H. Moore, deceased," instead of "Maggie M. Moore as administratrix of the estate of John H. Moore, deceased." But the common counts are added, and in each of them the cause of action is alleged to be an indebtedness to "said plaintiff's intestate." Besides, in the special count profert is made of the letters of administration, and the promise alleged is "to pay to the personal representative of said John H. Moore." If we could say that the words in the special count, "administratrix of the estate of John H. Moore, deceased," and the words, "the personal representative of said John H. Moore," are *descriptio personæ*, and that said count shows a cause of action in Maggie M. Moore, the record would fail to support the judgment. There is a statute in Illinois which saves a judgment from arrest or reversal on error, if, joined with counts that are bad, there be one count which is good, but there is no statute which does away with the common-law rule that a judgment cannot stand on good counts misjoined in the declaration. See 1 Chit. Pl. 204, and cases there cited; also, *Id.* 205, and cases there cited. To say that the declaration here can be construed as showing the cause of action to be in Maggie M. Moore, otherwise than as administratrix of the estate of John H. Moore, deceased, is out of the question.

It is, again, urged that if this judgment be affirmed, and its collection enforced in this suit, a court of equity will enjoin the prosecution of an action by Maggie M. Moore against this plaintiff in error. A share of this judgment distributed to Mrs. Moore as the widow of John H. Moore, deceased, would come to her, not in extinguishment

of any debt due to her from this plaintiff in error, but as part of the estate of her deceased husband. The creditors, if there be any, of that estate, would be first entitled. Subject to their rights, the proceeds of said judgment would be divided between the widow and the children of John H. Moore. A portion only could, in any case, be distributed to Mrs. Moore. But a judgment at law is as binding on the equity side of the court as on the law side. Upon what theory—there being no fraud or mistake of fact in the case—would a court of equity enjoin as claimed, except that the judgment in favor of the estate was erroneous? A court of equity is not a court of error. It has no appellate jurisdiction over a court of law. The grounds upon which a court of equity would interfere as suggested by counsel are not clear; nor do we see why this plaintiff in error should be driven to a court of equity, any more than we see why a judgment should be rendered in favor of the estate of John H. Moore, deceased, against a defendant who owes nothing to that estate. Counsel for defendant in error quote the following as from the opinion of the supreme court of Michigan in *Peet v. Great Camp*, 47 N. W. 119:

"The bringing of an action in the name of an administrator of a deceased member of a mutual benefit association, on a certificate of membership payable to the member's heirs, is a harmless error, where the administrator is the sole heir of such deceased person."

This is the language of the syllabus, not of the opinion. It appeared that there were no creditors, and that the plaintiff administrator was himself the sole distributee of the estate. But where, even in such a case, did the court get the right or the authority to render a judgment in favor of a plaintiff who confessedly had no cause of action? In the case at bar it does not appear that Moore left no creditors, but it does appear that he left children.

The trial court was asked to instruct the jury "that plaintiff, who sues as administratrix of the estate of John H. Moore, deceased, is not entitled to the benefits under the certificate of membership admitted in evidence, and defendant's constitution and by-laws." This instruction was denied,—the court declaring that upon certain findings of fact, which need not be here specified, "plaintiff would be entitled to recover under the declaration in this case,"—and plaintiff in error excepted. Said ruling is assigned as error. We do not deem it appropriate to discuss other points in the record. The judgment is reversed and the cause remanded, with directions to set aside the verdict and award a new trial.

WALKER et al. v. KEENAN et al.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

CARRIERS—SHIPMENTS OF CATTLE—TERMINAL CHARGES.

A railroad company accustomed to deliver cars of cattle at stock yards off its line, by transporting them over a line belonging to the stock yards company, for which it pays a fixed sum per car, is under no obligation

to consignees whose business is located at the stock yards to supply unloading facilities at its own station in a different part of the city, and hence is not bound, in default thereof, to deliver at the stock yards, without a separate charge. On the contrary, it may, on posting schedules to that effect, as required by the interstate commerce law, make a charge for freight to the city, and a separate terminal charge, of a fixed sum per car, for delivery at the stock yards. 64 Fed. 992, reversed. *Stock-Yards Co. v. Keith*, 11 Sup. Ct. 461, 139 U. S. 128, distinguished.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

On the showing of the record, the Atchison, Topeka & Santa Fé Railroad, commencing, it may be assumed, at some point west or southwest of the state of Missouri, passes through Kansas City, in that state, to its terminal station or freight depot on or near the corner of Twelfth and State streets, Chicago. About 10 miles back from this terminal station, a switch track runs from the main line of the road some 6 miles to a point of junction with the track of the Union Stock-Yards & Transit Company. This latter track extends from said point of junction to the cattle yards of the last-named company, the place at which cattle are usually unloaded from the cars into such yards being about one-half mile from the point of junction. This track of access to the cattle yards is part of a system of railroad tracks aggregating some 246 miles, which the Union Stock-Yards & Transit Company (incorporated) was authorized by its charter to construct in and about its cattle yards, and connecting therewith, and to charge for the use of. Said yards, commonly called the "Union Stock Yards," are the market place and ordinary place of delivery for cattle shipped by the car load to Chicago. A car laden with cattle sent from Kansas City to Chicago will ordinarily be moved by the route described from the main line of the Atchison, Topeka & Santa Fé Railroad to the Union Stock Yards, and there unloaded and delivered, rather than to the terminal station of the road, at State and Twelfth streets; and, for this reason, cattle yards and appliances for unloading such cars have not been provided at such terminal station. Cattle cars aggregating many thousand per year, hauled to Chicago over said road, are so taken to, and unloaded at, the Union Stock Yards. In December, 1893, as stated in the printed argument for appellants, the Union Trust Company of New York commenced a suit in the circuit court of the United States for the Northern district of Illinois to foreclose a mortgage upon the railroad property of the Atchison, Topeka & Santa Fé Railroad Company and for the appointment of receivers to take possession of the property, collect the tolls, and operate the railroad pending the litigation. These appellants were appointed receivers. The suit is still pending. They are in possession of said railroad, and its traffic as a common carrier is now conducted by them. On November 2, 1894, appellee Keenan filed in the cause his intervening petition, making the receivers parties defendant thereto. He commences his petition with the statement: "That he resides in and is a citizen of the city of Chicago, state of Illinois, and is, and has been for about twenty-nine years, engaged in the business of receiving for sale on commission, buying, selling, and shipping live stock at the Union Stock Yards, heretofore adjoining, and now within, the corporate limits of said city." He goes on to say that on the 30th and 31st days of October, 1894, four car loads of cattle were shipped to him from Kansas City, over the Atchison, Topeka & Santa Fé Railroad; that the cars containing his cattle were hauled over the road to Chicago, and there taken to the Union Stock Yards, and unloaded; that he has paid the freight from Kansas City to Chicago, but the receivers refuse to allow the cattle to pass into his custody without an additional payment of eight dollars, or two dollars for each of the four cars. He shows, also, that the waybill for two of the cars, which document was subscribed by the shippers and by an agent of appellants, contains the specification, "To be delivered at Chicago station at rate of trff;" that on the other two cars the shipper did not advance the freight, and as to them no written contract was subscribed by himself, or any person on his behalf; and that appellants have provided no means for unloading and

delivering cattle at their said "Chicago station." Upon the theory that the two dollars per car is a charge made by appellants for moving such cars from the main line of their road to the Union Stock Yards, and for there unloading the same, and for the use of the inclosures and appliances there provided in that behalf, and upon the theory that appellants are bound by law to provide at their said Chicago station, or at some point on their line in Chicago, "platforms, chutes, yards, stations, and cattle pens," suitable and appropriate for the unloading and delivery of cattle, Keenan insists that the delivery station at the Union Stock Yards must be deemed their Chicago station; wherefore he asked the court to order that his cattle be turned over to him without payment of the eight dollars, and that appellants be required to provide such appliances for the delivery of cattle at some point on their road in Chicago, or, in default thereof, that they in future transfer to, and unload and deliver at, said Union Stock Yards, without any charge for so doing, all cattle consigned to him. At the time of the filing of Keenan's intervening petition, other persons, firms, and corporations, to the number of 36, all cattle dealers doing business at the Union Stock Yards, joined in a similar intervening petition, but without specification of particular shipments of cattle. They also, and on the theory advanced in the petition of Keenan, asked that appellants be ordered, in default of appropriate delivery appliances on their line of road in Chicago, to move cars containing cattle consigned to any one of the several petitioners, to the Union Stock Yards, and there unload and deliver the same, without extra charge for so doing. Appellants answered each petition, and, from such answers and a stipulation made by the parties, the facts appear substantially as herein above given.

Section 6 of the interstate commerce law, enacted February 4, 1887, as amended March 2, 1889, contains the following provisions:

"Sec. 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route.

"The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges.

"Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected."

In the month of June, 1894, appellants duly published and posted, in connection with their schedule of rates (which up to that time showed 23½ cents per hundredweight to be the freight charge on cattle from Kansas City to Chicago), the following: "On and after July 9, 1894, a terminal charge of \$2.00 per car will be made in addition to the Chicago rates, as shown in the tariffs of the Western Freight Association, on live stock and other freight received from or delivered to the stock yards or industries located on the tracks of the Union Stock-Yards Railway, the Indiana State Line Railway; and \$3.00 per car on shipments received from or delivered to the Northern Indiana Railroad at Hammond." Pursuant to this announcement (and no question seems to be made of any default in complying with the statute, or any want of knowledge of the foregoing announcement on the part of any petitioner), appellants exacted the two dollar charge in question. It may be here added that prior to June 1, 1894, the Union Stock-Yards & Transit Company permitted appellants and other carriers of cattle by rail to move cars over its tracks to the Union Stock Yards, and there unload into its yards and return, without charge. On the day last named, said Union Stock-Yards & Transit Company commenced, and thereafter continued, to make a charge against such carriers of from 80 cents to \$1.50 per car.

Robert Dunlap, for appellants.

A. W. Green and H. S. Robbins, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

In the recital in Keenan's waybill, "To be delivered at Chicago station at rate of tariff," which is otherwise in print, the word "Chicago" was evidently written on a space left blank by the printer. This was done at Kansas City. It is obvious from the showing of the record that cattle consigned to Keenan were not, within his understanding, to be unloaded and delivered at any station in Chicago on appellants' line of road. The cattle were to be taken to the Union Stock Yards, where Keenan did business. The case of the two cars mentioned in said waybill is nowise different, as affecting the matter in controversy, to what it would be if no such paper had been subscribed.

In *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, a bill had been filed by Bliss and Gates against the Kentucky Central Railroad Company, to foreclose a mortgage on the railroad property of the defendant. Receivers had been appointed, and, at the time of the controversy, the suit was pending, and the receivers were in possession of and operating the defendant's road. On the 18th of June, 1886, Keith filed in the cause his intervening petition, making the receivers the parties defendant. Prior to the commencement of the foreclosure suit, and on November 19, 1881, the defendant railroad company had contracted with the Covington Stock-Yards Company, whose cattle yards adjoined the railroad track, and were, or were to be, provided with appropriate platforms, chutes, feeding pens, and inclosures, for the loading and unloading and delivery of cattle. By this contract, said yards became the railroad company's "depot for delivery of all its live stock," and it was not to build or "allow to be built on its right of way any other depot or yards for the reception of live stock." The Covington Stock-Yards Company was to perform for the railroad company the service of loading and unloading cattle, and to collect therefor a charge from all shippers and consignees not to exceed 60 cents per car load, and account to the railroad company for the same. Said stock-yards company was also to feed and care for all cattle brought to the yards pending transfer to the cars or delivery to consignees. For this a reasonable charge was to be collected, and turned over to the railroad company; and, for all these instrumentalities and services, the latter company was to pay the former a certain compensation. Keith was the owner of appropriately constructed cattle yards, separated by the width of a street from the yards of the Covington Stock-Yards Company, and adjoining a switch track of the railroad company. He had constructed or provided, apparently by the license of the railroad company, express or implied, platforms, chutes, and inclosures connecting his yards with said track. For a time subsequent to March 1, 1886, all cattle consigned to Keith, or his firm

Keith & Wilson, who were dealers in cattle on commission, were unloaded into Keith's cattle yards; but prior to the 18th of June, 1886, the receivers caused Keith's appliances for loading and unloading to be removed from their track. Keith was thereafter compelled to accept delivery of cattle consigned to his firm through the yards of the Covington Stock-Yards Company, and was thus obliged to pay 60 cents per car for a service which, without inconvenience either to the public or the railroad company, he was prepared to dispense with; hence his intervening petition. The court ordered the receivers, in the event that they or their agent in that behalf, the Covington Stock-Yards Company, should choose not to permit Keith thereafter to take his cattle through their yards without the 60 cents charge, to allow him to replace his platforms and chutes, and to unload and deliver to him thereat (he, or some agent employed by him, being then present to take charge of such cattle) all cattle consigned to him or to his yards. This ruling was affirmed by the supreme court of the United States.

As incidental to its business of transporting or hauling cattle, a railroad company must provide the means of loading, unloading, and caring for such freight pending its delivery to the consignee. The hauling the cattle from one point to another, and the providing the car, track, engine, and servants for that purpose, are no more a part of the service rendered by the carrier than are the loading and unloading and the providing the appliances and servants for those purposes. Nor, in the nature of things, is there any reason why, if the public convenience be subserved thereby, the compensation may not be apportioned so that so much may be paid for the loading and the hauling, and so much for the unloading and the care of the animals pending delivery. It was not necessarily a hardship or wrong, as against the ordinary consignee at Covington, that he pay the charge of 60 cents per car for unloading, etc., to the agent in charge of the stock yards there. Such charge ought, of course, to be specified, as now provided by the interstate commerce law, in connection with the tariff schedule, in order that the shipper may be advised of the same. The question whether a person to whom cattle were consigned for delivery at the Covington Stock Yards could have resisted the charge of 60 cents per car was not before the court in the Keith Case; nor could the court have ruled in the affirmative on such question, assuming due notice to the shipper beforehand, without, in effect, compelling the railroad company to perform, for nothing, part of the service comprehended in its obligations as a carrier. Keith's Case stood on its own facts. Keith having, without inconvenience, so far as appears, to the public or to the railroad company, and apparently by its permission or the permission of the receivers, himself provided the facilities and appliances for unloading into his yards cattle consigned to his firm, the railroad company or the receivers representing it, on the one hand, no longer owed to him, as respected cattle consigned to his yards, the duty of providing such structures and appliances; nor, on the other, was Keith bound to pay the railroad company or its agent in that behalf, the Covington Stock-Yards Company, any charge

which, on the face of the case, was distinctly a compensation for the performance of such duty. The Case of Keith, furthermore, shows the expediency and propriety of separating and apportioning the compensation to the carrier, so that the instrumentalities for and the service of unloading need not be paid for when the consignee has no occasion to use said instrumentalities or to exact such service. That decision, on its ultimate and essential facts, is that a railroad company, when the means for the unloading and delivery of cattle have been provided by the consignee himself at a convenient point on its line of road, may not refuse to make such delivery for the sole and only purpose of compelling such consignee to pay a charge fixed by the company in response to its obligation to provide the means of unloading for consignees who must, necessarily, require that service. If Keith's yards had been at some point in Covington, remote from the Kentucky Central track, and he had, by the license of the Kentucky Central Railroad Company or the receivers, extended a track of his own from the Kentucky Central track to his yards, and had there equipped a station for unloading, there would have been no obligation on the railroad company to Keith or his patrons to provide a depot on its line for the unloading of cattle consigned to his yards; nor could Keith have referred to such supposititious obligation as a reason for resisting compensation to the railroad company for the service of moving cattle cars from its line over his track to his yards.

In the case at bar, appellants, with their own engines and switching crew, remove the cars laden with cattle from a point on the Chicago end of their line, over the track of the Union Stock-Yards & Transit Company, to the Union Stock Yards. For this transfer from their own line to the stock yards, they charge, as stated on the tariff schedule, \$2 per car. All the petitioners do business at the Union Stock Yards. It is the understanding between them and appellants that cattle cars consigned to them are to be taken to the Union Stock Yards, and there unloaded. Upon the general and ordinary obligation of a common carrier of such freight to provide the appliances for unloading, and upon the fact that appellants have not provided means for unloading and delivering cattle at their freight depot in Chicago, petitioners argue: First, that the \$2 per car is for depot facilities at the stock yards; and, second, that the stock-yards station must be held to be appellants' "Chicago station," in the same sense as would be the terminal station at Twelfth and State streets if cattle yards and facilities for unloading were there provided. But the obligation of appellants to furnish delivery facilities upon their line of road in Chicago is not due to these petitioners with respect to cattle which appellants are expected to bring to the Union Stock Yards. Petitioners do not desire their cattle unloaded and delivered at any point in Chicago on appellants' line of road. The \$2 per car is not a charge for the use of the inclosures and station fittings at the stock yards, but for moving the cars from the line of appellants' road, and over the line of another company (which company exacts from appellants a toll of 80 cents per car), to a point in Chicago on said last-named line.

The case is the same as though petitioners themselves owned the stock yards, and the delivery station there, and the tracks leading to said station, and appellants charged them \$1.20 for transferring a car from appellants' line in Chicago to said stock-yards station. If facilities for unloading cattle cars were provided by appellants at their station in Chicago (the showing of the record being otherwise, as it is), the fact would be immaterial, since the petitioners' cattle must be taken by appellants to the Union Stock Yards. Appellants' failure to supply unloading facilities at its Chicago terminal station can in no way affect the rights of a litigant who, in view of the question at issue, could in no event have benefited by such facilities.

The learned counsel for appellees treat the Covington Case as a pronouncement by the supreme court that the receivers there must forego their 60 cents per car, and let Keith's cattle be delivered through the Covington Stock Yards, unconditionally. On the contrary, the essential and central fact upon which the judgment went was, as already explained, that Keith's yards adjoined the track, and he had, without hurt to the railroad company or to the public, and apparently by the license of the company, provided the means of unloading into his own yards. He had no occasion to avail himself of the service of, and the instrumentalities provided by, the Covington Stock-Yards Company, the concern which had assumed, to that extent, the duty of the carrier; hence the order that his cattle must either be unloaded into his own yards, or else passed free of charge through the yards controlled by the Covington Stock-Yards Company for the railroad. If the rule of law had been as counsel for these appellees contend, then the order would have been that Keith's cattle be unloaded free of charge into the yards used by the railroad company, without any alternative. The alternative implies that except in the case of Keith, or of a person having cattle yards and unloading facilities in Covington similarly situated with respect to the road operated by the receivers, the yards provided by the railroad company or the receivers as a place of delivery must be used, and the 60 cents paid as a proper item in the freight charge. To any assumed rule of law that a carrier could not divide into two or more items his freight charge for carrying live stock, so that the instrumentalities for unloading and delivery need not be paid for by consignees who are themselves prepared to receive their cattle directly from the cars, the decision in the Covington Case cannot be referred. The opinion states no such rule; nor can any such rule be evolved therefrom consistently with the judgment of the court.

When, as here, the delivery is to be made in Chicago, but at a point away from the carrier's line, and by means of a track not owned or possessed by the carrier, the printed schedule of such carrier showing in two items the compensation exacted for the haul to Chicago, and that exacted for the transfer in Chicago to the point of delivery, the theory that such carrier is bound by law to unload such freight at a station on its own line in Chicago, and that the transfer from its line to a point on the other line for the purpose of delivering at the latter point (being an equivalent or substitute for what ought to have been done pursuant to such supposed obligation)

is comprehended in the service of hauling to some station on its line in Chicago, is unsound. One side of the proposed equation is mythical. There is no obligation on the carrier in such a case, and as to such a consignment, to unload at a station on its line in Chicago, or to provide unloading and delivery facilities at such station. In the carrier's charge for the haul to any station or point on its line in Chicago, in such a case, there is not comprehended any compensation for unloading facilities at such station or point. The 23½ cents per hundredweight pays these appellants for hauling from Kansas City to a station or point on their line in Chicago; the \$2 per car pays for the transfer thence to the stock yards, where the consignees desire the delivery to be made.

The Covington Case was prior to the interstate commerce law. Within the express terms of the second paragraph of section 6, quoted in the statement which precedes this opinion, the total compensation to the carrier for his services as carrier may be divided into at least two items. The separation by these appellants of their charge for loading and hauling to Chicago from their charge for transferring from their line in Chicago to a specified point in Chicago, away from their line, is authorized by the statute. No satisfactory reason suggests itself against the legality and propriety, under special circumstances, such as exist here and as existed in the Covington Case, of such a division of his compensation by a carrier even apart from the statute. The learned district judge who made the order appealed from evidently understood the opinion in the Covington Case to imply that no division of a carrier's charge could be made. If this were the sound construction of that case, the statute has changed the rule, as already suggested.

It is not suggested, assuming any such charge as is here in question to be legal at all, that the amount is unreasonable. The contention that the carriers must move cattle from their lines of road over the track of the stock-yards company to the stock yards, without compensation other than as contained in their charges for hauling to points on their respective lines in Chicago (and this is what the claim of these appellees amounts to), is invalid.

The order appealed from is reversed, and the cause remanded, with the direction that said order be vacated, and the intervening petitions dismissed, for want of equity.

BROWN v. PARKER.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1896.)

No. 702.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—REFUSAL OF ASSIGNEE TO QUALIFY—APPOINTMENT OF SUCCESSOR.

The Iowa statute (McClain's Ann. Code, § 3307) requires the county district court, under certain circumstances, and "on the application of any person interested," to appoint some other person to execute the trust. *Held*, an assignee who has accepted and filed the deed, and taken possession of the property, though he has not filed an inventory or given

bond, is a "person interested," on whose application a successor may be appointed.

2. SAME—WHEN APPOINTMENT MAY BE MADE.

Statutory authority to appoint a successor if the assignee fail to file a bond and inventory within 20 days after the assignment (McClain's Ann. Code Iowa, § 3307) includes power to make such appointment before expiration of the 20 days, on the request of the assignee and his refusal to qualify.

In Error to the Circuit Court of the United States for the District of Kansas.

This suit was brought by George H. Brown, as assignee of the firm of John H. Engle & Son, the plaintiff in error, against George R. Parker, the defendant in error, to recover damages for the alleged wrongful conversion on or about July 22, 1893, of a stock of merchandise situated in the town of Gaylord, Smith county, Kan. The material facts relied upon to sustain the action may be stated as follows: Prior to July 17, 1893, the firm of John H. Engle & Son, consisting of John H. Engle and John R. Engle, had been doing a general merchandise business at Hamburg, Fremont county, Iowa, and also at Gaylord, Smith county, Kan., having stores at both of said places. They had become financially embarrassed, and, on the day last mentioned, John H. Engle, the senior member of the firm, executed at Hamburg, Iowa, in the firm name, a general assignment for the benefit of creditors to Edward Sudendorf, as assignee. The deed of assignment in terms covered the two stocks of goods situated at Gaylord, Kan., and the stock situated at Hamburg, Iowa. The deed of assignment was delivered to the assignee therein named, and was by him duly recorded in Fremont county, Iowa, on July 18, 1893. On the succeeding day, to wit, July 19, 1893, John R. Engle, the junior member of the firm who managed the business at Gaylord, Kan., executed a mortgage on the stock of goods there situated, in favor of the defendant, George R. Parker, to secure a debt in the sum of \$438.70, which the firm of John H. Engle & Son then owed to said Parker. This mortgage was duly recorded on July 19, 1893, in Smith county, Kan., and in accordance with its provisions the mortgagee shortly thereafter took possession of the mortgaged property. It was claimed by the defendant, Parker, that, when the last-mentioned mortgage was executed in his favor, he was led to believe, by representations made to him by John R. Engle, the mortgagor, that he had purchased all the interest of his co-partner in the stock of goods located at Gaylord, Kan., and was entitled to execute a mortgage thereon, as his sole and individual property. A demand was subsequently made on the defendant, Parker, by Edward Sudendorf, as assignee of the firm of J. H. Engle & Son, for the restoration of the mortgaged property to him, as assignee, which demand was refused. Thereafter this suit was brought by George H. Brown, as assignee of John H. Engle & Son, to recover the value of the stock of goods located at Gaylord, Kan., on the ground that it had been wrongfully seized and converted by the defendant, Parker, to his own use. Prior to the bringing of such suit, George H. Brown, the plaintiff, had been substituted as assignee in the place and stead of Edward Sudendorf, the original assignee, by an order to that effect made by the Honorable Walter I. Smith, judge of the district court in and for Fremont county, Iowa. At the conclusion of the plaintiff's testimony the circuit court directed the jury to return a verdict in favor of the defendant. The case comes to this court on a writ of error that was sued out by the plaintiff below.

George E. Stoker (Charles J. Dobbs was with him on the brief), for plaintiff in error.

Webb McNall and E. S. Ellis (W. W. Caldwell was with them on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question presented by this record is whether the circuit court properly directed the jury to return a verdict for the defendant; and the decision of that question turns upon the further inquiry whether the order substituting George H. Brown as assignee in place of Edward Sudendorf was void, and for that reason subject to be attacked collaterally. The order thus made was as follows:

"In the District Court of Iowa in and for Fremont County.

"In the Matter of the Assignment of J. H. Engle & Son.

"On this second day of August, 1893, comes E. Sudendorf, named as assignee by the written general assignment made by J. H. Engle & Son, July 17, 1893, recorded in Book D, pages 513 and 514, of the Records of Fremont County, Iowa, and refuses to qualify as such assignee; and thereupon George H. Brown, of Hamburg, Iowa, is appointed as assignee in place of E. Sudendorf, and the bond of said assignee is fixed at double the amount of his inventory and valuation of the property assigned; and said George H. Brown, on giving such bond with sureties approved by the clerk of the district court of Fremont county, Ia., shall possess all the powers conferred upon the said E. Sudendorf by said written assignment and the laws of this state, and shall, in like manner, be subject to all the duties imposed on said E. Sudendorf under said assignment and the laws of Iowa.

"Done at chambers at Council Bluffs, Ia., the date above given.

"Walter I. Smith, Judge.

"Filed August 3, 1893. L. F. Kline, Clerk."

The foregoing order was made in obedience to a written application for the appointment of a new assignee, which was signed and filed by Edward Sudendorf, wherein the said Sudendorf represented, in substance, that, on account of certain business engagements, it was impossible for him to qualify and act as assignee, in compliance with the provisions of the deed of assignment. The order was also made upon the assumption that the power to make the same was conferred by section 3307, McClain's Ann. Code Iowa, which reads as follows:

"In case any assignee shall die before the closing of his trust, or in case any assignee shall fail or neglect for the period of twenty days after the making of any assignment, to file an inventory and valuation, and give bonds as required by this chapter, the district court, or any judge thereof, of the county where such assignment may be recorded, on the application of any person interested, shall appoint some person to execute the trust embraced in such assignment; and such person, on giving bond with sureties as required above of the assignee, shall possess all the powers conferred upon such assignee, and shall be subject to all the duties hereby imposed, as fully as though named in the assignment; and in case any security shall be discovered to be insufficient, or, on complaint before the court or judge, it should be made to appear that any assignee is guilty of wasting or misapplying the trust estate, said court or judge may direct and require additional security, and may remove such assignee and may appoint others instead; and such persons so appointed, on giving bond, shall have full power to execute such duties and to demand and sue for all estate in the hands of the person removed, and to demand and recover the amount and value of all moneys and property or estate so wasted and misapplied which he may neglect or refuse to make satisfaction for, from such person and his sureties."

It is contended in behalf of the defendant in error that the aforesaid order was not authorized by the provisions of section 3307, *supra*, and is void, because it was not made on the application of any person interested in the assigned estate. It has also been suggested that it was void for the further reason that the appointment

of a new assignee in place of Edward Sudendorf was made within less than 20 days after the making of the assignment. We think that the first of these propositions is untenable, for the following reasons: It will be observed that the statute does not, in terms, require the application for the appointment of a new assignee to be made either by a creditor of the assignor, or by the assignor himself. On the contrary, the language of the statute is, in substance, that the application may be made by any person interested. This means, we think, that, when a court or judge is solicited to appoint an assignee in the place of the one named in the deed of assignment, such order shall not be made at the instance of a mere interloper, but shall only be made at the instance of a person who has some personal interest, either as a creditor or otherwise, in asking for the appointment of a new assignee to administer the trust. The statute does not undertake to define the degree or kind of interest which a petitioner must possess, and, in the absence of such provisions, any person should be deemed an interested party who occupies such a relation to the assigned property, or to any part thereof, that he may be held responsible for its care and management. Now, in the present case the testimony shows that Edward Sudendorf occupied the relation last described when he applied to the district judge of Fremont county, Iowa, for the appointment of an assignee in his place and stead. While it is true that he had not at that time qualified as assignee of the firm of John H. Engle & Son, by filing an inventory and giving the bond required by law, yet the evidence shows that he had accepted the deed of assignment from the assignor, and had caused the same to be duly recorded. He had also taken possession of that portion of the assigned property which was situated in the state of Iowa, and, having thus taken possession of it, he became responsible for its custody, and could only be relieved of such responsibility by delivering the property to some person who had been duly appointed to administer the trust. In view of these facts, we think that he was authorized to make an application for the appointment of an assignee, and that an appointment made on his application was not a void appointment, but was made at the instance of an interested party. There is no reason, so far as we can perceive, why an assignee who has become vested with a qualified title to property belonging to the trust estate, and who desires to divest himself of such title and to relinquish the trust, should not be regarded as having a sufficient interest to warrant him in making an application for the appointment of a new trustee or assignee. The Iowa statute, in our opinion, was designed to cover cases of that kind, as well as those cases where the assignor or a creditor is the moving party.

We are also of the opinion that the second objection to the order appointing the plaintiff as assignee is not founded upon a reasonable interpretation of the aforesaid statute. The statute does provide that the district court, or any judge thereof, shall appoint some person to execute the trust embraced in the assignment, if the assignee named therein fails or neglects for the period of 20 days after the making of the assignment to file an inventory and valuation and to

give bond as required by law; but this cannot be held to mean that said court or judge must, in every instance, wait for a period of 20 days before naming a new assignee, when the appointment is made on the ground that the original assignee has relinquished the trust. That view of the statute would frequently lead to great loss and inconvenience, for the reason that no steps could be taken, during a period of 20 days, to collect or to administer the assigned property, even when the assignee named in the deed at once declined to accept the trust. We think, therefore, that the statute must be held to mean that the court shall wait for the statutory period when no affirmative action is taken by the assignee, but that it may appoint an assignee within the statutory period, if the original assignee declines to qualify, and requests that some other person be appointed in his place. In other words, the statute provides that the failure of the assignee to file an inventory and give bond for the period designated in the statute shall be deemed conclusive evidence that he has elected not to qualify as assignee. But it does not exclude other evidence of that fact, nor prevent the court or judge from appointing a successor, when, before the expiration of 20 days, the original assignee appears and formally announces his intention not to qualify. It is the fact that the assignee named in the deed of assignment has relinquished the trust which confers jurisdiction to appoint a successor in office, and that fact may be established either by the failure of the assignee to qualify for a period of 20 days, or by a formal statement made by the assignee that it is his intention not to qualify. From the fact that the order above quoted was made by one of the judges of the district court of the state of Iowa, it is fair to presume that it was made in accordance with a well-established practice in that state, and that in the administration of the assignment act the courts of Iowa construe the statute in the manner above indicated. We also find some reasoning in the case of *Drain v. Mickel*, 8 Iowa, 438, 446, which indicates that it is the established view in that state that it is the nonacceptance of the trust by the original assignee, however that fact may be ascertained, rather than the mere lapse of time, which confers jurisdiction to appoint an assignee in lieu of the one named in the original deed of assignment. We accordingly conclude that the order in question was a valid order, and was not subject to collateral attack, even though it was made within less than 20 days after the deed of assignment was executed.

In the circuit court no questions appear to have been raised, other than those above mentioned. At the conclusion of the plaintiff's testimony the trial court directed a verdict for the defendant on the sole ground that the order appointing the plaintiff as assignee was void, and for that reason conferred no title. As we are not able to assent to that view, the case must be reversed and remanded, with directions to grant a new trial, and it is so ordered.

LUMLEY v. BACKUS MANUF'G CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

NEGLIGENCE—FORMATION OF ICE ON SIDEWALK.

In an action for personal injuries, alleged to have been caused by the defendant's negligently permitting ice to form and remain on the sidewalk, in front of premises in the city of New York, on which the plaintiff, who was defendant's tenant, slipped and fell, it appeared that whatever ice formed at the place in question had formed less than an hour and a half before the accident, and there was nothing to show that, before its formation, there was anything dangerous or requiring attention at such place. *Held* that, in view of this showing and the known variability of the winter climate in New York City, there was no sufficient evidence of negligence to justify a verdict against the defendant.

In Error to the Circuit Court of the United States for the Southern District of New York.

This case comes here on a writ of error to review a judgment of the circuit court, Southern district of New York, in favor of defendant in error, who was defendant below. The action was to recover damages for personal injuries caused, as plaintiff claimed, by defendant's negligence. At the close of plaintiff's case, the court directed a verdict for the defendant.

Wm. D. Tyndall, for plaintiff in error.

Jesse Stearns, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The defendant, a Pennsylvania corporation, was the lessee of premises No. 130, on the south side of West Thirty-Fourth street, in the city of New York; and plaintiff occupied a portion of said premises, as tenant of the defendant, under a sublease. The negligence averred in the complaint was that on "March 1, 1893, defendant, by its servants, employes, and agents, permitted the entrance and approach and passage to said premises to be covered with water, which quickly froze, and thereby coated the flagging, steps, and premises of defendant with ice, making the said flagging, steps, and premises very unsafe, dangerous, and unfit for their proper and reasonable use by the plaintiff." It was further averred that "defendant, by its said servants, agents, and employes, well knew the said dangerous condition of the flagging, steps, entrance, and premises, and took no measures to warn the plaintiff of its condition."

The proof showed that it snowed the night before March 1, 1893, and that prior to that the weather was icy. Plaintiff's son testified that he went out of the house to get his breakfast at about 9:30 a. m., and that at that time there was snow and ice on the steps, which had accumulated there the previous night, making it necessary for him to be careful, and pick his way along down the steps. On his return from breakfast, he saw a colored boy, who was employed about the house, engaged in cleaning them. The boy had a pail of hot water and a broom. He was dashing the water on the steps, and then scrubbing with the broom, to get the snow and ice off. How

long he was engaged in this work witness did not know. When witness saw him, the boy was standing on the top step. Witness passed him, and went into the house. Subsequently, and about 12 o'clock noon, the witness again left the house. At that time the steps were all washed off, and witness did not testify to observing anything dangerous upon them or in their vicinity at that time. He returned to the house about 1:30 p. m., in company with his mother and sister. At that time there was ice on the sidewalk in front of the steps, on the stone right in front of the bottom step, and between the two posts at the foot of the railings of the stoop. Witness testified that he did not think this ice extended over the sidewalk as far as the gutter, but covered the stone in front and "a little over in the court" or area way, which, according to the diagram in evidence, is separated from the sidewalk by a low curb, surmounted by a railing. The sister slipped on this ice, and fell. She testified that she had been out of the house to breakfast, and again a second time, but was not asked as to the condition of affairs on those two occasions. She testified that when she fell, which was on her return with her brother and mother, the ice on which she slipped was in the middle of the flagging as she was starting up the steps, and that the whole flagging adjoining the steps was covered with ice. This was shortly before her father's accident. The plaintiff testified that he left the house in the forenoon, and that the ice was not there then. He returned about 1:30 p. m. He was walking along close in to the railings, so as to avoid any ice if it was possible; and, when he came close to the house, he "came to the posts at the foot of the railings"; and as he "came around the post, and was just going up the steps," his foot slipped from under him, and he fell. What he slipped upon was a sheet of ice which covered the stone which is on a level with the sidewalk, running between the two posts. That individual stone, which was about 6x3 feet, was covered with ice, but he did not notice ice particularly on any other stones there. There was no proof as to the temperature at any time that day, except that it is manifest that at some time prior to the accident it was below the freezing point at the place in question. This is substantially all the testimony in the case.

It is manifest that whatever ice formed in front of the steps had so formed less than 1½ hours before plaintiff fell, and there is nothing to show that, before its formation, there was anything dangerous in or requiring attention in the approach to the premises. We concur with the trial judge in the conclusion that there is no sufficient evidence of negligence on the part of defendant in keeping the approach to its premises reasonably safe. The winter climate here is characterized by sudden and violent changes of temperature. In this city, in the winter season, it is not uncommon to see snow behind an area railing melting under the direct rays of the sun, while at the same time the water that flows from it over so much of the sidewalk as lies in the shadow is freezing hard. It would on such a day be impossible for any one to keep the level surface of the sidewalk and the approaches to the steps of a stoop at all times free from ice, without remaining continuously on the watch; and certain-

ly no such obligation rests upon the householder, whatever may be his obligations when some dangerous obstruction has continued long enough to charge him with notice of its existence. The plaintiff, therefore, failed to make out the negligence charged in his complaint.

It was suggested here (whether the point was made below or not does not appear) that the defendant was responsible for the presence of the ice, on the theory that it was formed from the water which the boy used in washing off the steps. But the proof is not sufficient to sustain such a finding. There is nothing to show that any depression of the stone or imperfection of the sidewalk prevented water from running off it in the ordinary way, into the gutter, or called for any peculiar or unusually careful management in cleaning the stoop.

The judgment of the circuit court is affirmed.

UNITED STATES *ex rel.* SIEGEL v. BOARD OF LIQUIDATION OF CITY DEBT.

(Circuit Court, E. D. Louisiana. March 11, 1896.)

No. 12,478.

CONSTITUTIONAL LAW — JUDICIAL LEGISLATION — LOUISIANA CONSTITUTION AND STATUTES.

The Louisiana statute (Act No. 133 of 1880) relative to the funding of the debt of the city of New Orleans, as amended by Act No. 67 of 1884, excepts from its benefits the floating debt of the year 1879, and forbids the funding of such debt; and, though such exception should be held to be a violation of article 254 of the constitution of Louisiana of 1879, requiring the general assembly to enact legislation to liquidate the indebtedness of the city, the courts are without power to require the authorities of the city to disregard such exception, since to do so would virtually amount to enacting a law for the funding of a debt for which the legislature had refused to provide.

Petition filed December 31, 1895, by Henry Siegel, a citizen of Germany, praying for a writ of mandamus to the board of liquidation of the city debt to order the board to fund, or pay to relator, certain judgments at law heretofore obtained in this court against the city of New Orleans, aggregating the sum of \$21,008.36. Upon a motion made by the defendant, at the close of the evidence, to direct a verdict against the relator, the court granted the same, for the following reasons.

Charles Louque and H. L. Lazarus, for relator.
Branch K. Miller, for defendant.

PARLANGE, District Judge. The relator heretofore obtained in this court several judgments against the city of New Orleans. The same were, in terms, made payable out of the revenues of the city of New Orleans for the year 1879, and out of the surplus of any subsequent years, in accordance with section 3 of Act No. 30 of the

extra session of the general assembly of this state held in 1877. These judgments were based upon floating debts or claims against the city created during, for, and against the year 1879. The relator prays for a mandamus ordering the board of liquidation of the city debt to fund or pay said judgments. Counsel for relator stated in open court that they abandoned any claim to have the judgments paid in this proceeding out of any surplus or revenues for the years subsequent to 1879, and they restricted the demand in this matter to a prayer to have the judgments funded into bonds by the board, or paid by the board with the proceeds of the sale of bonds. It was perfectly evident that relator could make no tenable claim to have his judgments paid out of such surplus, even if the pleadings be taken as setting forth and including a claim on relator's part to have his judgments paid out of such surplus, and even if such surplus had been proven to exist. It is true that section 3 of Act No. 30 of the extra session of 1877 declares that the "revenues of the several parishes and municipal corporations in this state, of each year, shall be devoted to the expenditures of that year; provided that any surplus of said revenues may be applied to the payment of the indebtedness of former years." But in a suit brought by this same relator the supreme court of the United States held (*U. S. v. Thoman*, 156 U. S. 353, 15 Sup. Ct. 378) that the provision as to the surplus is not mandatory, but only permissive, to the municipal corporations or parishes, and that the provision creates no contract right in a holder of indebtedness of former years which can be enforced by a mandamus. As the council of the city of New Orleans has never appropriated any part of the surplus (if such exists) towards the payment of relator's judgments, it is clear that the relator has no claim upon such surplus. This matter is therefore to be considered as a proceeding the sole object of which is to compel the board to fund relator's judgments, and give him bonds therefor, or to pay the judgments with the proceeds of the sale of the bonds which the board is authorized to issue. Article 254 of the constitution of Louisiana of the year 1879 makes it the duty of the general assembly to "enact such legislation as may be proper to liquidate the indebtedness of the city of New Orleans and apply its assets to the satisfaction thereof." The general assembly, proceeding to carry out this constitutional mandate, enacted, among other legislation, Act No. 133 of 1880, Act No. 58 of 1882, and Act No. 67 of 1884, which was amended by act No. 128 of 1890 in particulars which do not affect the present controversy. By Act No. 133 of 1880 the board of liquidation of the city debt was created. The board was authorized by that act to retire and cancel the entire valid debt of the city of New Orleans, by the sale of new bonds created by said act, and by the application of the proceeds to the purchase of the old obligations. But from the benefits of this scheme the act specially excluded all the floating debt created up to the date of the passage of the act, "whether represented by bonds of various classes or by judgments." Section 4 of Act No. 133 of 1880 makes it an offense punishable by fine and imprisonment for any member of the board to use any of the new bonds

created by the act, or the proceeds thereof, for purposes other than those contemplated by the act. Act No. 133 of 1880 failed of its purpose to cause the retirement of the city debt, and no bonds were issued under said act. In 1882 the general assembly of Louisiana enacted Act No. 58 of that year. That act recited that the city's creditors had indicated their willingness to settle claims equitably. It authorized the city, through the board, to extend for 40 years the payment of all outstanding bonds, except those known as "Premium Bonds," and to levy and collect a special tax to pay the interest on all bonds except the premium bonds. Under Act No. 58 of 1882, bonds for a large amount were issued. Act No. 133 of 1880 was amended by Act No. 67 of 1884. The amendment enlarged the scope of act No. 133 of 1880 by allowing the funding of the floating debt for years prior to 1879. Therefore, whereas under Act No. 133 of 1880 the board was forbidden from funding any of the floating debt prior to 1879, the only inhibition with regard to the fundable claims which now remains under Act No. 67 of 1884 is as to floating debt or claims created for and against the year 1879 and subsequent years. Section 3 of Act No. 133 of 1880 reads as follows:

"Sec. 3. Be it further enacted," etc., "that the board of liquidation of the city debt be and it is hereby authorized and empowered to retire and cancel the entire valid debt of the city of New Orleans, except the floating debt created up to the date of the passage of this act, whether represented by bonds of various classes or by judgments, either by the sale of the new bonds created under this act and appliance of proceeds to the purchase of such old obligations, or by exchange of the new bonds against said old obligations, on such terms as may be agreed upon between the holders of the said old obligations and the board of liquidation; provided the new bonds shall not be sold for a less sum than eighty cents in cash, on the dollar, and that no exchange shall be made at a greater rate than fifty cents in new bonds per dollar of the face value of the old obligation with interest accrued thereon; and provided further, that the entire issue of new bonds sold or exchanged, as above provided, shall not exceed in all ten millions of dollars."

Section 2 of Act No. 67 of 1884 reads as follows:

"Sec. 2. Be it further enacted," etc., "that section 3 of Act No. 133, approved April 10, 1880, be amended and reenacted so as to read: That the said board of liquidation of the city debt be and it is hereby authorized and required, and it is made the duty of the said board, to retire and cancel the entire debt of the city of New Orleans now in the form of executory judgments and registered, under the provisions of Act No. 5 of 1870, and that which hereafter may become merged into executory judgments and likewise registered; except the floating debt or claims created for and against the year 1879 and subsequent years; that it is the full extent and meaning of this act to apply solely the privileges thereof to executory judgments, at present rendered against such city, and to such floating debt or claims against said city for 1878, and previous years merged and to be merged into executory judgments, whether absolute or rendered against the revenues of any particular year or years, previous to the year 1879; that for the purpose of retiring and cancelling said judgment debt, the said board is authorized and required either to sell the bonds to be issued under this act at not less than their par value and apply the proceeds thereof to the payment of the said judgments, as above specified, or issue said bonds in exchange for said judgments."

As relator's judgments state, in terms, that they are to be paid out of the revenues of 1879, and out of the surplus of subsequent

years, and as relator is here seeking to have his judgments satisfied by means totally different from those which have been adjudged to him, the first inquiry which suggests itself is, on what law or right does the relator base his demand? As I understand it, the answer which is attempted to be made to that question, and the argument offered in behalf of relator, are as follows: In the case of *Board v. Hart*, 118 U. S. 136, 6 Sup. Ct. 995, the supreme court of the United States stated substantially, in general terms, that the holders of the floating debt of the city of New Orleans existing at the time of the passage of Act No. 133 of 1880, who have established the validity of their claims by judicial process, are protected by the provisions of the constitution of Louisiana adopted in 1879 from being excluded from sharing in the proceeds of the property and fund which by Act 133 of 1880 were, in terms, appropriated to purchase and retire the bonds of the city. With this declaration as a foundation, relator's counsel urge that the inhibition in Act No. 67 of 1884 against the funding of the class of indebtedness to which relator's judgments confessedly belong, is unlawful and of no effect, and that the inhibition and exception should be expunged by the court from Act No. 67 of 1884, and that the expurgated statute would then command the board to fund all the indebtedness of the city of New Orleans, without exception. In one essential particular, the *Hart Case* was precisely the converse of the case at bar. In the *Hart Case*, the board, after having, by a compromise, agreed to fund Hart's claim, refused to comply with its agreement to issue the bonds. Hart's claim was founded on contracts for municipal purposes made from 1871 to 1877, and had been merged into a judgment, and was conceded to belong to a class of claims which had been admitted to the benefits of the funding scheme by Act No. 67 of 1884. The board resisted solely on the ground that the acts of 1882 and 1884 conflicted as to the application of the property and funds of the city, and "that all the property of the city not dedicated to public use, and also the surplus of what was known as the 'Premium Bond Tax,' were pledged, under Act No. 58 of 1882, and by previous legislation, to the payment of other bonds of the city which were outstanding, and that the act of 1884, in so far as it directed a diversion of that property and fund, impaired the contract with the holders of those bonds, and was therefore unconstitutional and void." Therefore, in the *Hart Case*, the board of liquidation was refusing to obey the act of 1884, which plainly enjoined upon it to pay Hart's claim, while in the case at bar, relator seeks to have the board ordered to disobey the act of 1884, which, with equal plainness and with reiteration, forbids the board from paying relator's judgments. The statement made by the supreme court in the *Hart Case*, that the property of the city is the pledge of all its creditors, was a general declaration of the right and justice of the case, with which the court answered the board's contention, and upon which the court based its decision in ordering the board to obey the act of 1884. See, in this connection, *State v. Board of Liquidation*, 40 La. Ann. 398, 4 South. 122. There was no reference made in the *Hart Case* to the valid-

ity or invalidity of the exception made in the act of 1884 which excludes, in terms, relator's claims. No authority has been cited to me, nor have I discovered any, to the effect that the exception in the act of 1884 is invalid. It may well be that the general assembly had the right to make the exception. If, for instance, relator's claims were obnoxious to the constitutional amendment of 1874 (Acts 1874, p. 56) forbidding the city of New Orleans from increasing its debt, etc., relator might still have been entitled to judgments against the revenues; but it would not follow, necessarily, that he would be entitled to the benefits of the funding scheme. Article 254 of the constitution refers to the valid indebtedness of the city, and the supreme court, in the Hart Case, cannot be understood as having referred to any but lawful indebtedness. However, this consideration need only be briefly mentioned, because it is not essential to the decision of this case. It is clear that article 254 of the constitution of Louisiana is not self-operating. It is equally clear that if the general assembly had wholly disregarded its duty to carry out article 254, and had enacted no legislation whatever to that end, the court could not have created such an agency as the New Orleans board of liquidation, or provided the funding scheme for the relief of the relator. The relator would have been left to the means of payment which his judgments recite, and to such other modes of relief as he might have outside of article 254, and of the legislation enacted to carry it out. The difference between the supposed case and the case at bar is a difference in degree, but not in principle. The legal impossibility of ordering the board in this case to disobey the act of 1884 is the same as it would be for the court, in the total absence of legislation on the subject, to carry out itself the constitutional mandate. When the lawmaker gathers under one head, and in the form of a statute, several distinct and separate matters of legislation, which, though germane to each other, are not interdependent, a court may strike out one or more of the provisions which it adjudges to be in contravention of the organic law, and therefore null. In such a case, what remains of the statute may be enforced, because it was the will of the lawmaker that every one of the independent matters should be law. But this familiar doctrine does not apply to this case. The general assembly has clearly said, in the act of 1884, that it will not fund the class of claims to which relator's judgments belong. If (assuming that the exception in Act No. 67 of 1884 is invalid) I should strike out the exception, an extraordinary result would be produced. A statute would remain which would virtually order the board to fund relator's judgments. Who would be the author of that law? Surely, not the general assembly, for it has provided precisely the reverse. The court then would be the author of the law, and yet a court cannot legislate. I am clear that the relator cannot be given the relief which he prays for.

NATIONAL MASONIC ACC. ASS'N OF DES MOINES v. SHRYOCK.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1896.)

No. 677.

1. ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—BURDEN OF PROOF.

Under a policy promising indemnity in case death results solely because of bodily injuries effected by external, violent, and accidental means, and independently of all other causes, the burden of proof is on those claiming under the policy to show that the accident was the sole cause of death, independently of all other causes.

2. SAME—DEATH FROM ACCIDENT COMBINED WITH DISEASE.

Under such a policy, the insurer would not be liable if, at the time of the accident, insured was suffering from a pre-existing disease, and death would not have resulted from the accident in the absence of such disease, but insured died because the accident aggravated the effects of the disease, or the disease the effects of the accident.

3. REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE—RECORD.

The sufficiency of the evidence to sustain the verdict cannot be considered when the record discloses that only a portion of the evidence is included in the bill of exceptions, nor will a certificate that the substance of the evidence is returned warrant the court in considering that question.

4. HEARSAY EVIDENCE—PUBLIC POLICY—DISCRETION OF COURT.

The rule that hearsay testimony is incompetent to prove a past occurrence rests upon settled principles, the maintenance of which is essential to the preservation of personal liberty and property rights. The enforcement of this rule is not discretionary with the trial court, and its violation is fatal error.

5. SAME—DECLARATION—RES GESTÆ.

Declarations made by a person since deceased, two hours after an injury from a fall in a street, and not at the scene of the accident, but while engaged in his ordinary avocations in other places, that he had fallen and sustained an injury from which he was suffering, are inadmissible, as part of the res gestæ, to establish the fact of the fall.

6. APPEAL—PREJUDICIAL AND HARMLESS ERROR.

The rule that error without prejudice is no ground for reversal is applicable only when it is clear beyond doubt that the error alleged did not prejudice, and could not have prejudiced, the party against whom it was made.

7. RELEVANCY OF EVIDENCE—ACCIDENT INSURANCE.

In an action on an accident insurance policy, where defendant alleged that death resulted from disease or bodily infirmity, without alleging intoxication or suicide, *held*, that it was error to admit evidence for plaintiff that insured was not addicted to the use of intoxicating liquors, and that evidence offered for defendant, tending to show that he committed suicide, was properly excluded.

In Error to the Circuit Court of the United States for the District of Nebraska.

The National Masonic Accident Association of Des Moines, Iowa, a corporation, brings this writ of error to reverse a judgment rendered against it, and in favor of Celia V. Shryock, the defendant in error, on a certificate of membership of her husband, William B. Shryock, in that association. In her complaint the defendant in error alleged that on the 14th day of November, 1890, this accident association issued to William B. Shryock its certificate of membership, by which it agreed to pay to her such a sum, not exceeding \$5,000, as should be realized by it from one quarterly payment of \$2, made and collected from all its members at the date of the accident, if the death of William B. Shryock should result through external, violent, and accidental means alone, which should, independently of all other causes, cause his death within 90 days of the date of the accident, but expressly stipulated in the certificate that "this

insurance does not cover disappearances, nor injuries of which there is no visible mark upon the body, nor accident, nor death or disability resulting wholly or in part, directly or indirectly, from any of the following causes, or while so engaged or affected: Suicide, intoxication, or narcotics, dueling or fighting, war or riot, voluntary overexertion or exposure to unnecessary danger, intentional injuries (inflicted by the assured, or by any other person with the consent or procurement of the assured), medical or surgical treatment (necessitated solely by injuries, and made within ninety days of the occurrence of accident excepted), sunstroke, violating law or the rules of a corporation, taking poison or inhaling gas, disease or bodily infirmity, hernia, fits, vertigo, or sleep-walking." She then averred that on July 2, 1892, Shryock received a personal injury by a violent and accidental fall, and by striking a hard substance, on the street in the city of Omaha, from which he died in a few hours, and that she had complied with the provisions of the certificate on her part. The plaintiff in error filed an answer, in which it admitted its issue of the certificate, denied that Shryock met with any accident which caused his death, within the meaning of the certificate, set forth the stipulation of the certificate which we have quoted, and alleged, as a separate defense, that if Shryock received any bodily injury through external, violent, or accidental means, he was at the time suffering from disease or bodily infirmity, the same being some form of heart disease or other kindred disease, and his death resulted wholly or in part from that disease. The answer contained other allegations, but none that are inconsistent with those that we have recited, and none which attributed the death to any other cause than this disease.

Clark Varnum and Carroll S. Montgomery (Matthew A. Hall, with them on the brief), for plaintiff in error.

A. N. Sullivan, J. C. Cowin, and Mr. McHugh (R. Graham Frost, in behalf of counsel), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The certificate of membership in this accident association, on which this action is based, contained the covenant of this corporation to pay to the defendant in error the indemnity it promised in case the death of William B. Shryock resulted, within 90 days from the date of any accident, solely because of bodily injuries effected by external, violent, and accidental means, and independently of all other causes; and it also contained an express agreement that the insurance promised thereby should not cover any death which resulted wholly or in part, directly or indirectly, from disease or bodily infirmity. The defendant in error alleged that Shryock's death was caused by an injury to him which resulted from an accidental fall on the street. The association denied this allegation, and alleged that, if he was injured by such a fall, his death was not caused by that alone, but resulted, wholly or in part, from some disease of his heart. The burden of proof was upon the defendant in error to establish the facts that William B. Shryock sustained an accident, and that that accident was the sole cause of his death, independently of all other causes. If Shryock suffered such an accident, and his death was caused by that alone, the association agreed by this certificate to pay the promised indemnity. But if he was affected with a disease or bodily infirmity which caused his death, the association was not liable under this certificate, whether he also suffered an accident or not. If he sustained an accident, but at the time it occurred he

was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of this insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor. These propositions have been so lately discussed and affirmed by this court that we content ourselves with their statement. *Insurance Co. v. Melick*, 27 U. S. App. 547, 12 C. C. A. 544, 547, and 65 Fed. 178, 181; *Association v. Barry*, 131 U. S. 100, 111, 112, 9 Sup. Ct. 755; *Freeman v. Association*, 156 Mass. 351, 353, 30 N. E. 1013; *Anderson v. Insurance Co.*, 27 Scot. L. R. 20, 23; *Smith v. Insurance Co.*, L. R. 5 Exch. 302, 305; *Insurance Co. v. Thomas*, 12 Ky. Law Rep. 715; *Marble v. City of Worcester*, 4 Gray, 395, 397; *Association v. Grauman*, 107 Ind. 288, 290, 7 N. E. 233.

On the trial of the case there was evidence tending to show that about 4 o'clock in the afternoon of July 1, 1892, William B. Shryock, who resided at Louisville, in the state of Nebraska, went from that place by rail to the city of Omaha, in that state, where he arrived about 5 o'clock in the afternoon of that day; that, some months before, he had been injured by the fall of a horse upon him, but had recovered from much of the disability caused by that injury; that he was still lame, and wore a rubber supporter on his knee; that he told one of his acquaintances, just before he left Louisville, that he was nervous, and felt badly, that he was going to Omaha, and that he wanted him to keep his grave green if he never saw him again; that after his arrival in Omaha he met another acquaintance at the Millard Hotel in that city, about 6 o'clock in the evening, and went with him to a harness shop, bought a harness, and accompanied him to the depot; that the baggage master saw him at the depot in Omaha between 7 and 8 o'clock on that evening, and noticed that he was lamer than usual, and looked like a man in pain; that about 8 o'clock on that evening he entered the store of one Keefer, in Omaha, and purchased a harness; that he was very lame and pale, and looked as if he was suffering; that about half past 8 on that evening he entered the store of one Darst, in Omaha; that he remained there an hour and a half, and seemed to be weak and in pain; that Darst then accompanied him to his hotel in Omaha, where he obtained from a drug store a phial of some liquid, and retired to his room, where he was found dead in his bed at 6 the next evening; that an autopsy was held, from which it appeared that he had long been afflicted with fatty degeneration of the heart, and that there were abrasions on his left hip and on his left knee that might have been produced by such an accident as a fall on the street; that his heart was in such a diseased condition that, in the opinion of some of the physicians, a fall which probably produced these abrasions might have caused, and probably did cause, his death; but all the physicians testified that in their opinion the injury from such a fall or accident as these

abrasions indicated would not have been sufficient to have produced death if the heart of the deceased had not been weakened by its disease.

The sufficiency of the evidence in this case to warrant the verdict is not before us for consideration, because the record before us discloses the fact that only a portion of the evidence presented to the court below is contained in the bill of exceptions. A certificate that the substance of the evidence is returned is not sufficient to warrant an appellate court in reviewing the refusal of the trial court to direct a verdict. *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347, 350, 353; *Railway Co. v. Harris*, 27 U. S. App. 450, 12 C. C. A. 598, and 63 Fed. 800, 805; *Taylor-Craig Corp. v. Hage*, 16 C. C. A. 339, 69 Fed. 581.

But it is assigned as error that the trial court admitted in evidence the testimony of William Darst that, when the deceased came to his store, between three and four hours after he arrived in Omaha, he asked him what the matter was with him, and he said in reply that in going up from the depot he had slipped, got a fall, and struck something hard, and that he had hurt his side and the same leg that was injured before; that the court admitted the testimony of Keefer, to the effect that when he was selling him a harness at his store, about three hours after the arrival of the deceased in Omaha, the latter told him, in answer to his inquiry why he walked so lame, that he had slipped and hurt his ankle; and that the court allowed the baggage master, at the depot where Shryock went to ship his harness, to testify that, between two and three hours after his arrival in Omaha, he told him, in answer to a like question, that he had slipped and hurt the same leg that he hurt before. Each of these three witnesses testified that, when the deceased made these statements to them, respectively, he was lamer than usual, and Darst testified that he looked pale, said he was in pain, and acted as though he was. The objection urged upon our consideration, however, is not to the testimony of these witnesses, to the appearance, symptoms, and statements of the deceased to them as to his present condition and sufferings when he made these statements, and we dismiss that question here. The objection urged is that his statements that he had slipped and fallen, and struck against something hard, some hours before these statements were made, were mere narratives of a past occurrence, and were incompetent to prove the fact of the fall and accident. The rules of evidence which govern the trial of actions insure the stability, and measure the extent, of the rights of persons and property. Reversals, modifications, or variations of these rules tend to produce instability and uncertainty in these rights, and breed distrust of courts and of governments. The rule that hearsay testimony is incompetent evidence of a past occurrence rests upon settled principles of the law, the maintenance of which is essential to the preservation of personal liberty and property rights. The enforcement of this rule is not discretionary with the trial court, and its violation is fatal error. *Waldele v. Railroad Co.*, 95 N. Y. 274; *Tilson v. Terwilliger*, 56 N. Y. 273; *People v. Davis*, Id. 95; *Reg. v. Bedingfield*, 14 Cox, Cr. Cas. 341; *Meek v. Perry*, 36 Miss. 190,

260; *Merkle v. Bennington Tp.*, 58 Mich. 156, 24 N. W. 776; *Patterson v. Railway Co.*, 54 Mich. 91, 19 N. W. 761; *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36; *Martin v. Railroad Co.*, 103 N. Y. 626, 9 N. E. 505; *Association v. McCluskey* (Colo. App.) 29 Pac. 383, 384; *Railway Co. v. McLelland*, 27 U. S. App. 71, 10 C. C. A. 300, and 62 Fed. 116.

In *Mima Queen v. Hepburn*, 7 Cranch, 290, 295, Chief Justice Marshall said:

"It was very justly observed, by a great judge, that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of men. Our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered for their antiquity, and the good sense in which they are founded.' One of these rules is that 'hearsay' evidence is, in its own nature, inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible. * * * If the circumstance that the eye-witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained."

This was a just and timely warning against laxity in the enforcement, and carelessness in the application, of this rule. Why do not the statements of these witnesses that the deceased told them, two hours or more after the occurrence, that he had slipped and injured himself, fall under its ban? The argument in support of their admission is that they were a part of the *res gestæ* at the time of the fall, and that for this reason they come within the well-known exception to this rule, that, whenever the act of a party may be given in evidence, his declarations made at the time of the act are not hearsay, but constitute verbal acts, and are for that reason admissible, if they are calculated to elucidate and explain the character and quality of the act, and were so connected with it as to derive credit from the act itself, and to constitute one transaction with it. It is, however, equally well settled that statements which constitute a mere narrative of a past transaction are never admissible in evidence because they are detached from any material act that is pertinent to the issue. *Insurance Co. v. Mosley*, 8 Wall. 397, 405, 416; *Railroad Co. v. O'Brien*, 119 U. S. 99, 104, 105, 7 Sup. Ct. 118; *Fordyce v. McCants*, 51 Ark. 509, 513, 11 S. W. 694; *Railway Co. v. Becker*, 128 Ill. 545, 21 N. E. 524; *Railway Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346; *Adams v. Railroad Co.*, 74 Mo. 553; *Tennis v. Railway Co.*, 45 Kan. 503, 25 Pac. 876; *Railway Co. v. Holland*, 82 Ga. 257, 10 S. E. 200. The question is, were the statements of the deceased that he slipped and fell, made as much as two hours after the alleged fall, verbal acts done at the time of the fall, and a part of that occurrence, or were they mere narrations of that occurrence? The question seems to answer itself. After the slip and fall occurred, if they occurred at all, the deceased went about his business, met a friend at the hotel about an hour later, pursuant to a prior engagement, went with him to a harness shop, bought a harness, went with him to the de-

pot to send it to his home, then went to Mr. Darst's office, and finally, at about 10:30 p. m., returned again to the hotel. It was about 8:30 in the evening when he told Darst that he had slipped and fallen on his way up from the depot, and he went up from the depot about 5 o'clock in the afternoon. So far as this record discloses, he said nothing to the friend whom he subsequently met at the hotel, and who went with him to purchase the harness, and to carry it to the depot, about this slip and fall. He did not mention it to any one, except in answer to a question about his lameness or his health, and he mentioned it for the first time either in a harness shop, where he was buying a harness, or in a depot, where he was shipping it. None of his declarations were made at the place or at the time of the fall, but at later times, and in other places, when he was not falling, or arising from his fall, but when he was carrying on other transactions, entirely disconnected with that accident. He made his earliest declarations about it when he was engaged in the transaction of purchasing and shipping a harness. That transaction can hardly be said to be a part of the *res gestæ* at the fall in the alley two hours before, and, if it was not, how can the declarations made while he was conducting this harness trade and shipment, and thereafter, be so?

Counsel for the defendant in error cite but a single case in support of their contention that these declarations were a part of the *res gestæ* at the fall, and that case is *Insurance Co. v. Mosley*, 8 Wall. 397. Two questions were presented at the hearing in the supreme court in the Mosley Case—First, whether or not the declarations of a deceased person as to his bodily injuries and pains some time after he suffered a fall were admissible to prove his physical condition at the time they were made; and, second, whether or not his declarations, made immediately after the fall, that he had fallen, were competent to prove that fact. The court answered the first question in the affirmative, on the ground that his declarations of the former class related to present existing facts at the time they were made. It answered the second question in the affirmative, on the ground that the declarations of the latter class were made at the time and place of the accident, and immediately thereafter. These declarations of the latter class were two,—one to his son, and another to his wife. His wife testified that between 12 and 1 o'clock at night, after she and her husband had retired, he got up and went down stairs; that she did not know how long he was gone, but when he came back he said he had fallen down the back stairs, and almost killed himself; that he vomited as soon as he got into the room; that he did not sleep any more that night; and that she was up with him all night. The son testified that he slept down stairs, and that about 12 o'clock that night he saw his father lying with his head on the counter, and he said he had fallen down the back stairs, and hurt himself very badly. Thus it will be seen that these declarations were made within a few moments of the fall, at the place where it occurred, to the first persons the deceased met after the accident, and when he was suffering severely therefrom. The ruling that they constituted a part of the same transaction with the fall

has no tendency to show that declarations made in a harness shop or depot, in the course of the purchase and shipment of a harness, hours after a fall had occurred in a street in a city, constitute a part of the latter transaction. The declarations made in the Mosley Case were made at the place of the fall, immediately after it occurred, before any other transaction had intervened, and when that was the only transaction under consideration. The declarations in the case at bar were made at places distant from the scene of the accident. They were made hours after the fall, when other transactions had intervened between the fall and the declarations, and when the deceased was engaged in transactions entirely disconnected with the accident. Moreover, the case of *Insurance Co. v. Mosley* was decided by a divided court, and Justices Clifford and Nelson filed a vigorous dissent, which has, in effect, since received the sanction of the supreme court in *Railroad Co. v. O'Brien*, 119 U. S. 99, 104, 105, 7 Sup. Ct. 118. In the latter case the surviving members of the majority of the court in the Mosley Case joined in a dissent, while the majority of the court held that the declaration of an engineer, made from 10 to 30 minutes after an accident happened, was not admissible as a part of the *res gestæ*, because "the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it." In *Fordyce v. McCants*, 51 Ark. 509, 512, 11 S. W. 694, the deceased was found lying in great pain about 60 yards from a railroad wreck. In response to a telegram immediately sent, a doctor, after driving 12 or 13 miles, came to treat him, and his patient then told him that he had been thrown heavily across the corner of a seat in a car, and injured. The supreme court of Arkansas held that this declaration was not a part of the *res gestæ* at the accident, and reversed the judgment. In *Leahey v. Railway Co.*, 97 Mo. 165, 10 S. W. 58, the supreme court of Missouri held that the declarations of a deceased child as to the manner in which he was hurt, made at the scene of the accident, and while surrounded by the persons who witnessed the calamity, were admissible as a part of the *res gestæ*; but that what the child said after being carried 50 or 75 feet, and laid on a cot, and from 5 to 25 minutes after the accident, was not so admissible. In *Railway Co. v. Becker*, 128 Ill. 545, 21 N. E. 524, the supreme court of Illinois held that declarations as to the manner in which the injury occurred, made by one who was injured by a street car in the middle of a street 80 feet wide, after he had arisen and walked to the sidewalk, in answer to the question, "What is the matter?" were not admissible as part of the *res gestæ*.

Perhaps these decisions sufficiently illustrate the rule which forbade the admission of the declarations of the deceased in this case to prove the fact of the accident. If not, a large number of authorities in support of this rule, in addition to those we have cited, *supra*, will be found in 21 Am. & Eng. Enc. Law, p. 104, note 2, and *Id.* p. 105, note 1. The declarations here in question were not a part of the *res gestæ* at the fall, and were incompetent to prove it, because they were not made during the continuance of that transaction, but after it had ended, because they were not made until subse-

quent transactions had intervened between the accident and the declarations, which completely detached the latter from the former, and because they were made in answer to inquiries, while the deceased was engaged in subsequent transactions entirely disconnected with the accident. They were mere narrations of a past occurrence. The result is that declarations made by a deceased person two hours after an injury from a fall in a street, and not at the scene of the accident, but while engaged in his ordinary business avocations in other places, that he had fallen, and sustained an injury from which he was suffering, are inadmissible, as a part of the *res gestæ*, to establish the fact of the fall, because they are mere narratives of a past transaction, which had ended before they were made.

It is argued that this judgment ought not to be reversed on this ground, because there was other evidence of this fact in the case sufficient to sustain the verdict, and its admission was not prejudicial to the plaintiff in error. But the court below expressly charged the jury to take these declarations of the deceased into consideration in deciding whether or not he had slipped or fallen, and whether or not he died from the effects of that fall. The jury may have been persuaded by these declarations to find a verdict for the defendant in error, when, in their absence, they would have found against him; and it is impossible for us to say that they were in no way influenced by them. The presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error complained of did not prejudice, and could not have prejudiced, the party against whom it was made that the rule that error without prejudice is no ground for reversal is applicable. *Deery v. Cray*, 5 Wall. 795, 808; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471; *Smith v. Shoemaker*, 17 Wall. 630, 639; *Moores v. Bank*, 104 U. S. 625, 630; *Railroad Co. v. O'Brien*, 119 U. S. 99, 103, 7 Sup. Ct. 118.

It was error for the court below to admit testimony on behalf of the defendant in error that the deceased was not addicted to the use of intoxicating liquors, because this testimony was not relevant to any issue in the case. The plaintiff in error had alleged that Shryock's death was caused by disease or bodily infirmity, and had made no averment that it was produced by intoxication, or by any other of the excepted causes named in the certificate in suit.

For the same reason the court rightly held that evidence tending to show that Shryock committed suicide, offered on the part of the plaintiff in error, was irrelevant and inadmissible. The association pleaded no such defense, but pleaded that the death was caused by disease,—a defense inconsistent with the theory of suicide.

There are other errors assigned in this case, but some of the questions they present may not arise upon a second trial, and no good purpose would be subserved by extending this opinion for their discussion.

The judgment below must be reversed, with costs, and the cause remanded, with directions to grant a new trial; and it is so ordered.

SAUNDERS v. UNITED STATES.

(Circuit Court, D. Maine. March 30, 1896.)

No. 26.

1. OFFICERS OF UNITED STATES—JAILERS OF STATE JAILS.

The jailer of a state jail, in which prisoners, under sentence or awaiting trial by the federal courts, are confined, is not an officer of the United States; and a United States commissioner has no power to call upon him to perform any service.

2. UNITED STATES MARSHALS—FEES—SERVICE OF MANDATE ON POOR CONVICT.

A United States marshal is entitled to a fee of two dollars for the service of a mandate to bring in a poor convict for examination, upon his application for release, pursuant to Rev. St. §§ 1042, 5296.

3. SAME—REMOVAL OF PRISONERS.

A warrant for the removal of a prisoner, confined in a jail remote from the place of trial, but within the district, to the place of trial, is unauthorized; and such a warrant must be regarded simply as an order of court, under Rev. St. § 1030, for the service of which the marshal is not entitled to any fee.

4. SAME—WARRANT OF PARDON.

A marshal is entitled to a fee of two dollars for the service of a warrant of pardon, pursuant to directions of the department of justice.

5. SAME—MITTIMUS.

A mittimus for the commitment of a prisoner is a warrant, for the service of which on such prisoner the marshal is entitled, under Rev. St. § 829, to a fee of two dollars.

6. SAME—DISTRIBUTING VENIRES.

A marshal is entitled to fees, limited, however, by the statute, to \$50 for any one term, for distributing venires and paying constables. *Harmon v. U. S.*, 43 Fed. 560, followed.

7. SAME—DISCHARGE OF POOR CONVICTS.

A marshal is not entitled to any fee for the discharge of a poor convict, after examination pursuant to Rev. St. § 1042.

8. SAME—EXPENSES.

It is not a sufficient objection to the allowance to a marshal of expenses, incurred while endeavoring to make an arrest, that the warrant was issued and served at the place where the court is located.

9. SAME—TRANSPORTATION—NEAREST OFFICER.

Under the act of March 3, 1893 (27 Stat. 609), as well as under that of August 18, 1894 (28 Stat. 416), it was the duty of the marshal or other officer arresting a prisoner to take him before the nearest commissioner or other judicial officer, for examination; and the marshal was not entitled to charge for the transportation of a prisoner, for examination by the commissioner who issued the warrant for his arrest, when another commissioner was nearer to the place of arrest.

10. SAME.

The statutory allowance to a marshal for transporting prisoners is intended to cover the cost of actual transportation, and cannot be charged where the marshal and the prisoner walked from the jail to the place of hearing.

11. SAME—ATTENDANCE OF OFFICERS.

The determination of the number of officers whose attendance is necessary, at a hearing of parties accused before a commissioner, is a matter for such commissioner; and the marshal is entitled to charge for the attendance of as many officers as are so found necessary. *Harmon v. U. S.*, 43 Fed. 560, followed.

12. SAME.

The marshal is entitled to charge for attendance at an examination of a poor convict before a commissioner. *Harmon v. U. S.*, 43 Fed. 560, followed.

13. SAME—TRAVEL—RETURN HOME DURING TERM.

A marshal is entitled to charge for travel from his home to attend court, as often, during the term, as the court is adjourned over one or more intervening days, except where such adjournment is from Saturday to Monday. *Harmon v. U. S.*, 43 Fed. 560, and *U. S. v. Shields*, 14 Sup. Ct. 735, 153 U. S. 88, followed.

14. SAME—SEVERAL WRITS.

A marshal may charge for travel upon two or more writs against different persons, served at the same place and time. *Harmon v. U. S.*, 43 Fed. 560, followed.

15. SAME—EXPENSES—ELECTION.

A marshal cannot, where he holds, at the same time, warrants against different persons, which are served at the same place, charge for his actual expenses upon one of such warrants, and for travel upon the other or others, but must elect between his actual expenses and his statutory charges for travel.

16. SAME—SEVERAL PARTIES.

Nor can a marshal, where he holds one warrant against two or more persons, served at different places, charge for travel in going to serve it upon one, and his actual expenses for the additional distance to serve it on the other or others.

17. SAME—NO SERVICE.

A marshal cannot be allowed charges for travel to arrest when no service is made.

18. SAME—POOR CONVICTS.

A marshal is entitled to charge for travel to serve mandates to bring in poor convicts.

19. SAME—PARDON.

Or to serve a warrant of pardon.

20. SAME—ACCOUNTS—WRONG—FISCAL YEAR.

The fact that a marshal, in making up his accounts, has entered charges for services in the wrong fiscal year, is not a sufficient reason for disallowing such charges.

Geo. E. Bird, for petitioner.

Albert W. Bradbury, U. S. Atty.

WEBB, District Judge. In this proceeding the petitioner seeks to recover the amount of certain fees charged by him for official services as marshal of this district, which were included in his regular accounts, and disallowed by the comptroller. The accounts were all in due order presented to and approved by the court. Proof of required notice and service of the petition has been made. The United States, by the district attorney, demurs to the petition, and the demurrer has been joined. It only falls on the court to pass upon the legality of the charges for services, the performance of which the demurrer admits. The total demanded in the petition is the sum of \$1,653, distributed over more than four years.

The items are numerous, but may be conveniently classified under a few heads:

Class 1. Service of warrants and other writs in criminal cases. In this class are included:

(a) Service of warrants for the arrest of persons charged with crimes, 14 items, amounting to \$28.

The petitioner abandons his claim for these, as it is found that the same service had been charged and paid for in other accounts.

(b) Service of 67 mandates to bring in poor convicts for examina-

tion, upon their application for release from imprisonment, at \$2 each,—\$134.

The objection is that this service should have been performed by the jailer. But the jailer is not an officer of the United States, and the commissioner has no power to call upon him to perform any service. The United States uses the jails of the state for the confinement of prisoners under sentence or awaiting trial. The Revised Statutes of the United States (section 5539) subject prisoners so confined to the same discipline and treatment as convicts sentenced under the laws of the state, and place them under the control of the officer having charge of the jail under the laws of the state. Rev. St. §§ 1042, 5296, regulate the method of the discharge of poor convicts. Upon application to a commissioner, in writing, by the convict, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter. To discharge this duty, the commissioner properly issues his mandate that the prisoner, without whose presence he cannot perform the duty of hearing and determining the matter, be brought before him. These proceedings, in *Harmon v. U. S.*, 43 Fed. 560, affirmed by the supreme court in 147 U. S. 268, 13 Sup. Ct. 327, are held to be proceedings in a criminal case; and the marshal is the proper officer to execute all precepts issued therein. The fees for services of this class should be allowed to the full amount of \$134.

(c) Service of warrants for removal of prisoners confined in jails remote from the place of trial, to the jail in the city where the trial was to be had; seven prisoners, at \$2,—\$14.

Rev. St. § 1030, provides that no writ is necessary to bring into court any prisoner or person in custody, but the same shall be done on the order of the court or district attorney. This statute is broad enough in its terms to cover cases like these where the removal was for long distances, but within the same district, though it may be doubted if such cases were in contemplation when the statute was enacted. Probably the primary object was to cut off charges for warrants when the jail was near the courthouse. But, however that may have been, the statute must be construed as it stands; and I must hold that these warrants for removal, as warrants of court, were unauthorized, and must be dealt with simply as orders of the court, for which the charge of \$14 cannot be allowed.

(d) Service of a warrant of pardon,—\$2.

Satisfactory evidence has been produced that this service was made by the express direction of the department of justice, instructing also that the marshal should report to the department. It was essential that the warrant of pardon, granted by the President, should be delivered, and should be accepted by the convict. *U. S. v. Wilson*, 7 Pet. 150. The charge is the same as that allowed by the fee bill for the service of other warrants, and the marshal should be paid therefor.

(e) Service of warrant of commitment of four prisoners,—\$8.

In *U. S. v. Tanner*, 147 U. S. 661, 13 Sup. Ct. 436, it was held that a warrant of commitment was not served on a prison keeper, within

the meaning of that clause of Rev. St. § 829, which allows the marshal "for travel, in going only, to serve any process, warrant," etc. That case does not decide the question here presented; at most, it raises a query. "If a warrant of commitment can be said to be served at all upon any person, it is upon the criminal himself, rather than upon the jailer," is the suggestion of the court.

Rev. St. § 829, gives the marshal fees:

"For service of any warrant, attachment, summons, *capias*, or other writs except execution, *venire*, or a summons or subpoena for a witness, two dollars for each person on whom service is made."

Is a "mittimus," in legal terminology, strictly and properly a "warrant"? If so, the rightfulness of the marshal's charge is clear, under the statute. The ordinary employment of the term "mittimus" is merely a matter of brevity.

Hawk. P. C. bk. 2, c. 16, § 3:

"And inasmuch as the statute of 31 Car. II., commonly called the 'Habeas Corpus Act,' seems to suppose that all persons who are committed to prison are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate; and the constant tenor of late books, practice, and opinions are agreeable thereto."

In St. 31 Car. II. we find these expressions:

"Unless the commitment were for treason or felony, plainly and especially expressed in the warrant of commitment;" "unless for treason or felony plainly expressed in the warrant of commitment;" "upon view of the copy of a warrant of commitment or detainer."

The mittimus must be in writing, under the hand and seal of the magistrate issuing it, showing his authority. It must be properly directed, and must set forth the crime alleged against the party with convenient certainty, and ought to have a lawful conclusion. Hawk. P. C. bk. 2, c. 16, §§ 13-16, 18.

In Hale, P. C., the mittimus is constantly styled the "warrant."

Volume 1, p. 122, after specifying what a mittimus should regularly contain, adds:

"Yet I am far from thinking the warrant void that hath not all these circumstances."

Page 123: "And therefore the justification in false imprisonment against the gaoler may be good by virtue of such a warrant;" "and it seems to me (contrary to the opinion of my Lord Coke) that, if an escape be suffered willingly by the gaoler upon such a general warrant, it will be felony in him;" "and, therefore, if the conclusion of the mittimus be to detain him until further order of the justice, it is true it is an unapt conclusion) * * * but the commitment is notwithstanding good, if there be any tolerable certainty in the body of the warrant for what it is."

Volume 2, p. 583: "And this leads me to the mittimus or the warrant to the gaoler to receive him." "But, if the conclusion be irregular, I think it makes not the warrant void."

Page 584: "If the matter of the mittimus be otherwise sufficient to charge him in custody, it is a lawful warrant."

"Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the mittimus of the justice, or *warrant* under his hand and seal containing the cause of his commitment." 4 Bl. Comm. 303.

"Then such justice shall, by his *warrant*, commit him to the common jail," etc. 1 Archb. Cr. Prac. & Pl. 165. At page 167: "The v.73F.no.5—50

following is the form of the *warrant* of commitment." And the form given is in all essentials like those issued by the circuit court and commissioners.

U. S. v. Johns, 4 Dall. 413, Fed. Cas. No. 15,481: "By the Court. Upon habeas corpus, we are only to inquire whether the *warrant* of commitment states a sufficient probable cause to believe that the person charged has committed the offense stated."

"Though there should be no doubt as to the validity of the *warrant* of commitment;" "notwithstanding the *warrant* of commitment be defective." Gross, J., in King v. Marks, 3 East, 164.

"Though the *warrant* of commitment be informal." Le Blanc, J., 3 East, 166.

These examples show plainly that, in legal sense, a mittimus is a warrant. If the word in the statute is to be taken in its ordinary and popular sense, no difference appears. In the International Dictionary "mittimus" is defined: "A precept or warrant granted by a justice for committing to prison a party charged with crime; a warrant of commitment to prison." Webster's Unabridged Dictionary, edited by Goodrich & Porter, defines it in the same terms. Worcester's definition is: "A warrant by which a justice of the peace commits an offender to prison."

It follows that the charge was justifiable, and should not have been rejected. Upon what theory the treasury officers acted it is not easy to understand. Presumably not on the authority of Tanner's Case, as, of the original charge for five services, four were disallowed, and one allowed, with travel one mile; nor with regard to the statute, for that provides "two dollars for each person on whom service is made."

Class 2. Fees of marshal for distributing venires, and paying constables, at 15 terms of court; amount disallowed, \$256.

The propriety of this class of charges is sustained by Harmon's Case. But the statute provides that they shall not exceed at any court \$50. At the December term, 1893, of the district court, the total charged is \$60. The excess of \$10 must be denied the marshal, and the balance, of \$246, be held due to him.

Class 3. One charge, of \$1.50, for expenses while endeavoring to arrest.

The objection is that the warrant was issued and served at Bangor, and it seems to have been assumed that in such case there could not have been any expense in endeavoring to arrest,—an assumption that disregards the time frequently consumed in seeking and finding a person accused of crime, even in the town of his residence. But, in addition to the admission of the demurrer, I have the testimony of the marshal that these expenses were actually and necessarily incurred. They are allowed.

Class 4. Discharge of poor convicts after examination by commissioners; 66 discharges, at 50 cents,—\$33.

The petitioner argues that these fees are given to him by the clause of section 829, Rev. St., which allows, "for every commitment or discharge of a prisoner, fifty cents." The regulation of fees by

statute was first provided for by the act of February 26, 1853, and, without question, related to such services as were then required of officers according to the practice up to that date. The marshal was under the duty of committing prisoners either to await trial or in execution of sentence. When the term of confinement expired, because there was no indictment found, or when a prosecution was ended by the entry of a *nolle prosequi*, or by acquittal, the prisoners were, by order of court, discharged, and the marshal was the agent of the court in executing such order. For these services the fee of 50 cents was granted. It was not until June 1, 1872, that congress made an enactment for the relief of poor convicts retained in jail solely for inability to pay a fine or fine and costs. Prior to that date, the only way by which such convicts could be released from their imprisonment was by executive pardon. The act of June 1, 1872, now found in Rev. St. § 1042, directs the course to be pursued. If, upon examination, the commissioner is satisfied of certain facts, he is to administer to the convict a prescribed oath; "and," is the statute, "thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts." In this matter of discharge, no duty seems to rest on the marshal. The commissioner gives the certificate directly to the jailer or keeper of the jail, setting forth the facts, of which one is the discharge, the result of examination. I am inclined to think that the taking of the oath by the convict *ipso facto* operates as a discharge, and that, for further detention, he might have his action. But, however that may be, I cannot find in those proceedings any authority for allowing the marshal discharge fees, and therefore decide against the petitioner as to these charges, amounting to \$33.

Class 5. Transportation of prisoners.

(a) At the date of filing this petition, it contained three items of this class. But later, upon the marshal's explanation, two of them have been allowed and paid in full. There is left only one charge, of \$12.80, for transporting one George W. Williams, from Augusta to Portland, a distance of 64 miles.

The actual transportation on June 2, 1893, is proved. The computation is correct. The United States contends that, inasmuch as a commissioner of the circuit court was at that time resident at Augusta, it was the duty of the officer to take his prisoner before such commissioner for examination; and that failing to do so, and, instead, taking him to Portland, before the commissioner who issued the warrant, he cannot be allowed for transportation. This contention is based upon the following terms of the act of March 3, 1893 (27 Stat. 609):

"It shall be the duty of the marshal, his deputy, or other officer who may arrest a person charged with any crime or offence, to take the defendant before the commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him; and no mileage shall be allowed any officer violating the provisions hereof."

By Act Aug. 18, 1894 (28 Stat. 416), it is made the duty of the officer making the arrest "to take the defendant before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws,"—for the rest of the sentence following the terms of the act of 1893 on this subject.

In this case the complaint was received and the warrant issued by a commissioner at Portland, and the prisoner was taken before him for examination. On the part of the petitioner it is argued that the act of 1893 cannot properly be construed to mean the commissioner who is nearest the place of arrest; that the qualification of nearness is confined to other judicial officers; that the words "the commissioner" are, by the arrangement of the language and the form of the sentence, to be taken independently of the provision as to other judicial officers, and must be interpreted as referring only to the commissioner who issued the warrant. And, in confirmation of this argument, the change made in the statute by the act of 1894 is referred to. It is contended that, by this change, congress has interpreted the pre-existing statute, and furnished the construction to be adopted by the court.

It is the province of the courts to construe the statutes enacted by the legislative branch of the government. A congressional interpretation of an existing statute will control the courts in the future, since it must be regarded as new legislation, but it is of no weight in deciding the construction as to accrued rights or liabilities. So, if it be admitted that, by this change in phraseology, congress expressed the opinion that the act of 1893 was to be construed as the petitioner contends, it would not thence follow that the court is bound to adopt that construction. But it is more probable that the later legislation was designed to remove all possible ambiguity in the earlier. If there were any such ambiguity in the particular question now before the court, it could appear only upon very nice criticism of the language for the purpose of escaping its obvious import. Following the general rule for the construction of statutes, that the intention of the legislature is to be resorted to where the language is ambiguous, it does not admit of doubt that the true meaning of the act of 1893 is the same as that of the act of 1894. I must therefore hold that the disallowance of this item of \$12.80 was right.

(b) Sixty-three charges for transporting prisoner from jail to appear before the commissioner for examination as a poor convict; in each case one mile,—in all \$12.60.

While the statute allows the marshal, for transporting criminals, 10 cents a mile for himself and for each prisoner, it is manifest that the fee is given only in case of actual transporting, and is intended to cover its expenses. When, as in these cases, the officer and the convict walked, there was no transportation, within the meaning of the statute, and the marshal's charges were not justified.

Class 6. Attendance of marshal and deputies, before commissioners, at examination of parties accused.

(a) The marshal's account contained charges in two cases for the attendance of himself and one deputy, amounting to \$8.

The attendance of one officer only in each case was allowed, on the assumption that the attendance of more was unnecessary, and there was suspended \$4, which has not since been allowed and paid. Harmon's Case establishes that the determination of the number necessary is a matter for the commissioner. The suspension of this charge of \$4 was incorrect.

(b) Attendance of marshal before commissioner on 25 separate days, at examination of poor convicts, \$50; and attendance of one deputy on 27 days, in like cases, \$54.

Under the authority of Harmon's Case, the petitioner should be paid these items, amounting to \$104.

Class 7. Travel of marshal from his home to attend court; distance, 168 miles.

The law in respect to these charges is plainly laid down in Harmon's Case, thus:

"This allowance is not expressly, or by any reasonable implication, restricted to a single travel at each term, but extends to every time when he may be expected to travel from his home to attend a term of court. If the court sits for any number of days in succession, he should continue in attendance, and is entitled to only one travel. But, if the court is adjourned over one or more intervening days, he is not obliged to remain at his own expense at the place of holding court, but may return to his home, and charge travel for going anew to attend the term at the day to which it is adjourned." *Harmon v. U. S.*, 43 Fed. 560-565, affirmed 147 U. S. 268-279, 13 Sup. Ct. 327.

In *U. S. v. Shields*, 153 U. S. 88-92, 14 Sup. Ct. 735, it is decided that an adjournment from Saturday to Monday cannot be considered as an interruption of the term, or as a suspension of the business of the court, so as to bring the right to charge travel within the rule laid down in Harmon's Case.

Notwithstanding these authoritative expositions of the statute, the accounting officers lay down the rule: "When the adjournment was less than three days, the travel is disallowed." Moreover, they have, in dealing with these claims of the marshal, disregarded all difference between the circuit court and the district court. For example, the circuit court was adjourned from December 17th to January 2d. The marshal was in attendance on the district court December 31st, and, on its adjournment to January 5th, returned to his home, and has charged for travel to the circuit court on the 2d of January. This was disallowed, because there was only one day's adjournment. If the attendance upon the district court had continued to the day to which the circuit stood adjourned, there could have been no actual travel to be charged. But, where the travel was actually performed, it was properly charged. But the charges for travel to the circuit court on July 10, September 25, and October 22, 1893, and those of August 7, October 29, November 5, December 10, December 17, 1893, and of January 8 and 29, February 19, and March 19, 1894,—12 items of \$16.80; a total of \$201.60,—must be rejected, as they were all cases where the adjournment was from Saturday to Monday.

Class 8. Travel in going only to serve precepts, warrants, etc. Under this class are included:

(a) Charges for travel on two or more writs against different persons, served at the same place and time.

These charges were properly made. The marshal was authorized to make them, and should be paid. *Harmon v. U. S.*, 43 Fed. 560-566.

(b) Charges for travel upon one warrant when, upon another in his hands, against a different person, at the same time and served at the same place, charges for actual expenses were made, and have been allowed and paid; also, charges where, having one warrant against two or more persons, travel was charged going to serve upon one, and actual expenses for the additional distance to serve on the other or others.

The petitioner contends that part of these charges are permitted by the last clause of section 829 of the Revised Statutes:

"In all cases where mileage is allowed to the marshal, he may elect to receive the same or his actual traveling expenses, to be proved on his oath, to the satisfaction of the court."

He maintains that the words "in all cases" are equivalent to "upon any process, warrant, attachment, or writ"; and that as he is allowed mileage on several writs in his hand at the same time, and served on different persons at the same place, he can, at his election, charge actual expenses on one and full mileage upon the other. As to the other part, where more than one person was served with the same process, he justifies it under that portion of section 829 which gives him travel in going to serve on the most remote person to be served, adding thereto the extra travel which is necessary to serve it on the others. In this case, he contends, it is optional with him to charge his actual expenses, instead of such extra mileages.

The argument is specious and unsound. The choice given is between mileage and expense of the trip, and was unquestionably given as a matter of consideration to the officer, and to protect him from pecuniary loss in the performance of his duty. While the allowance of mileage may be regarded as designed to reimburse him for his expenses, it is practically to some degree compensation for time and labor. When the mileage allowable will not cover the expense of the trip, the officer is protected by this privilege of waiving the mileage, and collecting what he has been compelled to pay out. If the mileage exceed his expense, he is not required to account for the surplus. All the mileage he might charge for going the trip must be waived if he elects to take his expenses. The impropriety of a different course is seen if the writs he was to serve were in suits commenced by different private persons. Both could not be made to pay the actual expenses of the marshal; yet, if his construction of the statute is right, that would result. Each suit is a case. Upon each writ served on different persons at the same place he would be justified in demanding full travel, and in each case might, at his pleasure, charge actual expenses instead. Or, if he makes the election of expenses on one writ only, upon which should the expense fall? It is certain, expenses will not be claimed when they are less than the mileage amounts to. Therefore one plaintiff would be subjected to unequal and excessive charge for the same service. When the question of claiming mileage for one part, and expenses on the other part, of the same service, is examined, it

is still weaker. The action of the accounting officers in rejecting items of the kinds described was correct. They amount to \$50.10.

(c) Charges for travel to arrest when no service was made.

The statute gives "travel, in going only, to be computed from the place where the process is returned to the place of service, or when more than one person is served therewith, to the place of service which is most remote." The implication is obvious that, before any travel can be charged, service must be made. Without service there can be no computation of travel. It would be measuring distance with only a single point,—that of termination, and no point of beginning. These charges, amounting to \$204.42, cannot be sustained.

(d) Travel to serve mandates to bring in poor convicts.

These are proper charges, for travel, in going only, to make the service, and should be paid, \$17.28.

(e) Travel to serve warrant of pardon.

The warrant was sent from the department of justice to the marshal, with instructions to serve it, and make report to the department. It is familiar law that a pardon is inoperative till delivered and accepted. The travel was necessary under the order of the department, and is properly charged at \$3.60; but, probably by inadvertence in the statement of differences, only \$3.30 was actually withheld from the marshal, and for so much he still has a just claim.

Class 9. Sundry charges of actual expenses of traveling in service of process, warrants, etc.,—in all \$57.70.

Of this total, \$24.85 was for expenses in cases where no arrest was made; but the officer was allowed, and has received, the statute allowance for expenses while endeavoring to arrest. The excess of \$24.85 cannot be allowed. The sum of \$32.85, included in the above total of \$57.70, is for charges of expense when on the same trip, but upon other warrants mileage was charged and paid. What has been said in regard to the marshal's right to have both mileage and expenses on the same trip, although it was to serve more than one warrant and on different persons, applies to these charges. They must be rejected.

Class 10. Fees for services in sundry civil cases, wherein the United States were plaintiffs,—\$90.52.

The only objection made to these charges was that, in making his accounts, the marshal had entered them in the wrong fiscal year. Such an error does not deprive him of his right to compensation, and in this proceeding the regulation as to years does not influence. It may, however, be well to say that transferring the charges to the proper fiscal year would not in any year swell the marshal's emolument above his lawful maximum. These items are allowed.

Class 11. The only other charge is for expense for light, cleaning courthouse and lockup at Bath, at the September term, 1890, of the district court, charged among miscellaneous expenses.

The charge was for \$6.50, and was properly vouched; but, upon the mistaken theory that it was charged against appropriation for "pay of bailiffs," etc., and was carried into the abstract as \$8, the sum of \$8 was withheld from the marshal. A term of the district court is, by the statute, assigned to be holden at Bath on the first

Tuesday of September of each year. The United States have no courthouse there, and the county has no jail. The county has always allowed to the United States the use of its courthouse, without any other charge than the actual cost of lights and the expense of cleaning after the court ends. On the same terms, the city of Bath extends to the United States the use of its city lockup for the detention of prisoners during the session of the court. This charge was for such expenses, and amounted to \$6.50. The voucher was in the name of John W. Ballou, who attended to having the cleaning done, and settling with the gas company for light. Mr. Ballou is the sheriff of the county. In the same quarter's accounts of the marshal was a charge of Mr. Ballou as bailiff, attending the court, which amounted to \$8. Evidently, the accounting officers did not understand the facts, and concluded that these were double charges for the same thing, and charged also in one case to the wrong appropriation. They accordingly disallowed and refused payment of \$8. It was an unjustifiable disallowance, and the marshal should be paid the amount.

The result is that various claims specified in the petition, and amounting to \$627.52, are improper charges, and are rejected; and the balance, of \$1,025.48, was rightly charged. The demurrer is overruled. Judgment for the petitioner for \$1,025.48, and costs, according to the statute.

Note. To avoid delay and expense of a threatened appeal, on that point, the petitioner has remitted the sum of \$8 allowed for the service of warrants of commitment—as the same question is involved in another petition by him.

SAUNDERS v. UNITED STATES.

(District Court, D. Maine. April 2, 1896.)

No. 17.

1. UNITED STATES MARSHALS—FEES—ATTENDANCE BEFORE COURT AND COMMISSIONER.

A United States marshal is entitled to charge for the attendance of himself and his deputies before United States commissioners on the same days on which the circuit or district courts are in session, and fees for attendance on those courts are charged and paid.

2. SAME—MITTIMUS.

A marshal is entitled to charge fees for the service of warrants of commitment. *Saunders v. U. S.*, 73 Fed. 782, followed.

Geo. E. Bird, for petitioner.

Albert W. Bradbury, U. S. Atty.

WEBB, District Judge. The petition in this case was filed April 15, 1895. Proof of service as required by the statute has been made. The claim of the petition is for fees for attendance of himself and deputies before United States commissioners, and bringing in and guarding prisoners, on the same days that the circuit or the district court was also in session, and fees for attendance on those courts was charged and paid. The time covered by the petition is from February 6, 1890, to March 8, 1894. For the marshal's personal

attendance 89 days, and for that of his deputies 91 days, in all 180 days, at \$2 per day are charged, or \$360, in the petition as originally filed. By amendment, charges of \$4 on July 22, 1891, and \$4 on September 19, 1891, are struck out, leaving claimed the sum of \$352. The United States has pleaded that the services specified in the petition were never performed, and has also filed a counterclaim or account in set-off to the amount of \$504, for moneys before paid to this petitioner, as the United States now contends, improperly, for the service of 252 warrants of commitment during the years 1890, 1891, and 1892, for which it is said no fees were by law allowed. The items included in the petition were never entered in the accounts of the marshal that were presented from time to time to the court, and approved, for the reason that it was understood that such charges would not be allowed; and now the United States contends that the charges are improper.

At the hearing, the government did not contest the actual attendance as charged, except as to four items, viz. November 2, 1891, in the case of Tripp, before Commissioner Bradley, \$4; November 14, 1891, case of Rogers, before Commissioner Rand, \$2; May 23, 1893, Johnson's case, before Commissioner Bradley, \$4; September 21, 1893, case of Carleton et al., before the same commissioner, \$4. But the proof is plenary as to all the other items in the petition, and as to the charges of May 23, 1893, and November 14, 1893. The charge of September 21, 1893, is proved to be a mistake of date. The service was actually rendered on the 20th day of September, and is so entered in the officer's calendar. I do not think this mistake is fatal to the petitioner's right to recover for this item. But the charge in Tripp's case, under date of November 2, 1891, for \$4, has not been satisfactorily established by the evidence. Tripp, on his arrest, had, before that date, been fully examined by the commissioner, and, upon decision of probable cause, had been ordered to recognize with sureties for his appearance at the next term of the court, to answer, and, for want of recognizance, to stand committed. He failed to recognize, and was committed to jail. Later, he was able to find sureties, and was by the commissioner admitted to bail. The evidence fails to show that the prisoner was brought before the magistrate, or the actual attendance of the officers. This item of \$4 is therefore disallowed.

In *U. S. v. Erwin*, 147 U. S. 685, 13 Sup. Ct. 443, the statute touching fees for the attendance of a district attorney before a commissioner on the same day that he also attended before a court is construed, and the right of the attorney to be paid for both attendances is upheld. The construction of the statute in that case must govern in this. If anything, under the statute, the case of a marshal is clearer than in respect to a district attorney; and the petitioner rightly claims, and is entitled to be paid, the items he has proved, amounting to \$348, unless that right is canceled, in whole or in part, by the counterclaim of the government. Of the right of the United States to file a counterclaim, and to judgment upon it when properly proved, *McElrath v. U. S.*, 102 U. S. 426, and *U. S. v. Burchard*, 125 U. S. 176, 8 Sup. Ct. 832, are conclusive.

The petitioner admits that he has been paid the several sums charged in the counterclaim, for serving warrants to commit. The question, therefore, is the lawful propriety of such charges. In another case of this same petitioner, decided this week (*Saunders v. U. S.*, 73 Fed. 782), I fully and at some length considered the right of the marshal to be paid a statutory fee of \$2 for service of a warrant to commit, and sustained the right. It is not necessary to repeat the opinion on this question filed in that case. I adopt what I there said, without qualification. It follows that no part of the United States' counterclaim is established, and the petitioner is entitled to judgment for so much of his demand as he has proved, or \$348.

Judgment for the petitioner for \$348 and costs is ordered.

VAN DUZEE v. UNITED STATES.

(District Court, N. D. Iowa, E. D. April 23, 1896.)

1. **CLERKS OF COURTS—FEES—ORDER FOR BOOKS.**

Where the clerk of a United States court, pursuant to the practice of such court, makes an application to the court for books necessary in his office, and the court makes an order directing the marshal to furnish such books, the clerk is entitled to the statutory fees for filing such application, entering the order upon the record, and making and certifying two copies thereof for the marshal, to be attached to his original and duplicate accounts, but not to a fee for attaching his seal to such certificates.

2. **SAME—JURY NOTICES.**

Where the rules of court require a notice of the drawing of juries to be posted up on the door of the clerk's office, the duty of posting such notice is properly to be performed by the clerk, but is not one for which he is entitled to compensation.

3. **SAME—DOCKET FEE.**

Under Rev. St. § 828, the proper docket fee in criminal cases, where a plea of not guilty is first entered, but is subsequently withdrawn, and a plea of guilty entered, on which the case is disposed of, is one dollar.

4. **SAME—COPIES OF INDICTMENT.**

The clerk is entitled to the statutory fee for filing demands made by defendants in criminal cases, for copies of the indictments against them, when by the standing rule of court the defendants are entitled to such copies, upon making demand therefor in writing, and the clerk is also entitled to the fees for making and certifying such copies.

5. **SAME—FILING DOCUMENTARY EVIDENCE.**

When the court makes an order requiring the government to place in the hands of the clerk the several documents upon which it expects to rely as evidence in a criminal case, for the purpose of giving the defendant an opportunity to inspect the same, the clerk is entitled to the statutory fee for filing such several documents.

6. **SAME—ENTRY OF SENTENCES.**

Where two or more parties are jointly indicted, tried, and convicted, the sentence imposed upon each should be separately entered, and the clerk is entitled to a separate fee for entering each sentence.

7. **SAME—JURY LISTS.**

No fee is allowed or chargeable by the clerk for recording the names of persons forming the jury list, or for entering the names upon the tickets placed in the box for drawing.

8. **SAME—COPIES OF PAPERS FOR DISTRICT ATTORNEY.**

The district attorney is entitled to obtain, at the expense of the government, copies of indictments and opinions of the court, needed in the prep-

aration of cases for trial, and the clerk is entitled to charge the fees for such copies in his accounts with the government.

9. SAME—APPLICATIONS FOR SUMMONS TO DEFENDANT'S WITNESS.

The clerk is entitled to fees for filing applications by defendants in criminal cases for orders directing witnesses to be summoned at the cost of the United States, and fees for entering the orders of court upon such applications.

10. SAME—PRACTICE.

All applications in criminal cases for summoning witnesses, copies of indictments, or other matters in which the action of the clerk is involved, should be made to appear, with the action thereon, on the records, or among the files of the court.

Action to recover for certain items of service rendered by the plaintiff as clerk for the United States courts in and for the Northern district of Iowa.

Alonzo J. Van Duzee, in pro. per.

Cato Sells, U. S. Dist. Atty., and D. W. C. Cram, Asst. U. S. Atty.

SHIRAS, District Judge. The plaintiff in this action is the clerk of the United States courts for this district, and sues to recover the sum of \$327.71 as fees due him for services rendered by him as clerk, but which were not allowed him by the department at Washington. Several of the items included in the account attached to the petition are not now contested by the government, and likewise some of the items are not now claimed by plaintiff.

The first class of items in dispute is that wherein the clerk charges the statutory fee for filing applications made by him for orders directing the marshal to furnish books needed for the business of the courts, and the folio fee for entering upon the records the orders made upon such application by the court. Since these services were rendered, the department at Washington, by instructions issued to the marshal, has changed the mode of obtaining books for recording the proceedings of the court, but, as the proceedings for obtaining the books in question were had before these instructions were issued, the duty of the clerk must be determined by the practice formerly prevailing. When the services were rendered it was the practice of the court, when record or other books were needed by the clerk, to have the clerk file a brief application, setting forth the character of the book desired, and the need existing therefor. If the showing was sufficient, an order was granted, directing the marshal to furnish the book. This order the clerk entered upon the records of the court. Two certified copies of the order were furnished to the marshal, to be attached by him to his original and duplicate accounts, as evidence of his authority to procure the books. Under these circumstances I hold that the clerk is entitled to the statutory fee for filing the application, entering the order of the court upon the record, and for making and certifying two copies of the order for the use of the marshal; but under the ruling of the supreme court in *U. S. v. Van Duzee*, 140 U. S. 169-176, 11 Sup. Ct. 758, the clerk is not entitled to a fee for attaching the seal to such certification.

The next class of items in dispute is that which includes charges made by the clerk for preparing and posting up notices of the time

and place for drawing the juries for the several terms of court, and for filing such notice after the drawing has been had. Under the rule of this court, 10 days' notice of the drawing of juries is required to be given by posting up a written notice upon the front door of the clerk's office. This duty has always been performed by the clerk. It is now claimed by the government that it falls within the duty of the jury commissioner. In this view I cannot concur. All the necessary orders for drawing the juries are prepared by the clerk and signed by the judge, and I know of no rule that places the duty of giving notice of the time of drawing upon the commissioner. The difficulty, however, lies in the fact that there is no express provision in the fee bill for services of this character, and therefore it must be held, under the rule laid down in *U. S. v. King*, 147 U. S. 676, 13 Sup. Ct. 439, that these services are not such as to entitle the clerk to compensation, although properly performed by him as clerk of the court. These items are disallowed.

The next point at issue arises upon the question of the amount of the docket fee to be charged in criminal cases wherein a plea of not guilty is first entered by the defendant, but is subsequently withdrawn, and a plea of guilty is entered, upon which the case is finally disposed of. Section 828, Rev. St., provides that in cases wherein issue is joined, but no testimony is submitted, the fee shall be two dollars, but in cases which are dismissed or discontinued, or where judgment or decree is rendered, without an issue, the fee shall be one dollar. On part of the clerk it is claimed that the cases in question come within the two dollar clause, whereas on part of the government it is contended that they fall under the dollar clause. The section in question names three classes of cases in which a certain fee is allowed the clerk, the first being cases wherein issue is joined, and testimony is submitted; the second, wherein issue is joined, but no testimony is submitted; and the third, wherein the case is dismissed, discontinued, or judgment is rendered without an issue. It is apparent that these fees are not properly chargeable until the case is disposed of, and then the amount to be charged is dependent on the action had. If the case went to hearing upon an issue, and testimony was adduced thereon, then the fee to be charged is three dollars. If the case was disposed of upon some issue joined, which did not require testimony, as upon a demurrer, or upon an answer which admitted the facts, presenting only questions of law, then the fee to be charged is two dollars. If the case was dismissed, or if it was disposed of without an issue of law or fact being presented, as upon a default in a civil case, or upon a plea of guilty in a criminal case, then the fee to be charged is one dollar. The condition in which the case stands when finally disposed of is the criterion for the fee to be charged. The fact that originally a plea of not guilty was entered does not affect the question. Thus if, in a criminal case, a plea of guilty should be entered, but subsequently the court permitted the defendant to withdraw such plea and to enter a plea of not guilty, and upon the issue thus joined a trial should be had, and testimony should be introduced, I entertain no doubt the clerk could rightfully charge a fee of three dollars upon the ground that the

amount of the fee, lawfully chargeable, depends upon the mode in which the case was finally disposed of. I hold, therefore, that in criminal cases which are disposed of upon a plea of guilty, the fee to be charged is one dollar, even though it be true that originally a plea of not guilty was entered, but which was withdrawn before final action was had in the case.

The account sued on contains several items for filing demands by defendants in criminal cases for copies of the indictments pending against them, and for furnishing copies duly certified. The record rule of this court requires the clerk, whenever a demand therefor is made, to furnish a copy of an indictment to the defendant. Under the provisions of this rule the clerk is not required to furnish the copy unless demanded by the defendant. In order that the proper evidence of such demand may be preserved, the demand is required to be in writing, for otherwise the court, in passing upon the accounts of the clerk, would not have evidence that the demand had in fact been made, and therefore the practice is to have the demand made in writing, and by filing this in the case the proper evidence is preserved of the fact upon which the duty of the clerk to furnish a copy is made to depend. For filing such papers the clerk is entitled to the statutory fee. For the folio fee for making the copy and the fee for certifying under seal to the copy the clerk is entitled to the statutory amount, as was ruled in *U. S. v. Van Duzee*, 3 C. C. A. 361-366, 52 Fed. 930.

The next item in issue is that wherein the clerk charges the statutory filing fee for filing 696 papers and documents in connection with what are known as the Van Leuven and Kessel Cases. These were indictments for various alleged frauds in connection with the business of a pension agent or attorney carried on by Van Leuven. In all there were 43 separate cases filed. On behalf of the defendants application was made to the court for an order requiring the filing of the names of the witnesses before the grand jury, with a minute of the testimony as taken by the clerk of the grand jury, together with the written or documentary evidence which the government expected to introduce in the several cases. The court held that the government was not under obligation to furnish the names of the witnesses or the minutes of their testimony, but further ruled that it was due to the defendants that they should have opportunity to inspect and take copies of the particular documents, reports, affidavits, and the like which the government claimed were forged or falsified. In other words, the court in effect held that the defendants were entitled to a bill of particulars in the several cases, and that the defendants were entitled to an inspection of the original papers, for only by such an inspection could the defendants know whether the papers expected to be used against them were in fact prepared by or signed by the defendants; and therefore the court made an order that the government, in the several cases, should place in the hands of the clerk the several written papers, affidavits, and other documents which the government expected to rely upon in the prosecution of the case. In obedience to this order, the district attorney deposited with the clerk the papers in question, and

the clerk filed same in the usual manner. Ordinarily, when the government is directed to furnish a bill of particulars, the same is filed by the clerk, and I know of no reason why the same should not be filed as part of the proceedings in the given case. In the cases now under consideration the papers deposited with the clerk were so deposited separately, and not in such form that a single filing upon one cover might serve as a filing for the entire number. The clerk received the several papers in the form in which they were furnished him by the government, and marked them "Filed" in the usual manner. I hold that he is entitled to recover therefor.

The next question at issue arises upon the fact that two parties—Marlow and Canty—were jointly indicted for burglarizing a post office. A joint trial was had. A verdict of guilty was returned, and the defendants were sentenced to imprisonment in the penitentiary for a period of two years each, and to pay a fine of \$100. The clerk made a separate entry of the sentence against each defendant. The government claims that the entry of sentence should have been joint, and that only a fee for one entry should be allowed. Where two or more parties are jointly indicted and convicted, the better practice is to enter the sentence separately against each one. In fact the court considers the case of each defendant separately when determining the sentence to be imposed, and no defendant is bound by or interested in the sentences imposed upon his co-defendants. In cases of joint indictments and trials, the proper course is to include in one entry the proceedings so long as they are in fact joint, but, when the matter of sentences is reached, then in fact the defendants are dealt with separately, and the sentences imposed upon each one should be so entered. In fact, the sentences pronounced against two or more may be similar in terms, but they are not joint, and hence the proper practice is to make a separate entry of the sentence against each defendant. Thus in 1 Bish. Cr. Proc. § 1035, it is said: "The punishment, we have seen, is to be several; and the sentence is, in form, several, not joint." I hold that in cases of joint indictment and trials the sentences against two or more defendants should be separately entered, and, when thus entered, the clerk is entitled to the proper fee for each entry.

Another class of items in regard to which question is made are those wherein the clerk charges for services in recording upon the book kept for the purpose the names and addresses of persons forming the jury list, and for entering the names upon the tickets placed in the box from which the juries are drawn. These services are proper, but under the ruling of the supreme court in *U. S. v. King*, 147 U. S. 676, 13 Sup. Ct. 439, it must be held that they were performed as part of the general duties of the clerk, and, as the fee bill makes no provision for compensation for such services, none can be allowed.

Exception is also taken to the charge made by the clerk for furnishing copies of indictments in several cases for the use of the district attorney, upon praecipes filed therefor, by the district attorney. It is the duty of the clerk to furnish a copy of any record or paper filed in his office to any one entitled thereto, and the fee

bill fixes the compensation to be paid therefor. There can be no question that for the copies made in these cases the clerk is entitled to the statutory fee, but the mooted question is whether the government is liable therefor. The plaintiff in the cases was the United States government, and it was for its use and benefit that the copies were furnished. It is suggested that the district attorney, as an officer of the court, had access to the original indictments, and therefore did not need the copies. While the district attorney could have access to the indictments in the clerk's office, he would not be permitted to remove the same. The district attorney does not reside at the place where the court is held, and where the indictments are kept, and he doubtless needed the copies in order that he might properly prepare the cases for trial. Under these circumstances the clerk would not have been justified in refusing to furnish copies for the use of the attorney for the government, and, as they were furnished for the benefit of the government, upon the direction of the district attorney, I see no reason why the cost thereof should not be paid by the United States. These items are allowed, including the fee for filing the præcipe or written order for the copies.

Item No. 17, a charge is made for copies of opinion furnished the district attorney. These opinions were given in writing by the court in the several cases against Van Leuven and Kessel, who were indicted for frauds against the United States in connection with various pension cases. The indictments were attacked by motion and demurrer. In some cases the indictments were held bad in whole or as to some counts, and in other cases the demurrers were overruled. Many of the defects existing were cured by procuring new indictments at a subsequent term. When the district attorney applied to the clerk for copies of these opinions, it was clearly the duty of the clerk to furnish them, and, as they were furnished to the attorney of the government, in order to aid him in the performance of his duty to the government and in furtherance of the interests of the government, I see no reason why the United States should not be held liable for the usual copy fee. This item is allowed.

Item 48 is for filing applications made by defendants, under the provisions of section 878, Rev. St., for orders of court directing defendants' witnesses to be summoned at cost of the United States, and for entering the orders of the court upon the application. Under the settled practice of the court these fees are proper, because it is made the duty of the clerk to file the applications and enter the orders upon the records. It is perhaps proper for me to say in this connection that in my judgment all applications made in criminal cases for summoning witnesses under section 878, for copies of indictments under the rule of this court, or for any other matter wherein the action of the clerk is involved, the evidence of such demand should appear either upon the records or among the files of the court, and the action or order of the court should in all cases be entered upon the records. In this way record or written evidence is always preserved of all action taken. If this is not done, the rights of parties may be left dependent upon the uncertain recollection of parties, to say nothing of the difficulty of procuring the

evidence after the lapse of some time, and when the parties are not in attendance upon the court.

The remaining items not included within the foregoing holding are all covered by the rulings of this court heretofore made in the several cases of *Van Duzee v. U. S.*, and reported in 41 Fed. 571, 48 Fed. 643, and 59 Fed. 440; and, following the rulings therein made, plaintiff is allowed the items in question; it thus appearing that plaintiff is entitled in the aggregate to the sum of \$247.11, for which amount judgment will be entered.

UNITED STATES v. PATRICK et al.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1896.)

No. 653.

1. INDIAN AGENCIES—EMPLOYMENT OF PHYSICIAN—AUTHORITY OF SECRETARY OF INTERIOR.

The provision in the appropriation act of March 3, 1875, that the number and kind of employes at each Indian agency shall be prescribed by the secretary of the interior, gives him authority to employ physicians to attend Indians; and the fact that during 11 years the secretary had approved vouchers and directed payment of bills rendered by a particular physician employed at various times by an Indian agent is a sufficient determination by the secretary that one of the employes of such agency shall be a physician, to be called by the agent from time to time, to render medical services as the Indians require.

2. SAME—PRINCIPAL AND AGENT.

Where the secretary of the interior had authority to employ physicians at an Indian agency, and his subordinate, the Indian agent, did employ them, and the secretary approved their bills, and directed the agent to pay them out of the public funds in his hands, *held*, that the United States and the secretary were bound by the agent's acts, both because of the ratification thereof, and because, by their action, they induced him to expend money which he would not otherwise have disbursed.

3. SAME—CLAIMS AGAINST UNITED STATES—REJECTION BY ACCOUNTING OFFICERS.

Where, in an action by the United States to recover an alleged shortage due from an Indian agent, the government introduced a transcript from the books and proceedings of the treasury department, which, among other things, contained an opinion by one of the accounting officers disallowing a claim by the agent for one of the items sued for, and discussing the vouchers on which the claim was based, *held*, that this was conclusive proof that the claim had been presented to, and disallowed by, the accounting officers, as required by Rev. St. § 951.

4. SAME—PLEADINGS AND PROOF.

In an action by the United States on the bond of an Indian agent, defendants pleaded that all the moneys with which the agent had been charged had been properly expended by him, and, at the trial, offered to prove a credit of a specified sum paid to physicians for services to Indians. *Held*, that the fact that defendants had not pleaded this claim for a credit did not render proof thereof inadmissible, it appearing that the United States were already correctly informed of the amount and character of the claim, by reason of its officers having examined and disallowed the same, and that these facts were proved by a transcript from the books of the treasury department, in the hands of the United States attorney, who had not moved to make the answer more specific.

5. ACTIONS BY UNITED STATES—ALLOWANCE OF CREDITS—DISALLOWANCE BY ACCOUNTING OFFICER.

The provision of Rev. St. § 951, that, in actions by the United States against individuals, no credits shall be allowed except such as have been presented to and disallowed by the accounting officers of the treasury, requires that the claim only shall have been presented, and not the evidence to support it, and hence such evidence will not be excluded merely because it was never so presented.

6. SAME—PROVINCE OF COURT AND JURY.

It is the duty of the court, and not of the jury, to determine whether or not such a claim has been presented and disallowed, so as to authorize it to be admitted on the trial.

7. SAME—TECHNICAL FAILURE TO ACCOUNT—PROPERTY NOT LOST.

The failure of an Indian agent, through clerical errors, to include in his accounts property which, in fact, remains at the agency, and which is not lost to the government, does not entitle the United States to recover the value thereof in a suit on his bond; and he may show these facts in defense. The technical failure to account would authorize a recovery of no more than nominal damages.

8. APPEAL—HARMLESS ERROR.

Technical error in failing to award nominal damages in respect to one of a number of items sued for is no ground for reversal, where there has been a substantial recovery.

9. SAME—ERROR IN INSTRUCTIONS—APPLICABILITY TO FACTS.

The burden of showing that there was no evidence to warrant a charge is on him who asserts an error of that kind; and, to support his claim, he must either present all the evidence, so that the reviewing court can see for itself what the evidence was, or he must present a bill of exceptions, with a certificate of the trial court that no evidence of the character in question was introduced.

10. RESPONSIBILITY OF GOVERNMENT AGENTS—ACCOUNTING FOR PROPERTY—ERRORS OF CLERK.

A government agent is not to be held liable for property still in the possession of the agency, and which has never been lost, merely because a careless clerk, appointed by the government itself to keep the accounts of the agent, has omitted it from a return, which he is required to make.

In Error to the Circuit Court of the United States for the District of Kansas.

The plaintiffs in error, the United States, brought this action against Isaac W. Patrick, who was the agent for the Indians of the Pottawatomie and Great Nemaha agency, in the state of Kansas, from March 2, 1885, until November 30, 1886, and against the other defendants in error, who were charged to be liable as sureties for Patrick, to recover \$1,851.51 and interest, upon Patrick's official bond as such agent. The penalty of this bond was \$25,000, and its condition that "if said Isaac W. Patrick shall, at all times during his holding, and remaining in, said office, carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same, and for all public funds and property which shall come or may come into his hands, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue." The plaintiffs alleged in their complaint that Patrick had failed to account for public money amounting to about \$700, and for public property amounting to about \$1,100, which came to his possession as such agent. Defendants answered that Patrick and his sureties executed the bond, but that the other allegations of the complaint were not true. They alleged that, before any of the defaults alleged in the complaint occurred, the commissioner of Indian affairs appointed a drunken and incompetent clerk of the said agency, whose duty it was to keep correct and accurate accounts of the public moneys received and disbursed and the public property received and disposed of through the agency of said Patrick. They averred that Patrick

reported to the commissioner of Indian affairs that this clerk was intoxicated, and was incapable of filling his position; but the commissioner peremptorily refused to remove him. They alleged that all the moneys charged against Patrick by the government had been properly expended, and that all the public property charged against him was either properly disposed of or remained at the agency in charge of Patrick or his successor, and that this money and property were unaccounted for by reason of the mistakes, drunkenness, and incompetency of the said clerk, whom the government had appointed to keep the accounts. The trial of the issues raised by these pleadings resulted in a verdict and judgment for \$350 against the defendants in error. The United States insist by this writ that errors of the court in the trial of the case caused the verdict to be much smaller than that to which they were entitled.

W. C. Perry, U. S. Atty.

Eugene Hagan, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court. 1. Perhaps the chief complaint made by the United States about the trial of this case is that the court below admitted, and submitted to the jury, evidence that \$520 of the public moneys charged against the defendant Patrick was expended by him with the approval of the commissioner of Indian affairs and the secretary of the interior, in payment for services of physicians, who were temporarily employed by Patrick to treat sick Indians under his charge. That evidence consisted of—First. Testimony that from 1874 until 1886 no regular physician had been employed for these Indians, but that, when they needed the services of doctors, the agent had employed physicians to treat them. The physicians had presented vouchers for their services from time to time. These vouchers had been certified by the agent, had been approved by the commissioner of Indian affairs and by the secretary of the interior, and had then been paid by the agent out of the public funds in his hands as agent. Second. Vouchers of the various physicians for the amounts of their services during Patrick's agency, which amounted in the aggregate to \$520, to each of which was attached a letter of the commissioner of Indian affairs to Patrick, to the effect that the secretary of the interior had approved the indebtedness incurred by him through the employment of the physician, as shown by the voucher, and a certificate of Patrick to the effect that the services were rendered, that the charges were reasonable, and that, after the secretary had approved the voucher, he had paid the amount thereof. And, third, testimony tending to show that the physicians rendered the services to the Indians that are set forth in the vouchers. The court below admitted this evidence, and then charged the jury that, if they believed that it correctly presented the facts, Patrick was entitled to credit for the money he expended for these medical services. The admission of this evidence and this charge are assigned as error on four grounds: First, that the physicians were employed without authority of law, and hence the United States were not liable for their services; second, that the claim for credit for them was not presented to the accounting officers of the treasury of the United States before the trial, as required by sec-

tion 951 of the Revised Statutes; third, that the defendants did not plead that these medical services were rendered, and that Patrick had paid for them; and, fourth, that the evidence of the custom of the government to so employ and pay physicians from 1874 to 1886 was incompetent to show authority so to do.

The secretary of the interior, the commissioner of Indian affairs, and this Indian agent employed, or ratified the employment of, these physicians. The first question is: Had any or all of them any authority so to do? Section 5 of the "Act making appropriations for the current and contingent expenses of the Indian department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, eighteen hundred seventy-six and for other purposes," approved March 3, 1875 (18 Stat. 449, c. 132, § 5), provides:

"That hereafter no more than \$6,000 shall be paid in any one year for salaries or compensation of employees at any one agency, in addition to the salaries of the agent and no more at any one agency than is absolutely necessary; and where Indians can perform the duties, they shall be employed; and the number and kind of employees at each agency shall be prescribed by the secretary of the interior and no others shall be employed."

Here is certainly ample authority for the secretary of the interior to employ these physicians. If it is said that they were not employed by him until after their services were rendered, and hence that Patrick could not lawfully have credit for the amounts that he paid for these services, there are two conclusive answers to that objection: First. The secretary of the interior had authority to prescribe the number and kind of employes at this agency. From 1875 to 1886 he had approved the vouchers, and directed the payment of the bills, of Dr. H. H. Miller, who was employed by the agent from time to time during those years to treat the Indians in need of medical services; and the first payment made by the defendant Patrick for the services of a physician was upon a voucher of this same doctor, approved by the secretary of the interior in the same way. By this uniform course of action for 11 years, we are of the opinion that the secretary of the interior sufficiently prescribed that one of the employes at this agency should be a physician, to be called by the agent from time to time, to render such medical services as the Indians required. Another answer to this objection is that since the secretary of the interior had authority to employ physicians for the United States at this agency, and his subordinate, Patrick, did employ them, and the secretary approved their bills, and directed Patrick to pay them out of the public funds, the United States and the secretary are bound by his acts, both because they thus ratified them, and because, by their action, they induced him to expend money for this purpose which he would not otherwise have disbursed. A principal cannot, with full knowledge of the fact, direct his agent to expend money on his account, and then repudiate the expenditure.

The next question is: Were the rulings of the court here complained of erroneous, because the claim of Patrick for this \$520 had not been presented to, and had not been disallowed by, the accounting officers of the treasury, before the trial? Section 3 of the act

of March 3, 1797 (1 Stat. 514, c. 20, § 3), which is now section 951, p. 180, of the Revised Statutes, provides:

"Sec. 951. In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States or by some unavoidable accident."

Before the defendants offered their evidence in support of their claim for this credit, the plaintiffs had introduced in evidence, under section 886 of the Revised Statutes, a transcript from the books and proceedings of the treasury department relating to the account of the defendant Patrick. This transcript has been omitted from the record before us, and a summary of it appears in its place. More than two printed pages of this summary are occupied with the opinion of one of the accounting officers of the treasury, disallowing this claim of Patrick for \$520. In this opinion, he discusses at length the vouchers on which this claim is based, a letter of the commissioner of Indian affairs, advising Patrick that the secretary of the interior had approved one of these vouchers, and the authority of the agent and the secretary to employ the physicians. This was conclusive proof that this claim had been presented to, and had been disallowed by, the accounting officers of the treasury department; and it was but an idle form for the counsel of the government to object to evidence in support of this claim, after he had introduced this transcript. *U. S. v. Hart* (Ariz.) 19 Pac. 4.

But it is said that the defendants did not plead this claim for a credit. They did plead that the moneys with which Patrick had been charged had been properly expended by him. The main purpose of a pleading is to inform an opposing party of the nature and character of the claims of the pleader. The United States were already correctly informed of the amount and character of the claim of the defendants for this credit of \$520, for they had examined and disallowed the vouchers on which it was based. The transcript which proved these facts was in the hands of their counsel. He made no motion to require the defendants to make their answer more specific. Indeed, he first put in evidence the transcript, which proved the nature and extent of Patrick's claim. In this state of the case, the objection that this claim was not more specifically pleaded is entitled to no consideration.

Finally, it is insisted that the evidence of the method of the employment and payment of the physicians at this agency for 11 years prior to 1886 was incompetent, because authority to employ them could not be proved by a custom. But the purpose of this testimony was not to prove by a custom the authority to employ the physicians. That authority was given by the act of March 3, 1875, *supra*. The object of this testimony was to show how the authority thus vested in the secretary of the interior had been exercised, and to prove that, by a uniform course of action for more than a decade, he had prescribed the employment by the agent of one physician at this agency,

from time to time, as his services were required by the Indians. For this purpose, this testimony was not, in our opinion, incompetent. *U. S. v. Fillebrown*, 7 Pet. 28, 48.

Our conclusion is that there was no error in the action of the court in submitting to the jury the evidence in support of the claim of the defendant Patrick for a credit for the amounts he expended for these medical services.

2. This conclusion disposes of the assignments of error made upon the refusal of the court to instruct the jury to return a verdict for plaintiffs for the full amount of their claim, and, upon its refusal to direct them, to disregard all evidence on the part of the defendants, which did not appear to have been submitted to the treasury department, in explanation of the disallowance of the accounts of the defendant Patrick, unless it appeared that knowledge of such evidence came to Patrick at so late a date as to render the submission thereof to the treasury department practically impossible. The former instruction was not applicable to this case, because there was competent evidence in support of Patrick's claim for a credit for the \$520. The latter instruction is not the law, because, first, it is not all the evidence in support of a claim for a credit, but the claim itself, which the act of congress requires to be presented to, and to be disallowed by, the accounting officers of the treasury department, before it can be admitted upon the trial; and because, second, it is the duty of the court, and not the province of the jury, to determine whether or not the claim has been so presented and disallowed that it may be admitted upon the trial. *U. S. v. Gilmore*, 7 Wall. 491, 495.

3. It is assigned as error that the court charged the jury, with reference to the public property charged against Patrick in his account with the government, that the fact that some articles were left out of the quarterly reports made by Patrick was *prima facie*, but not conclusive, proof that they had been lost to the government; that this presumption might be overcome by satisfactory proof that such articles were, in fact, at the agency when the reports were made, that their omission from the reports was due to clerical errors, and that if they found from the evidence that such articles were in fact at the agency, and that no money or property had been appropriated by Patrick or lost to the government through his negligence, the United States could not recover. It is argued that this charge was erroneous—First, because the condition of the bond was that the obligors should account for the money and property coming into Patrick's possession, and the government was entitled to recover for his failure to account, whether it lost thereby or not; and, second, because the charge ignored section 951 of the Revised Statutes.

If the United States made no loss of money or property through the failure of the defendant Patrick to account for the public money and property which came to his hands, it goes without saying that they could recover no more than nominal damages in this action. Six and one-fourth cents could undoubtedly have been recovered for the technical failure of Patrick to make his account, although no loss or damage resulted to the government, and to this extent there

is a technical error in this charge; but in view of the fact that the jury found a default in the bond, and returned a verdict in favor of the United States for \$350, this technical error was certainly without prejudice, and it is too trivial and insubstantial to warrant a reversal of this judgment. *Pyeatt v. Powell*, 10 U. S. App. 200, 2 C. C. A. 367, and 51 Fed. 551; *Railroad Co. v. Stoner*, 10 U. S. App. 209, 2 C. C. A. 437, and 51 Fed. 649. The objection that this charge ignored section 951 of the Revised Statutes is untenable, because it does appear from the summary of the transcript put in evidence by the government that many of the claims of the defendant Patrick for the credits he asked on account of the moneys charged against him were presented to, and disallowed by, the accounting officers of the treasury department before the trial, and it does not appear that his claims for credits on account of the public property with which he was charged were not also presented and disallowed. This record shows on its face that a large portion of the evidence presented to the lower court, which consisted of exceedingly voluminous copies of vouchers, papers, and accounts, that were of record in the treasury department of the United States is not before us. In this imperfect state of the record, we cannot presume that there was no evidence to support this charge of the court. Instructions given by the court to the jury are presumed to be applicable to the case presented to it, in the absence of a record, which establishes the contrary. The burden of proof to show that there was no evidence to warrant a charge is on him who asserts an error of that character; and, if he would maintain his claim, he must either present all the evidence to the appellate court, so that the reviewing court can see for itself what the evidence was, or he must present a bill of exceptions which has the certificate of the trial court that no evidence of the character in question was presented to it. The plaintiffs in error have done neither. Moreover, when the evidence of the defendants as to the disposition of the public property which is charged against Patrick was introduced, this objection that is now urged was not made to that evidence. It never was made to the claim of Patrick for these credits against the property charged to him until the court came to charge the jury, and the record raises a very serious doubt whether it was ever made at all until it was noted in writing on the margin of the written charge, after the jury had retired. All these facts tend strongly to strengthen the presumption that evidence had been presented to the court below which made this evidence of the defendants competent, and warranted the charge. However that may be, this objection cannot now be sustained, because the record does not contain all the evidence, nor any certificate of the trial court that there was no evidence of the presentation and disallowance of this claim by the accounting officers of the treasury department; and the plaintiffs in error have therefore not overcome the legal presumption that the charge was right, and that there was evidence before the court below which warranted it. *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347, 350, 353; *Railway Co. v. Harris*, 27 U. S. App. 450, 12 C. C. A. 598, and 63 Fed. 800, 805.

4. There was no error in the charge of the court that the defendant Patrick would not be responsible for the negligence of his clerk, unless, by the exercise of reasonable diligence, he might have prevented such negligence; that he was only responsible for the performance of clerical duties in the best way practicable for him; and that the testimony was that these Indian agencies were widely scattered, and that it was impossible for him to give attention to the details of all the bookkeeping, and so the government furnished him a clerk for that purpose. Some of the evidence to which this portion of the charge applied was that the clerk who was appointed by the commissioner of Indian affairs to keep Patrick's accounts at this agency was drunken and careless; that, shortly after his appointment, Patrick notified the commissioner of the intoxication and incapacity of this clerk, and asked for his removal, but the commissioner refused to make it; that Patrick was charged with the loss of 100 yards of sheeting, which was at the agency, and which was never lost to the government, because this clerk omitted the figure "1" from the number "168" in one of his returns of property on hand, so that an item read "68 yards of sheeting" instead of "168 yards of sheeting"; that Patrick was charged with the loss of 19 blankets, which were at the agency, and were never lost by the government, because this clerk made an item in a return read "19 blankets," when it should have read "19 pairs blankets"; and that many similar mistakes and omissions were made in the same way. No principle of law or equity occurs to us which requires a court to charge an agent, for the benefit of his principal, with property which the principal has never lost, because a careless clerk, appointed by the principal himself to keep the accounts of his agent, has omitted property from a return of it which he was required to make to the principal. It has been settled ever since *U. S. v. Wilkins*, 6 Wheat. 134, 143, that the object of the act of March 3, 1797, which comprised what is now section 951 of the Revised Statutes, was to allow the United States to obtain judgments in their favor, against their debtors, for such sums, and for such sums only, as, in equity and justice, these debtors should be proved to owe, and that, to accomplish this end, the court ought to consider and allow all the just claims of the debtors, whether legal or equitable. *Gratiot v. U. S.*, 15 Pet. 336, 369, 371; *U. S. v. McDaniel*, 7 Pet. 1; *U. S. v. Ripley*, 7 Pet. 18.

We have carefully examined and considered all the rulings of the court below of which complaint has been made, in view of the rules and principles announced by these authorities; we have discussed at some length the more important assignments of error that have been urged upon our consideration; and we are of the opinion that no substantial error was committed by the court in the trial of this case, and that its rulings and charge are well sustained by the established rules of the law. The judgment below is accordingly affirmed without costs.

FIELD et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit.)

No. 248.

CUSTOMS DUTIES—CLASSIFICATION—WHITE FRILLED MUSLINS.

Cotton muslin in pieces 30 yards by 30 inches, having hemmed to one edge a frill about three inches wide, with an embroidered, scalloped, or fancy border, and known to the trade as "white frilled muslins," and not as "ruffled flouncings or embroideries," was dutiable at 60 per cent. ad valorem, under paragraph 373 of the act of 1890, as "articles embroidered by hand or machinery," and not at 40 per cent., under paragraph 355, as "manufactures of cotton not especially provided for."

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The appellants Marshall Field and others imported and entered at the port of Chicago in December, 1893, certain merchandise, composed entirely of cotton, upon which the collector of the port imposed and collected a duty of 60 per cent. ad valorem, as "cotton embroideries," under paragraph 373 of Schedule J of the tariff act of October 1, 1890 (26 Stat. 594, c. 1244), which is as follows: "Laces, edgings, embroideries, insertings, neck ruffings, ruchings, trimmings, tuckings, lace window-curtains and other similar tambooured articles, and articles embroidered by hand or machinery, embroidered and hem-stitched handkerchiefs, and articles made wholly or in part of lace, ruffings, tuckings or ruchings, all of the above named articles, composed of flax, jute, cotton, or other vegetable fibre, or of which these substances or either of them, or a mixture of any of them is the component material of chief value, not specially provided for in this act, sixty per cent. ad valorem. Provided, that articles of wearing apparel, and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed." The importers claim that the merchandise was subject to duty under paragraph 355 of Schedule I of that act, which is as follows: "Cotton damask, in the piece or otherwise, and all manufactures of cotton not specially provided for in this act, forty per centum ad valorem." The duty imposed was paid under protest, and the question was reviewed by the board of general appraisers sitting at New York, and the decision of the collector approved and affirmed. The importers thereupon, pursuant to statute in that behalf, filed in the court below their application for review of the decision of the board of general appraisers. Under that application further evidence was taken, and at the hearing the court below found: (1) That the goods are as invoiced,—white frilled muslins made of cotton; that they are not textile fabrics, but an article of imported merchandise, embroidered. (2) That they are known in trade in this country as "white frilled muslins," and not as "ruffled flouncings," nor are they recognized or known in trade as "embroideries." And thereupon the court affirmed the decision of the board of general appraisers, which decree of the court is here for review upon this appeal.

N. W. Bliss, for appellant.

J. C. Black, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after statement of the case, delivered the opinion of the court.

It was declared by the supreme court in *Robertson v. Salomon*, 130 U. S. 412, 414, 9 Sup. Ct. 559, that "the commercial designation, as we have frequently decided, is the first and most important desig-

nation to be ascertained in settling the meaning and application of the tariff laws." See *Arthur v. Lahey*, 96 U. S. 112, 118; *Barber v. Schell*, 107 U. S. 617, 623, 2 Sup. Ct. 301; *Worthington v. Abbott*, 124 U. S. 434, 436, 8 Sup. Ct. 562; *Arthur's Ex'rs v. Butterfield*, 125 U. S. 70, 75, 8 Sup. Ct. 714. The cases of *Curtis v. Martin*, 3 How. 106; *Arthur v. Morrison*, 96 U. S. 108; and *Worthington v. Abbott*, 124 U. S. 435, 8 Sup. Ct. 562,—are interesting as furnishing instances of the practical application of this rule. The same canon of construction is announced in *Rossman v. Hedden*, 145 U. S. 561, 12 Sup. Ct. 925; *Cadwalader v. Zeh*, 151 U. S. 171, 14 Sup. Ct. 288; and by this court in *U. S. v. Field*, 9 U. S. App. 460, 4 C. C. A. 371, and 54 Fed. 367. It was found by the court below that the merchandise in question is not known to the trade as "ruffled flouncing," nor as "embroideries"; that it is not a textile fabric, but is an article of imported merchandise, embroidered, and is known to the trade as "white frilled muslins." The merchandise is cotton muslin in pieces of about 30 yards in length and 30 inches in width, having hemmed to one edge a frill about 3 inches wide, composed of the same material, with an embroidered, scalloped, or fancy border. The question, therefore, is whether this merchandise is "an article embroidered by hand or machinery," under paragraph 373, or a "manufacture of cotton not otherwise provided for." Being unknown to the trade as "embroideries," it cannot be comprehended under that designation in paragraph 373. This then results: that the merchandise is not included within that provision, unless under the designation, "articles embroidered by hand or machinery." Does the word "article," as there employed, mean a completed piece or a particular commodity? Without doubt, a word may, in the same act, be employed both in its general and its restricted sense; and because, in one or more instances, it may be used in a definite sense, it does not necessarily result that it is employed in that sense throughout the act. If, from the context, it appears that the word is used in a restricted sense, it should be given a restricted meaning. The enacting clause of the tariff act of 1890 provides that there should be levied upon articles imported from foreign countries a specific rate of duty prescribed by the schedule. So, also, in section 2, certain specific articles are exempted from duty. In these instances the word "article" is undoubtedly employed in its general sense, as meaning "commodity." In various paragraphs of the act the word is no less clearly employed in its restricted sense, signifying a completed piece. In some instances, as in paragraph 493, it is employed to comprehend both the general and the restricted sense. The context of this particular provision must furnish the clue to the sense in which the word is employed in paragraph 373. The provision speaks of "laces, edgings, insertings, neck-ruffings, ruches, tuckings, lace window-curtains and other similar tamboured articles." These, it is stated, are imported in the piece, and sold by the yard, although lace window curtains are also sold by the set. The correct interpretation of the language here employed includes tamboured articles similar to laces, edgings, etc., whether sold by the yard, or as a completed article. The word "article," as employed in this particular clause;

should therefore be construed in its general sense, as indicating a commodity. Then follows the phrase, "articles embroidered by hand or machinery." We observe no reason to declare the word is here used in its restricted sense, to indicate a completed article. It is not used in an analogous sense, requiring a strict construction of its meaning. This paragraph was considered by the circuit court of appeals of the Second circuit in *Lahey v. U. S.*, 18 C. C. A. 341, 71 Fed. 870, where it was said that this paragraph treated of embroideries more elaborately than the preceding acts had done, and that its intent was to place a high duty upon cotton, jute, and flax articles and textile fabrics which are embroidered. In that case tamboured cotton or muslin sash curtains in the piece were held to be comprehended within the phrase, "other similar tamboured articles." The distinction between tambouring and embroidering is there pointed out to consist in the number of needles employed in the work. The phrase, "and articles embroidered by hand or machinery," would include all goods embroidered, whether a completed article or remaining in the piece. The word is used in its comprehensive sense. This construction comports with the spirit of the act, and accords with the ruling in the case referred to. While not technically known to the trade as "embroideries," the merchandise here is an article of commerce "embroidered by hand or machinery," within the intendment of the act. The decree will be affirmed.

HAGUE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. April 28, 1896.)

CUSTOMS DUTIES—CLASSIFICATION—COTTON ELASTIC CORDS.

Cords of cotton and India rubber, the rubber being of chief value, are dutiable at 45 per cent. ad valorem, as "cords * * * made of cotton or other vegetable fibre, and whether composed in part of India rubber or otherwise," under paragraph 263 of the act of 1894, and not as a non-enumerated manufacture of which India rubber is the component material of chief value, under paragraph 352.

Appeal by the importers, A. J. Hague & Co., from a decision of the board of general appraisers which sustained the action of the collector in assessing duty upon the merchandise in question under paragraph 263 of "Schedule I, Cotton Manufactures," of the act of August, 27, 1894 (28 Stat. 529).

That paragraph, so far as it relates to the present controversy is as follows: "Cords * * * made of cotton or other vegetable fiber, and whether composed in part of India rubber or otherwise, forty-five per centum ad valorem." The importers insist that the merchandise should have been assessed as a "miscellaneous manufacture" under paragraph 352, which is, in part, as follows: "Manufactures of bone, chip, grass, horn, India rubber, palm leaf, straw, weeds, or whalebone, or of which these substances, or either of them is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem."

The decision of the board is as follows: "We find as facts (1) That the merchandise is dutiable under the act of August, 1894. (2) That it consists of cords made of cotton and in part of India rubber. (3) That it is commer-

cially known as cotton (elastic) cords, and also as cotton and India rubber cords. (4) That it is a manufacture, of which India rubber is the component material of chief value, specially provided for elsewhere than in paragraph 352. We think it would be a strained construction of the statutes to hold that cords made entirely of the two substances denominatively provided for in paragraph 263 were not dutiable thereunder because one of those substances was of more value than the other. For the purposes of this case we hold that that paragraph stands as if reading: 'Cords made of cotton and India rubber;' and we are strengthened in the correctness of this conclusion in law by the fact that as far as the board has been able to discover, India rubber is the component material of chief value in all imported cords made of cotton and India rubber. Upon the facts found in this case, and in accordance with the principles enunciated in a recent decision covering similar goods, we overrule the protest now under consideration, and affirm the collector's decision in assessing duty on the merchandise at 45 per cent. ad valorem, under paragraph 263."

There is no dispute as to the facts. The facts found by the board are not questioned. The only question in controversy is whether paragraph 263 is limited to cotton articles of which cotton is the component material of chief value. If it be so limited the importers are right and the collector is wrong for India rubber is the component material of chief value of the imported cords. If, on the other hand, the paragraph covers cotton cords composed in part of India rubber, irrespective of the value of the India rubber, the collector is clearly right, as the articles in question would then be specially provided for under paragraph 263, and paragraph 352 would have no application.

Albert Comstock, for importers.

J. T. Van Rensselaer, Asst. U. S. Atty.

COXE, District Judge (after stating the facts). Paragraph 263 of the act of 1894 is substituted for paragraph 354 of the act of 1890. After enumerating a number of articles made of cotton, paragraph 354 contained the following words, "Any of the foregoing which are elastic or nonelastic, forty per centum ad valorem." Controversy soon arose regarding articles similar to those now in question, and the court, being of the opinion that cotton webbing could be made elastic without the presence of India rubber, reversed the decision of the board assessing webbing containing India rubber under paragraph 354. At the same time the court intimated that a different result would have been reached if India rubber were necessary to produce elasticity, or, in other words, if the statute, instead of using the word "elastic," had used the words "composed in part of India rubber;" the decision of the board would have been sustained. In *re Shattuck*, 54 Fed. 365; affirmed, 8 C. C. A. 176, 59 Fed. 454. Subsequently the board found as matter of fact that "it is not practicable to make cotton webbing elastic without the presence of India rubber." It must be presumed that when the present act was passed in August, 1894, congress legislated with reference to the misunderstanding which had arisen regarding paragraph 354. In order to make plain what had previously been obscure congress substituted for the words "elastic or nonelastic" the words "whether composed in part of India rubber or otherwise." Taking all this into consideration, as the court is permitted to do when endeavoring to arrive at the correct construction of a statute, is it not plain that congress intended to assess cotton cords under

paragraph 263 without reference to whether they are elastic or nonelastic, or, what is the same thing, whether they are or are not composed in part of rubber? The importations in question are the cotton elastic cords of commerce. If paragraph 263 does not refer to them it is not easy to perceive to what it does refer. There is no proof that there are cotton elastic cords of which cotton is the material of chief value. Indeed, the board say, "that so far as they have been able to discover India rubber is the component material of chief value in all imported cords made of cotton and India rubber."

The construction contended for by the importers entirely ignores the existence of the clause "whether composed in part of India rubber or otherwise." If the paragraph covers cords made wholly or chiefly of cotton and these only, the words quoted have no meaning. They might as well be omitted. With the rubber clause omitted cotton cords made wholly or chiefly of cotton would, of course, be classified properly under paragraph 263. If cotton cords contain rubber and the rubber is of greater value than the cotton they would go to paragraph 352. If they contain rubber of less value than the cotton, assuming that such cords could be made, they would go to paragraph 263. In other words, the paragraph with the rubber clause omitted means precisely what it means with the rubber clause present. Such a construction would seem inadmissible under any circumstances and especially so in a case where the purpose is so manifest as in the present instance. It was clearly the intent that elastic cotton cords should pay duty under this paragraph and not as manufactures of India rubber.

The authorities deciding between two broad provisions of law have little application to the controversy in hand. For instance, in *Hartranft v. Sheppard*, 125 U. S. 337, 8 Sup. Ct. 920, the question was whether quilts made of cotton and eider down, chief value, should be assessed as "manufactures of cotton" or as "unmanufactured articles not provided for." Had the act of 1883 provided for "quilts made of cotton and whether composed in part of eider down or otherwise," it is probable that a different result would have been reached.

The decision of the board is right and should be affirmed.

CALIFORNIA FIG SYRUP CO. v. FREDERICK STEARNS & CO.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 328.

1. TRADE-MARKS—DESCRIPTIVE NAME—"SYRUP OF FIGS."

The words "Syrup of Figs" or "Fig Syrup," being descriptive, are not sustainable as a trade-mark for a laxative syrup in which the active medicinal property is the juice of the fig. 67 Fed. 1008, affirmed.

2. SAME—DECEPTIVE NAME.

The use of the words "Syrup of Figs" in connection with a preparation described as a "Fruit Remedy," "Nature's Pleasant Laxative," and with other statements leading the public to understand that the juice of the fig

is the important medicinal agent, is deceptive, so as to prevent equitable relief, where the preparation contains but a slight quantity of fig juice, which has no laxative properties, and in which the active medicinal ingredient is senna. 67 Fed. 1008, affirmed. *Syrup Co. v. Putnam*, 16 C. C. A. 376, 69 Fed. 740, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is an appeal from a decree of the circuit court for the Eastern district of Michigan dismissing a bill in equity brought by the California Fig Syrup Company, a corporation of the state of Nevada, against Frederick Stearns & Company, a corporation of the state of Michigan, to enjoin the defendant from infringing that which complainant claims to be its trade-mark property in the name "Syrup of Figs" or "Fig Syrup," to designate a liquid laxative medicine. The ground upon which the circuit court refused the relief prayed for was that the complainant did not come into court with clean hands, but that in its advertisements and in the use of the term "syrup of figs" to designate the medicine which it sells, it was committing a fraud upon the public. See 67 Fed. 1008.

R. E. Queen, in 1879 or 1880, was a druggist in Reno, Nev. After experiments, he succeeded in making a liquid laxative preparation, the secret formula of which is now the property of the California Fig Syrup Company. He selected the name "Syrup of Figs" to designate the preparation because of the popular impression that the fig, when eaten, has the medicinal property of opening the bowels and curing or preventing constipation. The chief medicinal agent in the preparation is senna. Its exact composition is a trade secret, but this much is admitted. There is not now, and never has been, in the mixture, more than one-tenth of 1 per cent. of the juice of the fig; and this, it is conceded, is not enough to have any effect, either medicinally or by way of flavor. The popular impression that figs are laxative by reason of any medicinal element contained in them is erroneous. Their laxative effect when eaten in some quantities is caused by the physical action of the seeds and skin upon the bowels. There is practically no laxative property in the juice of the fig any different from that of the juice of any other fruit. It has no effect whatever unless taken in quantities as great as that of a pint or a quart. The business of the California Fig Syrup Company in the sale of this preparation has increased enormously. More than a half million of dollars have been expended in advertising it through the daily press and otherwise in this country and in foreign countries. Much evidence was introduced showing that the complainant's syrup of figs was a very useful medicine, and one prescribed by physicians of high standing.

Complainant's preparation is put up in bottles of two or three sizes. Blown into the bottle are the words "Syrup of Figs." Upon the paper label pasted on the bottle are these words: "Nature's Pleasant Laxative," "Syrup of Figs," "The California Liquid Fruit Remedy," "Gentle and Effective." Then follow the directions for use, in which reference is made to a printed circular wound around the bottle for further details, and at the bottom of the label is printed, "Manufactured only by the California Fig Syrup Co., of San Francisco, Cal.; Louisville, Ky.; New York, N. Y., U. S. A." The bottle is inclosed in a paper box or carton, on the outside of which is shown the picture of a branch of a fig tree with figs upon it, and around the branch are these words: "California Fig Syrup, San Francisco, Cal." Beneath this, in large print, is "Syrup of Figs," followed in type of a less size by the words, "Presents in the most elegant form the laxative and nutritious juice of the figs of California." The sentence is continued, but in fine print, as follows: "Combined with the medicinal virtues of plants known to be most beneficial to the human system, forming an agreeable and effective laxative to permanently cure habitual constipation and the many ills depending on a weak or inactive condition of the kidneys, liver, stomach, and bowels, and is perfectly safe in all cases, and therefore the best of family remedies. Manufactured only by the California Fig Syrup Co., of San Francisco, Cal., Louisville, Ky., New York, N. Y." There is also a direction on the outside of the carton to read the inside wrapper for full directions and description. Upon the wrapper, which

is printed in four languages, are further statements concerning the preparation and its exceptional medicinal qualities. The first paragraph is as follows: "The great natural demand for a pleasant, prompt, and effective laxative and gentle diuretic led to the combination of the laxative and nutritious elements of figs with the medicinal virtues of plants known to be most beneficial to the human system, thereby forming Syrup of Figs, and the universal satisfaction which this excellent remedy has given is attested by the immense quantity constantly used in all sections of the United States and in many other countries."

The evidence tends to show that the defendants are manufacturing druggists, who make a business of imitating proprietary medicines, and of attempting to secure a large sale of the imitations by selling them to druggists to be substituted by them in their trade for the advertised article. The preparation of the defendants is also a laxative medicine, in which there is considerably more of the juice or syrup of the fig than in that of the complainant. The defendant does not attempt to imitate the package or the bottle or any part of the outer dress of the complainant's article in making and preparing its own package. It does designate its article, however, as "Laxative Fig Syrup."

The seventh paragraph of the defendant's answer below was as follows: "And this defendant, further answering, denies that the complainant has any exclusive right whatever, or can have any exclusive right, to designate a syrup of figs by its common appellative. It admits that the name 'Syrup of Figs' undoubtedly distinguishes a syrup of figs from any syrup which is not a syrup of figs, and that if said complainant's syrup of figs is really what its title purports, said title distinguishes it from any other syrup which is not a syrup of figs; but this defendant submits that if the said syrup sold by the said complainant is really a syrup of figs, that said name is purely descriptive, and that, on the other hand, if it is not a syrup of figs, said name is false and deceptive, and that in either case the said complainant can have no exclusive right of property therein; and prays the same benefit of this defense as if it had formally demurred to said bill on that ground."

Paul Bakewell (R. A. Bakewell, of counsel), for appellant.
Geo. H. Lothrop, for appellee.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts as above). Counsel for the appellee contends that the decree of the court below must be sustained on two grounds: First, that the complainant and appellant cannot appropriate as a trade-mark the term "Syrup of Figs," because it is a descriptive term, and relates to the composition of the article which it is used to designate; and, second, that the complainant cannot have relief in a court of equity, because, in using the name to designate the preparation which it sells, it is guilty of a distinct misrepresentation to the public, which has a tendency to mislead the public into buying the article with a false impression in respect to its manufacture and its composition.

1. There is nothing about the defendant's article which resembles the complainant's article except the words "Fig Syrup," which is substantially the same in meaning and appearance as the words "Syrup of Figs." "Syrup of Figs" is a descriptive term. It may be that no one had ever made a syrup of figs at the time that Queen selected the term to designate the preparation which he put upon the market. That is immaterial. It is entirely possible to describe something by the use of common words which may never have had a commercial use, or which may never have been in fact made. The

Century Dictionary describes "syrup" to be "a solution of sugar in water, made according to an official formula, whether simple, flavored, or medicated with some special therapeutic or compound." It is defined by Webster as "a thick and viscid liquid, made from the juice of fruits, herbs, etc., boiled with sugar." The Standard Dictionary defines "syrup" generally "as a thick, sweet liquid," and specifically as "a saturated solution of sugar in water, often combined with some medicinal substance, or flavored, as with the juice of fruits for use in confections, cookery, or the preparation of beverages." This authority further states that "syrups are commonly named from their source of flavoring." The Century Dictionary gives a number of medicinal syrups. Syrup of aconite is a mixture of tincture of fresh aconite root 1 part, with syrup 9 parts. Syrup of almond is sweet almond 10 parts, bitter almond 3 parts, sugar 50 parts, orange-flower water 5 parts, water to make 100 parts. Syrup of althaea is althaea 4 parts, sugar 60 parts, water to make 100 parts. Syrup of citric acid is citric acid 8 parts, water 8 parts, spirit of lemon 4 parts, syrup 980 parts. Syrup of garlic is fresh garlic 15 parts, sugar 60 parts, dilute acetic acid 40 parts. Syrup of gum arabic is mucilage of acacia 25 parts, syrup 75 parts. Syrup of ipecac is fluid extract of ipecac 5 parts, syrup 95 parts. Syrup of rhubarb is rhubarb 90 parts, cinnamon 18 parts, potassium carbonate 6 parts, sugar 600 parts, water to make 1000 parts. Syrup of squill is vinegar of squill 40 parts, sugar 60 parts, with water. Syrup of wild cherry is wild-cherry bark powdered 12 parts, sugar 60 parts, glycerine 5 parts, water to make 100 parts.

It is manifest that the term "Syrup of Figs," used to describe a medical preparation, has a distinct and definite meaning, namely, a combination of sugar and the juice of the fig, and possibly other ingredients, in which, however, the medicinal property of the fig is the active and chief element. That this is the sense in which the complainant intends it to be understood may be gathered from its reference to it as the "California Liquid Fruit Remedy," from its statement upon the package that it "presents in the most elegant form the laxative and nutritious juice of the figs of California," and from its statement in its circular "that it is a combination of the laxative and nutritious elements of figs with the medicinal virtues of plants known to be most beneficial to the human system, thereby forming Syrup of Figs." In *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, it was held that the term "Iron Bitters" was so indicative of the ingredients, characteristics, and purpose of the preparation upon which it was placed that it could not be monopolized as a trade-mark. Mr. Justice Brown, delivering the opinion of the court, said:

"The general proposition is well established that words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark (*Canal Co. v. Clark*, 13 Wall. 311; *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Caswell v. Davis*, 58 N. Y. 223; *Thomson v. Winchester*, 19 Pick. 214; *Raggett v. Findlater*, L. R. 17 Eq. 29); and we think the words 'Iron Bitters' are so far indicative of the ingredients, characteristics, and purposes of the plaintiff's preparation as to fall within the scope of these decisions."

The term "Syrup of Figs," therefore, cannot be used as a trade-mark.

But it is well settled that, even if the complainant is using something to designate its articles which it cannot claim to have the exclusive right to use as a trade-mark, yet, if it can show to the court that the defendant is selling an article like the complainant's in such a way as to induce the public to believe that defendant's article is the complainant's, and that it is doing this intentionally and fraudulently, the complainant may have the relief of a court of equity by injunction to prevent such piracy. Thus in this case, even though "Syrup of Figs" is such a descriptive term that it cannot be used as a trade-mark, yet, if the defendant here put its medicinal preparation up in packages ornamented and dressed so as to be a colorable imitation of the complainant's package, with the intention of misleading the public into the purchase of the defendant's article as the complainant's, then undoubtedly the defendant might be enjoined from thus attempting to palm off its article as the article of complainant. *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625; *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. 396; *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 209; *McLean v. Fleming*, 96 U. S. 245; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, 41 Ch. Div. 35-50. In this case there is evidence tending to show that the defendant is attempting to appropriate to itself by unfair means the good name which the preparation of the complainant has acquired by advertising and use among the public at large. Witnesses, who are retail druggists, testified that defendant's agents visited them, and recommended the sale of defendant's article, on the ground that the druggists could palm off defendant's article as complainant's article upon intending purchasers who were not familiar with complainant's package, and who called only for syrup of figs, intending thereby to purchase the complainant's article. The defendant reduces the price of its article very considerably in order to induce druggists to take this course. We are not prepared to say, therefore, that the complainant might not, except for the reason about to be stated, be entitled to some relief, by an injunction against the defendant to prevent unfair competition.

2. But the second ground presented, and that upon which the court below rested its decision, prevents the complainant from having any relief at all. That ground is that the complainant has built up its business and made it valuable by an intentional deceit of the public. It has intended the public to understand that the preparation which it sells has, as an important medicinal agent in its composition, the juice of California figs. This has undoubtedly led the public into the purchase of the preparation. The statement is wholly untrue. Just a suspicion of fig juice has been put into the preparation, not for the purpose of changing its medicinal character, or even its flavor, but merely to give a weak support to the statement that the article sold is syrup of figs. This is a fraud upon the public. It is true, it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it

is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of, and is dependent upon such deceit. It is well settled that if a person wishes his trade-mark property to be protected by a court of equity he must come into court with clean hands, and if it appears that the trade-mark for which he seeks protection is itself a misrepresentation to the public, and has acquired a value with the public by fraudulent misrepresentation in advertisements, all relief will be denied to him. This is the doctrine of the highest court of England, and no court has laid it down with any greater stringency than the supreme court of the United States. *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137, and 11 H. L. Cas. 523; *Buckland v. Rice*, 40 Ohio St. 526; *Palmer v. Harris*, 60 Pa. St. 156; *Prince Manuf'g Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990; *Krauss v. Jos. R. Peebles' Sons Co.*, 58 Fed. 585; *Connell v. Reed*, 128 Mass. 477; *Siebert v. Abbott*, 61 Md. 276-284. The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined. Exactly this question, raised against the same complainant, was considered by the circuit court for the district of Massachusetts (*Syrup Co. v. Putnam*, 66 Fed. 750), and relief was denied by Judge Colt to the complainant on the ground that its use of the term "Syrup of Figs" was a misrepresentation to the public, and a fraud upon it. The case was carried to the court of appeals and affirmed upon the opinion of the circuit judge. 16 C. C. A. 376, 69 Fed. 740.

Reliance is had by the defendant upon a decision of the court of appeals of the Ninth circuit, which was on an appeal from an order of Judge McKenna, granting a preliminary injunction. *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 4 C. C. A. 264, 54 Fed. 175. The opinion in the Ninth circuit is based on the theory that the term "Syrup of Figs" is not descriptive. We are unable to follow that learned court to this conclusion. It seems to us that the reasoning of Judge Colt, affirmed as it is by the court of appeals of the First circuit, is more satisfactory.

The decree of the court below is affirmed, with costs.

v.73F.no.5—52

GENESEE SALT CO. v. BURNAP et al.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 370.

TRADE-MARKS—UNFAIR COMPETITION—GEOGRAPHICAL NAMES.

A manufacturer of salt in the Genesee valley will not be enjoined from using the word "Genesee" in connection therewith; but he will be restrained from using it in any color, style, or form of letters, or in combination with other words, so as to imitate a combination previously used by another maker of salt in the same locality. 67 Fed. 534, affirmed.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

This is an appeal from a decree of the circuit court for the Northern district of Ohio entered upon a bill filed by the Genesee Salt Company, a corporation organized under the laws of the state of New York, against Burnap & Burnap, a partnership of citizens of Ohio, to restrain unfair competition in business. The Genesee Salt Company has its salt works at Piffard, Livingston county, in the valley of the Genesee river, in the state of New York. It manufactures salt of various qualities. The salt which it prepares for dairy purposes is packed in sacks and bags of white English or Irish linen, branded in black letters as follows:

GENESEE SALT CO.

**REGISTERED**

Factory Filled.

This salt has been sold since 1884, and has come to be known among the buyers of salt as "Genesee Salt." The firm of Burnap & Burnap, of Toledo, Ohio, was organized in 1890 for the sale of dairy supplies. Among other supplies, they sold complainant's Genesee Salt in bags as packed by complainant. In 1892 they purchased from the Pavilion Company (a company which makes salt at the town of Pavilion, in Genesee county, in the state of New York) dairy salt which the Pavilion Company called "Genesee County Salt." The salt was packed in bags made of brown toweling, and marked:

GENESEE CO.

Factory Filled

Salt

Put up Expressly for

Burnap & Burnap,

Toledo, Ohio.

"Factory Filled" is a term widely used to denote a quality of dairy salt.

In 1892 the salt works at St. Clair, Mich., of the company which manufactured the Diamond Crystal Salt, burned down, and Burnap & Burnap filled their orders for that salt with the Genesee County Dairy Salt. Soon after this, Burnap & Burnap issued the following circular to their customers:

Great Cut on Our Best Dairy Salt.

Owing to our large sales during the past 60 days of our celebrated Genesee County Dairy Salt, we have decided to continue selling, for 60 days longer, at the following reduced prices:

224	lb.	No.	1	English	Bags,	at	\$1.60	each
56	lb.	No.		"	"	"	.45	"

This salt is perfect in grain; strong, white, and pure; warranted to preserve butter, and to retain the natural high flavor, equal to any other brand on the market. As further inducement to those who have no market for them, we offer, in cash, for uniform empty sacks delivered to us in Toledo, \$2.00 per dozen for 224-pound sacks, and \$1.00 per dozen for 56-pound sacks. The above prices are for Genesee County brand only. We give you our profit on salt for above-stated time only, hoping to increase our general supply trade. Please send in your orders, and do not forget to add to the salt order other supplies, which will be shipped promptly.

Burnap & Burnap,
Toledo, Ohio.

120 Superior Street,

In October, 1892, the complainant sent a circular to their customers as follows:

The Genesee Salt Company, Mercantile Exchange, 6 Harrison Street.
Works at Piffard, Livingston Co., N. Y.

New York, Oct. 15, 1892.

Gentlemen: We beg leave to advise that a firm in Ohio are offering for sale what they call "Genesee County Dairy Salt," in reference to which would say that the salt in question is not manufactured by us, and that the action of the firm in question appears to be an attempt to obtain custom on the strength of our name and reputation.

Yours, truly,

The Genesee Salt Company

The defendants reprinted the foregoing, and sent it to all their customers, and others, with this answer:

Office of Burnap & Burnap.

Toledo, Ohio, October 24, 1892.

Yes, we live in Ohio, and sell Genesee County Salt, and wish all customers to know that while our salt is manufactured in Genesee County, New York, and is far superior in strength, purity, and grain to many of the well-known brands of dairy salt, we sell at reasonable prices, viz. \$1.60 for each No. 2 English linen sack of 224 lbs. We also fully warrant every sack, and, if not found equal to any dairy salt, it can be returned to us, by freight, at our expense. It is not the brand, but the 65 cents gain to our customers on each sack, as well as our immense sales of this salt, that causes our competition bird to croak and flutter. We do not obtain custom on the strength of \$2.25 salt, but simply on the quality and price of our goods, together with honest dealing and equal prices to all. We solicit further trial orders for our Genesee County Salt.

Yours, truly,

Burnap & Burnap,
Toledo, Ohio.

It appeared that Burnap & Burnap, in 1891,—the year previous,—had applied to the Genesee Salt Company to become their agents, and this was refused. One witness testified that one of the firm of

Burnap & Burnap sold him Genesee County Salt as Genesee Salt,—that is, as the salt of the Genesee Salt Company; but this was expressly denied, and the correspondence subsequently produced gave the weight of evidence to the denial. One letter was introduced in which a request was made to Burnap & Burnap for Genesee Salt, Factory Filled, and it was answered by sending Genesee County Salt. This was all the evidence tending to show an effort on the part of the defendants to palm off, as Genesee Salt, Genesee County Salt, except the use of the abbreviation “Co.” for “County,” on their bags. This was apt to mislead purchasers into the belief that the salt was that of the Genesee Company. The evidence of the proprietor of the Pavilion Salt Company, which manufactured the salt, and packed it and marked it, is that he suggested the use of “Genesee County” as the brand, and that it had been used for other customers previously. It appears that the Pavilion Salt Company’s works are within a few miles of those of the Genesee Salt Company, and that no suit has been brought by the latter against the former to restrain the use of the brand of “Genesee County Salt.” The stratum of rock salt from which the complainant’s salt and that of the Pavilion Salt Company are taken is the same. It extends through several counties in the western part of New York, and crosses the Genesee valley, and is to be found in Genesee and Livingston counties. The court below entered the following decree:

This cause came on to be heard on the pleadings and proofs in the case, and was argued by counsel for both complainant and defendants. In consideration whereof, the court finds that the equities of said cause are with the complainant. It is therefore ordered, adjudged, and decreed that the said defendants, Hiram F. Burnap and James D. Burnap, their agents and servants, and each of them, be, and they are hereby, perpetually enjoined and restrained, and that an injunction issue perpetually enjoining and restraining them, and each of them, from branding or marking upon any sacks or other receptacles containing salt, not of the manufacture of complainant, the words “Genesee Co. Salt,” or any other words or designations similar thereto, or only colorably differing therefrom, or any words or marks so contrived as to represent or lead to the belief that the salt contained in said sacks or other receptacles is the salt of the complainant, and from packing, keeping, selling, or offering for sale, or in any manner disposing of, or offering to dispose of, any salt so marked, and from advertising, by letters, circulars, price lists, catalogues, or otherwise, any salt, not the salt of the complainant, so marked or designated; and they, and each of them, are in like manner restrained and enjoined from representing, in any form or manner whatsoever, that any salt not of complainant’s manufacture is the salt of said complainant. But it is ordered that this decree is not to be construed as applying to or prohibiting the use by defendants of the words “Genesee County Salt,” or “Genesee Salt,” in the sale of salt actually manufactured in Genesee county or in the Genesee valley, when said words shall be used without abbreviation, and not in imitation of, or in resemblance to, the mark of the complainant set forth in the bill of complaint herein. 67 Fed. 534.

Though this decree was in favor of the complainant, it was not sufficiently broad, in its view, to protect it. Therefore it appealed from the decree, and assigned errors as follows:

First. That the court erred in refusing to grant a decree providing for the issuance of an injunction herein perpetually restraining the defendants, Hiram F. Burnap and James D. Burnap, their agents and employes, from packing, selling, or keeping or offering for sale, or otherwise disposing of, any salt not of complainant’s manufacture, under the terms “Genesee Salt,”

or "Genesee Co. Salt," or to which shall be applied, in any form or manner, as the name and designation thereof, the words "Genesee Co. Salt," or the words "Genesee" and "Genesee Salt," with or without other words, and from, in any other form or manner, using any name or designation which is calculated to cause their article to be known in the market and sold under the name of complainant's article, or as "Genesee Salt." Second. That the court erred in ordering in its decree heretofore entered herein that said decree was not to be construed as applying to, or prohibiting the use by defendants of, the words "Genesee County Salt," or "Genesee Salt," in the sale of salt actually manufactured in Genesee county or in the Genesee valley, when said words shall be used without abbreviation, and not in imitation of, or in resemblance to, the mark of the complainant set forth in the bill of complainant herein.

Geo. H. Beckwith, for appellant.

John F. Kumler (Almon Hall, of counsel), for appellees.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts as above). It is well settled, and we have just had occasion to decide in this court, that words merely descriptive of the character, quality, and composition of the article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark. *California Fig-Syrup Co. v. Frederick Stearns & Co.* (decided by this court at the present term) 73 Fed. 812; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625; *Canal Co. v. Clark*, 13 Wall. 311. The name "Genesee," when used in connection with complainant's salt, obviously refers to the place of its production. The complainant could, therefore, assert no trade-mark property in it. This principle is not denied by counsel for complainant. He relies rather upon that line of cases in which equitable relief has been granted to restrain unfair competition. Where one is shown to be palming off his manufactures as those of another, he may be enjoined, even where he commits the fraud by the use of names which are not the subject of trade-mark property. This principle is well established by the decisions of the supreme court of the United States in *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. 396; and *McLean v. Fleming*, 96 U. S. 245,—and in the English courts in the cases of *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 209; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, 41 Ch. Div. 35–50. We do not differ from counsel for the complainant in his exposition of the principles of law. His difficulty is that the facts of the case do not justify their full application. The evidence upon which it is claimed that Burnap & Burnap were fraudulently palming off the Genesee County Salt as the salt of the Genesee Salt Company is very slight. There is possibly enough evidence to sustain the claim that originally the name "Genesee County" was adopted with the abbreviation of "Co." for "County" to induce the purchase of the Genesee County Salt as that of the Genesee Salt Company, though it must be admitted that a most cursory examination would show very little resemblance between the packages; for the one is white linen, and the other is a brown English toweling. The lettering is not the same, one being solid, and the other open; and the only resemblance is in the collocation of the words "Genesee Co.," "Factory Filled," and "Salt."

It appears that, immediately upon the complaint being made by the Genesee Salt Company that this was a colorable imitation of their goods, Burnap & Burnap sent out 5,000 circulars making clear the difference, and that their salt was Genesee County Salt, as distinguished from the salt of the Genesee Salt Company. The court below was of opinion that it would sufficiently protect the complainants from unfair competition to require that the word "Co." should be written out in full, so as to read "County," and that the defendants should be enjoined from representing in any way that the salt of the defendants was the salt of the complainant; but the court was of opinion that it ought not to enjoin the defendants from using the words "Genesee County Salt" and "Genesee Salt" in the sale of salt actually manufactured in Genesee county, when those words were used without abbreviation, and not in imitation of the trade-mark of the complainant, as set forth in the bill. On the whole case, we think that the court gave the complainant all that it was entitled to. If the defendants had been persistently palming off their goods as the goods of the complainant, equitable relief might have gone to the extent of enjoining the use of the word "Genesee" by defendants; but, by their circulars, the defendants, if they ever had any purpose to pirate the business of the Genesee Salt Company by use of the words "Genesee Co.," abandoned it, and explained to the public what was the fact, namely, that their salt was made in Genesee county. They may rightfully call it "Genesee Salt," or "Genesee County Salt," provided they do not mislead the public into buying their salt as the salt of the complainant. Under the restrictions of the decree of the circuit court, we do not think there is any evidence that they are doing this, or intend to do it. The decree is affirmed.

KLOTZ v. HECHT.

(Circuit Court, S. D. New York. April 17, 1896.)

UNFAIR COMPETITION—LABELS.

One E. P., in 1840, began in Paris, France, the business of manufacturing toilet preparations, which became well and favorably known in Europe and the United States, in connection with the name of E. P. The business was continued by a firm of which E. P. was a member, under the name "Parfumerie E. P.," and by plaintiff, to whom the business and all trade-marks, etc., were sold. In 1895, defendant, who had been in plaintiff's employ, began the manufacture and sale of certain toilet preparations, with the same names as plaintiff's, which were manufactured in the United States, but were marked with labels in the French language, and devised, as admitted by defendant, to give the impression that the goods were French. Defendant also placed on his labels a statement that he was "formerly with" the Parfumerie E. P., arranging the names in such a manner as to give the impression that the latter was the name of the manufacturer, and he placed upon them a picture closely resembling a picture used on plaintiff's labels. *Held*, that it appeared that defendant was attempting to palm off his goods as plaintiff's, and that the use of such labels should be enjoined.

Application for restraining order to continue until final hearing of the cause.

James L. Bishop, for the motion.
William G. Witter, opposed.

LACOMBE, Circuit Judge. Edouard Pinaud, about the year 1840, embarked in business in Paris, France, as manufacturer of and dealer in various toilet preparations. His goods became well and favorably known in the trade and to the public, and the name "Ed. Pinaud" has for many years been associated with such preparations, as one of the distinguishing marks thereof. In 1852, Pinaud formed a partnership with one Emile Meyer, continuing the business under the names "Ed. Pinaud," or "Parfumerie Ed. Pinaud." Upon his death, in 1868, all the firm property, trade-marks, names, and good will passed to the survivor, and subsequently, and long prior to the commencement of this suit, the same were purchased by and duly transferred to complainant, who has ever since continued to deal largely in these goods throughout the United States, and has expended large sums of money yearly in advertising the same. The goods he sells are made and put up at the old Pinaud establishment abroad, and are sold here in large quantities, mainly because of the reputation acquired during the many years in which the "Ed. Pinaud" preparations have been in the market. Among the goods thus prepared and sold are an "Extrait Végétal" and an "Eau de Quinine," both being toilet preparations for the head. Defendant was in the employ of complainant from 1891 to 1895. After leaving, he began to put up and sell toilet preparations known as "Extrait Végétal" and "Eau de Quinine," which complainant now seeks to enjoin. The defendant's preparations, contents, bottles, labels, and stoppers are all made in this country. The labels, however, are printed in French, avowedly for the purpose of inducing a belief on the part of the purchaser that he is getting an imported article. In excuse for this attempt at deception it is suggested that toilet preparations would not sell readily unless they were presented to the public in a French dress. It is true that defendant nowhere expressly states that his goods are of foreign manufacture, but he ingeniously conveys that idea by the manner in which he labels them. Moreover, upon the bottles in which he vends his Eau de Quinine there are blown into the glass in raised letters the words "Paris" and "France." The word "Paris" is arranged on a convex line, and the word "France" below it on a concave line, and there is a wide space between the two, which is covered by a white label, pointing out the advantages of the preparation. This space covered by the label is so wide as to suggest the presence of other words on the glass between "Paris" and "France," and the ingenuity of the device becomes apparent when it is remembered that the public is now quite generally advised that the customs laws require that packages containing articles of foreign manufacture shall be stamped or labeled so as to indicate the country of their origin. The words, "Made in England," "Made in Germany," etc., are calculated to induce a belief that any articles thus labeled are made in those respective countries; and the ingenious combination of the

raised words with the white label on defendant's bottles is well devised to delude the ordinary purchaser into the belief that the words "made in" are also there, but covered by the white label. In view of the light thrown upon defendant's intent by his admission that he is endeavoring by artifice and device to mislead the public into the belief that his domestic goods are made in France, it is not difficult to reach the conclusion that his goods have been dressed up with the further intent to palm them off as those of the complainant, viz. the preparations of the old and well-known house, "Ed. Pinaud" or "Parfumerie Ed. Pinaud."

As to some of the points of resemblance there are conflicting statements of fact in the affidavits presented by both sides. In view of this conflict, and of the number of bottles of similar shapes presented as exhibits, all those questions may be left for final hearing. Those resemblances only as to which there is practically no dispute will be considered on this motion. Defendant's principal label contains the statement, "Préparée par M. Hecht, Dernièrement avec Parfumerie Ed. Pinaud, Paris." Whether or not defendant's former relations with the house of Pinaud were such as to authorize him to describe himself as "formerly with" such house is an issue which may best be reserved for final hearing. Manifestly, however, defendant so uses the above-quoted words that by means of the spacing and the type employed they are calculated to deceive the purchaser, especially if he be not familiar with the French language. The words, "Ed. Pinaud, Paris," are in large type, and, although no larger than that used for the words, "M. Hecht," they are placed last on the label, the place where the maker's name is usually displayed. This is manifestly well calculated to delude the purchaser, and is a fraud on the public and on the complainant, and should be stopped. On the bottle in which complainant's Eau de Quinine has been sold there is also a basket of flowers, blown into the glass. In the same place on defendant's bottle there is in like manner blown into the glass a vase of flowers. There can be no doubt that this has been done with the intent to simulate complainant's goods, and it is wholly unwarranted. So far as shown, no one, prior to complainant or his predecessors, used this distinguishing mark upon bottles of perfume.

There is nothing in the defendant's counter charges of fraud upon the public perpetrated by complainant. In view of the unbroken continuance of the business of the original house of Edouard Pinaud by the partnership and by complainant, there is no deception in the use of the words "Préparée par Ed. Pinaud, Parfumeur, 37 Bd. de Strasbourg, Paris." Nor is the phrase, "Préparée aux Jaunes d'Oeufs," used on complainant's Extrait Végétal, a statement that it contains "yolk of egg." There is a conflict of evidence as to whether the complainant's Eau de Quinine contains a substantial quantity of quinine, but upon the proof as it stands I am inclined to the opinion that no deception of the public as to its composition has been sufficiently established to warrant a refusal of his motion for an injunction.

Motion granted as to the use of labels such as defendant now uses on the face and neck of his bottle, or any labels so printed as to convey the impression that the goods to which they are affixed are those of the house of "Ed. Pinaud." Also as to the use of the bunch of flowers blown into the glass on bottles of Eau de Quinine.

ALBANY STEAM TRAP CO. v. WORTHINGTON et al.

(Circuit Court, S. D. New York. April 27, 1896.)

PATENTS—LIMITATION AND INFRINGEMENT—PUMP REGULATING VALVES.

The Blessing patent, No. 207,485, for an improvement in pump regulating valves, construed in connection with the disclaimer filed April 18, 1891, and held to be limited to the precise means described, for automatically regulating a pump for returning to a steam boiler the water of condensation, by means of a closed system,—that is, one not open to the atmosphere.

This was a suit in equity by the Albany Steam Trap Company against Charles C. Worthington and William A. Perry, for alleged infringement of a patent relating to pump regulating valves.

Cowen, Dickerson, Nicoll & Brown, and Mr. Chapin, for complainant.

Philipp, Munson & Phelps, for defendants.

TOWNSEND, District Judge. The complainant herein alleges infringement of its patent No. 207,485, granted August 27, 1878, to James H. Blessing. The patent originally covered generally an "improvement in pump regulating valves." It consisted in means for automatically regulating the operation of a boiler feed pump. The specification stated that it was "particularly useful in feed-water pumps which return to steam boilers the water of condensation from heating coils in buildings." The claims as to which infringement is alleged are the following:

"(1) An apparatus, constructed substantially as described, whereby the amount of water supplied to a pump regulates the operation of said pump.

"(2) A pump regulating apparatus, constructed substantially as described, and placed intermediate between the water and the pump, whereby the water passing to such regulating apparatus opens the steam valve of the pump, which valve is closed on the cessation of the water supply."

In steam-heating systems, when one or more of the coils were below the level of the water in the boiler, so that the water of condensation could not be returned by gravity, a small receiving tank and return trap were originally used, by means of which the water, forced from said tank into said trap, opened a valve in a pipe connected with the boiler, and admitted steam pressure into said trap, which forced the water back into the boiler. This method was impracticable when heating coils were at a considerable distance below the water level of the boiler, and where the steam for a heating system was taken, by means of a reducing valve, from a boiler used for other purposes. One way of obviating these objections was to provide an open receiving tank, from which the water was pumped back into the boiler. The chief disadvantage

of this latter arrangement lay in the loss of heat by the exposure of said water to the atmosphere. In the device of the patent in suit, the water of condensation automatically started and stopped a boiler feed pump. The patent, as originally granted, covered any such pump regulating apparatus operated by means of the return water of condensation. After suit brought on April 18, 1891, the following disclaimer was filed:

"Your petitioner, therefore, hereby disclaims any apparatus, as included in the claims of said patent, which is not directly connected with the return pipe, H, under the pressure of the return from the heating system without escape to the atmosphere."

It is unnecessary to consider whether this disclaimer either estops complainant to contend that the original claims were valid, or so limits said original claims as to now make them valid. The patented improvement is, in fact, limited by the disclaimer to what is known as the "closed system,"—that is, a system wherein the water of condensation from steam-heating coils is returned to the boiler without exposure to the atmosphere, and consequent loss of heat.

There is much force in defendant's contention that the invention attempted to be covered through the operation of the disclaimer is neither described nor implied in the patent. The eminent expert for complainant, Mr. Brevoort, admits that the patent was not in terms limited to a closed system. The only advantage of the alleged invention, stated in said specification, is the automatic control of the pump.

But, assuming that the disclaimer is valid, let us consider the question of patentable novelty and infringement. It is unnecessary to examine the whole field occupied by the prior art. The specification of the patent in suit states that it was customary to force the water of condensation back into the boiler by means of a force pump, requiring the presence of an engineer to regulate it. Both open and closed tanks, from which the water was thus pumped, were old. The return-trap system, already considered, was also a closed system. It therefore appears that the patentee was not the first inventor of means for returning the water of condensation to the boiler without loss of heat.

The decision of this case depends, not upon the validity of the patent in suit, but upon its scope. It is not anticipated. But, irrespective of the general state of the prior art, it appears that Blessing, himself, by his prior patents of 1871 (Nos. 214,257 and 216,403) had shown other means for returning the water of condensation to the boiler without loss of heat. In the devices described in these patents, the water of condensation acted either upon a diaphragm or piston, as in the patent in suit it acts upon the pump. But these devices, as described, because of the variable flow of the return water, would not successfully work automatically. Defendants' expert, therefore, first constructed one with modifications, which would work by regulating the valves by hand, and afterwards so altered and adapted it that it would work automatically. It is not clear, however, that these modifications did not themselves involve invention. The effect, then, of Blessing's prior contributions to the art

is merely to limit the invention in suit. Assuming the patent to be properly limited, by the disclaimer, to a closed system, Blessing's improvement covered the form of apparatus therein described, to automatically return the water of condensation to the boiler.

To determine the scope of this alleged invention, and the question of infringement, it is necessary to consider only a single plant, as bearing on the state of the prior art already discussed, and to compare it with defendants' construction. The Syracuse plant was constructed in 1876. It comprised a closed tank for receiving the water of condensation, connected with a pump, which pumped said water back into the boiler. Complainant's counsel are forced to admit the important bearing of this evidence. Speaking of what Bates, the constructor of this plant, did, they say:

"This work of Mr. Bates was one step ahead of the prior art towards the invention of the improvement in suit. He did what had never been done before,—returned the water of condensation under pressure to a boiler carrying so high pressure that a return trap would not operate."

And this part of the case may finally stand upon their assertion, that the difference between the prior art, as shown in the Syracuse plant and the patented improvement, is between regulation by hand and automatic regulation. The construction and operation of this automatic regulator must be further explained. It comprises two disk-shaped vessels, provided with a spring-pressed diaphragm and two concentric pipes, the inner of which is attached to said diaphragm. The return water of condensation enters the larger pipe, and, when it has filled it and the space above the diaphragm, the weight thereof depresses the diaphragm and said smaller pipe and a valve rod governing a pump regulating steam valve attached to said pipe, which causes said valve to close, and prevents the steam from operating the pump. Thereafter, the water, continuing to flow, passes into said smaller pipe, and also below said diaphragm, until its upward pressure, plus that of the spring, floats the diaphragm, elevates said smaller pipe, opens the valve, and admits the steam to the pump, which pumps the water back to the boiler, and automatically stops when the supply thereof is exhausted.

The state of the art already considered shows that, if this patent be construed to cover any apparatus adapted to regulate a pump through the action of the water supplied to the pump, it would be void. As counsel for complainant admit in their reply brief, in discussing the necessity of the disclaimer:

"This new element or governing apparatus, in combination with the open tank, operates, in substantially the same way as the old open tank, with a float, and produces the same result, and is, therefore, thus combined, the exact equivalent of the open tank and float of the Poage patent, the Kokomo devices, and the elevator devices, provided such devices were so combined. * * * It is not old, except as the term is used to express an equivalent. It is old, because, combined with the open tank, it is not patentably new."

If said patent be construed to cover the precise means claimed, as limited by the disclaimer to the closed system, the defendants do not infringe. The only device used by them not found in the Syracuse plant is an ordinary float in the return tank, which automatically governs the operation of the pump. Such floats were used in vari-

ous boilers and tanks, and notably in the Kokomø and other open tanks, prior to this patent. Complainant is not entitled to claim that this construction is the equivalent of his patented device.

Let the bill be dismissed.

CONSOLIDATED FASTENER CO. v. COLUMBIAN FASTENER CO.

(Circuit Court, N. D. New York. April 23, 1896.)

No. 6,386.

1. FEDERAL COURTS—TERRITORIAL JURISDICTION IN PATENT CASES.

A New York corporation, whose certificate provides that its principal business office is to be in the city of New York, but with a further provision that the location of its business is to be in "the city of New York, and county of New York and state of New York, and such other places as the company may hereafter select," may be sued in the circuit court for the Northern district of New York, for an infringement there committed, where it has publicly advertised that its place of business was at a certain town in that district, which announcement was in accordance with the fact.

2. SAME—NEW YORK DISTRICTS.

Under Rev. St. U. S. § 657, providing that the original jurisdiction of the circuit courts of the Southern district of New York shall not be construed to extend to causes of action arising in the Northern district of that state, it is doubtful whether a corporation can be sued in the Southern district for an infringement of a patent committed in the Northern district, although its charter provides that its principal office is to be in New York City.

3. PATENT-INFRINGEMENT SUITS—PRELIMINARY INJUNCTION.

Where there have been no adjudications sustaining the patent, if the court can see that there is a fair controversy on the two vital questions of patentability and infringement, the wiser course is to postpone their consideration until the final hearing, even though the preponderance of proof may be in favor of complainant.

4. SAME—IMPROVEMENT IN BUTTONS.

A preliminary injunction upon patent No. 405,179, for an improvement in buttons, denied, but a bond required of defendant in place thereof.

This was a suit in equity by the Consolidated Fastener Company against the Columbian Fastener Company for alleged infringement of a patent for improvement in buttons. Complainant has moved for a preliminary injunction.

John R. Bennett, W. B. H. Dowse, and Fred G. Fincke, for complainant.

William A. Jenner, for defendant

COXE, District Judge. The complainant is the owner of letters patent, No. 405,179, granted to P. A. Raymond, June 11, 1889, for an improvement in buttons. The complainant now moves for an injunction restraining the defendant from infringing the first and third claims of the patent upon the ground that the validity of the patent has been established by long acquiescence and that the defendant clearly infringes. The defendant opposes the motion on the following grounds: First. The court has no jurisdiction. Second. The patent is void for want of patentable novelty. Third. The defendant does not infringe.

The alleged want of jurisdiction is based upon the proposition that the defendant can only be sued in the Southern district of New York for the reason that the certificate of incorporation states that "the location of its principal business office is to be in the city of New York, in the county of New York, and state of New York." It is argued that the case is thus brought within the doctrine of *Railway Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401. The court is of the opinion that the action is maintainable in this district. The certificate provides further, "The location of the business is to be in the city of New York, and county of New York and state of New York, and such other places as the company may hereafter select." Pursuant to this option the company selected Gloversville in this district as its place of business and repeatedly and in the most public manner announced to the business world that its place of habitation was Gloversville. The fact seems to accord with this announcement. A part of the business of the defendant is done in this district notwithstanding the fact that it has an office in the city of New York. It should not be permitted after thus giving its address as Gloversville to segregate one clause of its charter from the rest and put a construction thereon wholly inconsistent with its public declarations and with the actual facts. It must not be forgotten that this is an action for the infringement of a patent, where the jurisdiction of the federal courts is exclusive and depends upon the subject-matter and not upon the parties or the amount involved. The acts constituting the alleged infringement all took place in this district, and under section 657, Rev. St. U. S., it is, at least, doubtful whether the action could, in any circumstances, be maintained in the Southern district. That section provides that "the original jurisdiction of the circuit court for the Southern district of New York shall not be construed to extend to causes of action arising within the Northern district of said state." *Wheeler v. McCormick*, 8 Blatchf. 267, Fed. Cas. No. 17,498. See, also, upon the general subject of the jurisdiction of the circuit courts in patent causes, *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273; *Button Works v. Wade*, 72 Fed. 298.

The specification says:

"I have found that the eyelet above mentioned necessitated a hole in the fabric of considerable size, and that an unnecessarily large number of pieces were essential to the construction of the spring-stud set forth in the said patents. To avoid these objections I have devised the construction set forth in the following specification, in which construction the dome forms a fundamental supporting part so rigid as to admit of an eyelet being riveted over against it and affording a seat for the external spring by which the stud is made to engage with the embracing button or socket. Instead of employing the eyelet with its upper flange held in the clamping-ring, I make use of an eyelet having a smaller shank and a larger flange, which is inserted from beneath the fabric, and, extending up into the dome-piece above described, is met by a depending lug in the top of the said dome-piece, against which it is forced, and its upper edge thereby riveted over, so that it cannot be withdrawn, the spring-cap being thus held firmly in position upon the fabric."

The first and third claims are involved. They are as follows:

"(1) The combination, with an embracing-button attached to one part of a fabric, of a spring-stud attached to the opposite part and adapted to engage the said button, the stud being composed of a depressed dome or support forming an annular riveting-surface and an exterior engaging spring, and being fastened to the fabric by an eyelet adapted to enter the back of the dome or support and be riveted over by contact with said depression."

"(3) A spring-stud for engagement with a receiving button or socket, consisting of a depressed dome or support forming an annular riveting-surface and an exterior engaging spring, combined with a fastening-eyelet, the eyelet being adapted to enter from behind and be riveted over by contact with the said depression, and the dome having a flange extending beyond the spring, by which it is held while the eyelet is forced into position."

The subject-matter of these claims is a spring stud designed to be used as one member of a snap fastener. The stud in actual use is so small, and its internal construction, which is the subject of controversy, is so minute, that its details can hardly be seen or appreciated even by the use of a powerful glass. At the argument it was suggested that the work of the court would be simplified if enlarged models of the complainant's and defendant's structures were submitted. If this suggestion had been complied with it is possible that the briefs received since the argument, aggregating 152 pages, might have been somewhat condensed. After a careful examination I have reached the conclusion that the complainant's right to recover is not so free from doubt as to warrant the court in issuing an unconditional writ. An extended discussion of the subjects of invention and infringement should be postponed until the hearing for the reason that the controversy may then present a different aspect. These questions should not be decided upon *ex parte* affidavits. Suffice it to say that the patent has never been adjudicated or the claims construed. The art, speaking generally, is old and crowded. The claims relate to improvements which necessarily are most minute and are not asserted to be fundamental. The defendant's device though similar in appearance and operating, apparently, upon the same principle, has introduced some minor departures which may or may not be important according to the construction placed upon the claims in view of the file and of the prior art. The cases are very rare where the court determines these questions upon a motion for an injunction, especially where, as here, there is a very wide and radical difference of opinion between the experts which has developed into an extended and animated discussion. If the court can see that there is a fair controversy upon the two vital questions, patentability and infringement, the wiser course is to postpone their consideration until the final hearing. And this is true even though the preponderance of proof may be in favor of the complainant. On the other hand there are many considerations surrounding this controversy which appeal strongly to a court of equity to grant the relief prayed for. The patent has been in existence seven years, the acquiescence by the public has been continuous and complete, including the defendant, or, to be more accurate, those who are behind the defendant and responsible for its actions. The manner in which defendant's present business was commenced, in connection with the employment of complainant's salesmen at an increased salary, is certainly not calculated to prepossess the court in the defendant's

favor. On the whole case I am convinced that for the present, at least, substantial justice will be best accomplished by requiring the defendant to give a bond in the usual form and providing for an injunction in case of its failure to file the same. Should it appear that the defendant is using the knowledge derived from the complainant's recent salesmen to entice away complainant's customers and injure its business an application may be made for further preliminary relief.

FENTON METALLIC MANUF'G CO. v. CHASE et al.

(Circuit Court, S. D. New York. March 31, 1896.)

1. OPENING DEFAULT INJUNCTION—REIMBURSEMENT OF EXPENSES.

Where a preliminary injunction, obtained by default, was opened on presentation of satisfactory excuses, *held*, that defendant should reimburse complainant, at the regular rate, for all disbursements incurred in procuring affidavits and copies of documents read by him in the application to open the default, and not used on the original motion for the injunction.

2. PATENTS—INVENTION.

No patentable invention is involved in providing skeleton-frame, roller-shelf book cases with "hand-holes," or re-entrant recesses, to facilitate lifting the books from the shelves, similar to the hand-holes used in the old-fashioned wooden shelves.

3. SAME—PRELIMINARY INJUNCTION—PRIOR DECISIONS.

A prior decision by the supreme court of the District of Columbia, granting an injunction, without opinion, in a case in which the defendants were in privity with parties who had been contestants in interference proceedings in the patent office, in relation to the alleged invention, *held* insufficient to support a motion for preliminary injunction against another alleged infringer.

4. SAME—BOOK CASES.

The Hoffman patent, No. 450,124, for improvements in book cases, *held* invalid on motion for preliminary injunction, for want of invention.

This was a suit in equity by the Fenton Metallic Manufacturing Company against Samuel W. Chase and others for alleged infringement of a patent relating to book cases. Defendant moves to vacate a default order for a preliminary injunction.

Paul Bakewell and Leonard E. Curtis, for the motion.
Edwin H. Brown, opposed.

LACOMBE, Circuit Judge. This is an application by a defendant against whom an injunction pendente lite was obtained by default to open such default and vacate the injunction. Satisfactory excuses are presented for opening such default, and the motion to that effect is granted upon payment to complainant of the disbursements, at the regular rate, for taking depositions, incurred in procuring all affidavits and copies of documents read by the complainant upon this application, and which were not a part of the papers presented by it on original motion for the injunction. The case may then be disposed of as if motion for injunction pendente lite were now first made. The patent is No. 450,124, to Horace J. Hoffman, April 7, 1891, for improvements in storage cases for books. As stated in the patent, the object of the invention is "to facilitate the

handling and prevent the abrasion and injury of heavy books, etc. It consists, essentially, of the peculiar arrangement of the guiding and supporting rollers and of the peculiarities in construction of the case and shelves hereinafter specifically set forth." It is unnecessary to discuss the details of the patent, or to enter into any elaborate disquisition on the state of the art. That may be more appropriately left for final hearing. Where the validity of a patent is attacked, and there is not a clear preponderance in its favor, injunction pendente lite should not issue. Not only has the complainant no clear case, but, on the contrary, it is difficult to see on what ground it can be seriously contended that there is patentable novelty warranting such a construction of the patent as would cover defendants' structure. Roller-shelf book cases were old. So, too, it was old to provide such shelves with a roller or rollers arranged in front of the edge of the shelf, so as to facilitate the insertion and removal of a heavy book without friction or abrasion. Stripped of all verbiage, the sole improvement of the patentee germane to the structures now before the court consisted in so arranging the front edge of the shelf as to provide a re-entrant band or recess therein, so that the hand could be inserted a greater or less distance back from the line of the front edge, and the book seized hold of. The evidence shows, and certainly without any proof it is common knowledge, that so-called "hand-holes" in the front of book shelves have been used for very many years before the patent was applied for. It is true that these "hand-holes" or "re-entrant recesses" had been provided only in the old-fashioned wooden shelves unprovided with rollers; but when skeleton-frame roller shelves had come into use it seems a rather startling proposition to advance that it required inventive genius to provide them with the same sort of "hand-hold" to perform the same function. There might be some mechanical ingenuity warranting a patent for the details of the structure, but to hold defendant as an infringer the patent must be construed so broadly as to cover the recess or hand-hole generally, whether it be rounded or square, formed by a bending-in of the front bar of the frame, or by protruding rollers on brackets to the right and left of the recess beyond the front bar.

Since the patent apparently does not disclose sufficient patentable invention to stand alone, the only question remaining is whether the decision of the supreme court of the District of Columbia will support it. The infringing structure in that case, save for some most trivial mechanical details, was manifestly the same as the defendants' here. That court wrote no opinion, so we are unable to determine what meritorious elements it found in the patent. It is a suggestive circumstance, however, that the defendant in the Washington suit was in privity with Jewell & Yarman, who had been in interference in the patent office with Hoffman, the patentee, over this very patent, claiming to be themselves the first inventors, and asking a patent for their "invention." This interference did not prevent defendants in the Washington suit from arguing that there was no patentable novelty in the alleged invention, but such contention came with ill grace from them. In granting a decree and

writing no opinion the supreme court of the District may have intended to express the conclusion that for some sufficient reason, not shown here, those particular defendants should be enjoined, while at the same time, by not filing an opinion, they avoided giving the patentee a supporting adjudication which would enable him to get injunctions as a matter of course against infringers generally. The injunction pendente lite is therefore vacated, but, inasmuch as defendants' carelessness has made the argument more troublesome for their adversary than it otherwise would be, solely upon condition that defendants file each month until final hearing a sworn statement of all shelves with hand-holes sold by it, giving date of sale, name of purchaser, and, if not manufactured by defendants, name of person from whom purchased.

BERNHEIM v. BOEHME.

(Circuit Court of Appeals, Third Circuit. April 8, 1896.)

No. 6.

1. PATENTS—ANTICIPATION—CATCHES FOR SATCHELS.

The Lieb patent, No. 242,944, for catches for traveling bags and satchels, *held* void because of anticipation by the Lagowitz spring catch. 67 Fed. 547, affirmed.

2. SAME—LIMITATION OF CLAIM—PRIOR ART.

The Flecke patent, No. 303,716, for catches for traveling bags and satchels, if sustainable at all, must, in view of the prior state of the art, as shown by the Lagowitz spring catch, be limited to a catch having three cam projections placed equidistant on the shaft, and is not infringed by a catch having but two such projections.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a bill in equity by Gustav Bernheim against Albert Boehme for alleged infringement of letters patent No. 242,944, granted to John W. Lieb June 14, 1881, and No. 303,716, granted to Robert Flecke August 19, 1884. The circuit court held both patents void for want of invention, in view of the prior state of the art. 67 Fed. 547. Complainant appeals.

Louis C. Raegener, for appellant.

Jonathan Marshall, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

BUTLER, District Judge. The decree in this case must be affirmed; and with slight modification the opinion of the circuit court may be adopted as an expression of our views.

Taylor's device does not we think anticipate either of those sued upon. It contains substantially the same elements; but the parts are not so constructed and combined as to render it applicable to the use for which they are designed. No doubt the construction

and combination might readily be changed so as to render it applicable to this use; but it does not follow that the necessary changes are so obvious that an ordinary mechanic would see, and make them.

Lagowitz's device we think anticipates Lieb's. In construction, combination and operative effect, the two are in all material respects indistinguishable.

As respects the other device sued upon (Flecke's) the resemblance to Lagowitz's is not so close. There are differences, which though slight affect and vary their operation. There may be room to doubt whether the differences are sufficient to sustain the Flecke patent. Possibly with the presumption of validity in its favor, it should be sustained. It is unnecessary however to decide this question; for if the patent may be sustained the respondent's device must be held not to infringe. It is certainly as easy to distinguish his from Flecke's, as it is to distinguish Flecke's from Lagowitz's. The claim involved reads as follows:

"The improved spring catch or fastener for a bag frame, the same consisting of a box, a, having therein a spring, c, and a pivotal shaft with ears at each end thereof, adapted to hold the section of the bag frame together, and having three cam projections disposed at equal distances apart around the said shaft, to engage the spring whereby the ears may be turned to a catching relation to the said frame or to either a right or left outwardly-projecting position from the frame, substantially as set forth."

The novelty thus described consists in the *three cam projections*, placed equidistant on the shaft. The respondent has but *two* such projections; and but one distinct cam surface. In the complainant's specifications it said:

"I do not wish to be understood as limiting myself to a bar, e, having projections upon it, inasmuch as a plain round bar might be employed, the friction of the spring alone serving to hold the ears in position."

If, however, this language is read into the claim the device described is rendered indistinguishable from Lagowitz's and the patent is consequently invalidated. The subject need not be pursued. It is clear that to sustain Flecke's patent it is necessary to confine it to the special structure claimed, and that when thus confined the respondent does not infringe.

BONSACK MACH. CO. v. ELLIOTT.

SAME et al. v. NATIONAL CIGARETTE & TOBACCO CO. et al.

(Circuit Court of Appeals, Second Circuit. April 6, 1896.)

PATENTS—LIMITATION OF CLAIMS—CIGARETTE MACHINES.

The Emery "belt patent," No. 216,164, for a cigarette machine, is limited, as to claims 10 and 12, to an endless belt, curved transversely into tubular form, to constitute a mold for compressing the tobacco into a filler, and they do not cover a flat belt, which serves merely to support and carry the filler after it has been formed by a separate device. 16 C. C. A. 250, 69 Fed. 335, affirmed on rehearing.

Appeal from the Circuit Court of the United States for the Southern District of New York.

These were suits in equity by the Bonsack Machine Company against Henry C. Elliott, and by the Bonsack Machine Company and the American Tobacco Company against the National Cigarette & Tobacco Company and others, for infringement of four patents for cigarette machines. In the circuit court certain claims of each patent sued on were sustained, and found to be infringed, and a decree was entered for complainants accordingly. 63 Fed. 835. Defendants appealed to this court, which, on June 28, 1895, reversed the decree below. 16 C. C. A. 250, 69 Fed. 335. The cause is now for decision on a rehearing.

Robert H. Duncan and A. H. Burroughs, for complainants.

E. N. Dickerson and Edwin H. Brown, for defendants.

Before WALLACE and SHIPMAN, Circuit Judges, and TOWNSEND, District Judge.

SHIPMAN, Circuit Judge. The complainants in the above-entitled causes applied for a rehearing upon two questions: (1) The proper interpretation of claims 10 and 12 of the Emery patent, No. 216,164; (2) the question of infringement of said claims,—and the application was granted. The original opinion of the court states the facts in regard to the Hook, Abadie, and Emery belt patents (16 C. C. A. 250, 69 Fed. 335), but some repetition may be desirable. The Hook machine was the first attempt to manufacture a rolled and wrapped cigarette of indefinite length. It attempted to compress the tobacco into a filler, and to roll the wrapper about the filler simultaneously in the same trough or tube-forming die, and was a commercial failure on account of the resistance which the fibers of long-fibered tobacco made to being wrapped before they had been thoroughly compressed. The Emery belt machine improved upon the Hook patent by adopting "the principle of forming the filler before beginning the wrapping operation. The filler was continuously formed before it reached the wrapper, in an endless traveling belt, curved around the tobacco by the walls of a chamber through which the belt passes. This endless belt separates from the tobacco filler as it delivers it to the paper wrapper and disappears beneath the table; but, after the paper strip has been wrapped around the filler, and the overlapping edge pasted down, the belt, reappearing above the table, comes into action again, and is caused to encircle the sealed cigarette rod with a close frictional contact, passing with it through a hollow cylinder or guide tube." In the determination of the question of infringement by any subsequent and competing machine, it became, of course, important to ascertain the scope of the Emery invention, and for this purpose to know its position in the history of the art. The complainants, who were anxious that the patent should occupy a large territory, desired that especial consideration should be given to its alleged primary character, and considered that the essential features of the Emery invention were that the filler should be formed in one set of devices and should be wrapped in another set, and that an endless belt should, as a carrier, connect the two sets, and that the particular kind of filler-

forming chamber and the particular kind and office of the belt, if it was a carrier or supporter, were unimportant. The court said, in its opinion, that this construction took no account of the Abadie machine, which had, in an imperfect form, the principle of the Emery invention, by which was meant that the filler was formed by one set of devices, and was subsequently wrapped by another set. No importance was placed upon the heavy thread of leather or rubber in the Abadie machine which passed over the center of drawing pulleys, and threaded the paper into the machine. This was not supposed to be a belt. Subsequent reflection has brought us to the conclusion, which was strengthened upon the rehearing, that too much stress was placed in the former opinion upon the Abadie machine, not because it did not have separate filler-forming and filler-wrapping devices, but because its filler-forming mechanism, and the manner by which the filler was conveyed to the wrapping mechanism, were so unlike the Emery construction as to make its place in the history of the development of cigarette mechanism between Hook and Elliott of no comparative importance. In the Abadie machine the tobacco was molded into a filler in a metallic molding tube, through which the tobacco was moved onward by a piston or pump plunger. A helicoidal mold inclosed the orifice of the molding tube, supported the paper in trough form, which received the filler as it was pushed forward by the piston. The filler, on leaving the end of the molding tube, entered directly upon the band of paper during its formation into a continuous tube, and there was no intervening belt or carrier between the two sets of devices. Abadie, by a piston or plunger, pushed his filler immediately upon the paper in the helicoidal mold which inclosed the orifice of the molding tube; Emery carried to the paper wrapper his formed filler in the curved belt which compressed it.

The question remains as to the proper construction of the Emery belt patent with the Abadie machine out of view. The Hook machine was a combined filler forming and wrapping device. Its successor was a separate filler-forming and filler-wrapping machine; and the complainants, without limiting themselves to the peculiarities of either set of devices, and speaking in general terms, regard the claims 10 and 12 as covering any machine which forms the tobacco into a filler in one set, and subsequently wraps such formed filler in another set, provided the filler is carried from the filler-forming devices to the wrapping devices by an endless belt. This construction is broader than the invention, and gives far wider scope to the belt than it deserves. The invention was the described and claimed means by which the filler was formed and delivered to the wrapping devices, and consisted as much in the means by which it was formed as the means by which it was delivered. The expansion of the invention so as to make any flat belt or ribbon which may serve as a support and as a carrier correspond to the curved belt, which is a part of the forming mechanism, cannot be permitted. As it was said in the prior opinion: "The Emery belt was not a mere carrier. It was continually a forming and encircling tube. An endless belt, to serve simply as a carrier, has a different char-

acter, and performs a different office, from the belt of the Emerys." The conclusion which we reached before is not changed, that "the endless belt of the tenth and twelfth claims is curved, so as to compress the tobacco and form the filler, and the filler-forming chamber is one in which the filler is molded by the curved belt. The two claims are to be limited to the endless belt, which is curved transversely into tubular form, to constitute a mold, which compresses or molds the tobacco into a filler, and to the filler-forming chamber, which operates to bend or curve the belt into the tubular form; not merely to enable it to receive or to carry, but to enable it to form, a filler by the power conveyed by it." 16 C. C. A. 250, 69 Fed. 335. The directions which were heretofore given in regard to the interlocutory decree of the circuit court in the case against Henry C. Elliott, and in regard to the order, pendente lite, of the circuit court in the case against the National Cigarette Machine Company, are not changed.

JACKSON v. VAUGHAN.

(Circuit Court, N. D. California. March 16, 1896.)

No. 11,877.

PATENTS—PURCHASE FROM TERRITORIAL LICENSEE—SALE IN OTHER TERRITORY.

A dealer in territory reserved by the patentee may purchase the patented articles from a licensee of other territory, through an agent in such territory, and import and resell them in the reserved territory, without infringing any rights of the patentee; and it is immaterial that such dealer may have knowledge of a contract whereby such licensee has agreed not to sell, or permit the sale, directly or indirectly, of his articles in such reserved territory. *Keeler v. Folding-Bed Co.*, 15 Sup. Ct. 738, 157 U. S. 659, applied.

Suit in equity for infringement in importing, using, and selling horse hayforks in the state of California, and to restrain the further sale of the same.

J. P. Langhorne, for complainant.

J. H. Miller, for respondent.

MORROW, District Judge. This is a suit in equity, brought by Byron Jackson against F. W. Vaughan, for alleged infringement of letters patent Nos. 197,137 and 210,548, for improvements in horse hayforks, in importing, using, and selling said hayforks in the state of California. The facts show that Jackson is the owner of the patents referred to on horse hayforks; that Jackson licensed F. E. Myers & Bros., of Ashland, in the state of Ohio, to exclusively manufacture and sell horse hayforks, under said patents, within the territory of the United States lying east of the Rocky Mountains, said license to run during the lifetime of the patents. In consideration of this license to manufacture and sell exclusively within said territory, F. E. Myers & Bros. agreed with the complainant as follows:

"We further agree that we will not, directly or indirectly, permit any of said horse hayforks made by us to be sold west of a line drawn north and south along the western margin of the great Salt Lake Valley, and extended from thence north and south across the territory of the United States. We further agree to abandon all agencies for the sale of horse hayforks manufactured by us west of the line last above described."

A letter accompanying this license from F. E. Myers & Bros. to the complainant is as follows:

"Ashland, Ohio, August 23, 1889.

"Byron Jackson, Esqr., San Francisco, Cal.—Dear Sir: In consideration of your numerous claims on your Jackson light weight horse hayforks, the validity of which we have examined in detail, and which we hereby acknowledge, we have agreed to abandon the manufacture of our California forks, and to manufacture under your patents exclusively, and to pay you a royalty thereon. We also agree not to permit the sale of said forks, directly or indirectly, on the Pacific coast; we to abandon agencies that trespass or violate this agreement on first notification from you.

"Yours, respectfully,

[Signed] F. E. Myers & Bros."

The respondent, Vaughan, is the manager, in San Francisco, of the Deere Implement Company, which deals in agricultural implements. This company was incorporated in Illinois, under the laws of that state, with headquarters at Moline. It has a branch in this city, of which, as stated, the respondent is the manager. The infringement complained of was involved in the following transaction: Vaughan sent an order for 100 horse hayforks, covered by Jackson's patents, to the Deere Implement Company, in Moline, Ill., which, in turn, ordered and bought them from F. E. Myers & Bros., and then shipped them to San Francisco, where the respondent has been engaged in selling them, without having been licensed or permitted so to do by Jackson. It was further stipulated by counsel for the respective parties:

"That when the respondent in this cause ordered the consignment of 100 hayforks, to which he has testified, he ordered the same through the firm of Deere & Co. of Minneapolis, and not directly from the firm of Myers & Bros., of Ashland, Ohio, for the purpose of having it appear that the said forks were purchased by parties east of the Rocky Mountains from Myers & Bros., and by such persons sold to the Deere Implement Co. of California, and that said purchase was really a purchase by the Deere Implement Co., through the respondent in California, of said forks from Myers & Bros., and that said Deere Implement Co. of Minneapolis was merely an agent in the matter of said purchase and shipment."

The territory west of the Rocky Mountains had been reserved by Jackson for his own use; that is to say, he had not licensed this territory to the respondent, or to any one else.

The question is, whether the respondent, Vaughan, has the right to purchase the forks covered by Jackson's patents from a territorial licensee of another territory, and to ship and sell them outside of that territory, and in a district reserved by the patentee to himself, without first obtaining the consent or license from the patentee to do so. The complainant contends that such conduct on the part of the respondent is in violation of his rights as a patentee under the patent law; that it is, therefore, an infringement; and that he is entitled to damages for the forks so sold, and to an injunction restraining further sales by the respondent of forks so imported.

The respondent, on the other hand, contends that F. E. Myers & Bros., being licensed to sell within their territory,—that is, in the United States lying east of the summit of the Rocky Mountains,—were authorized, and had the unquestioned right, to sell within that territory; that he had a right to purchase from them within that territory; and that such purchase, through the Deere Implement Company, as agents, vested in him, as purchaser, an absolute property therein, unrestricted in time or place, and that the sale of such articles within the state of California by the respondent, as manager of the Deere Implement Company, does not constitute an infringement of the complainant's patent, nor an invasion of any rights thereunder. The authorities in the circuit courts have, with but few exceptions, held that such a course as that pursued by the respondent in this case constituted an infringement. The decisions so holding are summed up by Judge Hawley in *Electrical Works v. Finck*, 47 Fed. 583, where he adhered to the prevailing rule enunciated in those courts as follows:

"The sale of the patented articles by a territorial assignee within his own territory does not confer upon the purchaser of such articles the right to carry the same into the territory of another assignee, and there sell them in the usual course of trade, without the consent or license of the latter assignee. Although the question has never been authoritatively settled by any decision of the supreme court of the United States, it has frequently been held in the circuit courts that where one purchases a patented article from the owner of the patent right for a certain territory, he has no right to sell the same in the course of trade, in a territory for which another owns the exclusive territorial rights. *Hatch v. Adams*, 22 Fed. 436; *Hatch v. Hall*, Id. 438, 30 Fed. 613; *Folding-Bed Co. v. Keeler*, 37 Fed. 693, 41 Fed. 51; *Sheldon Axle Co. v. Standard Axle Works*, 37 Fed. 789."

But since the views of that learned judge were expressed, the supreme court, in one of the very cases cited by him, viz. *Folding-Bed Co. v. Keeler*, 37 Fed. 693, 41 Fed. 51, has overruled the doctrine followed by the circuit courts. The title of the case on appeal is *Keeler v. Folding-Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738.

Before noticing that case, it may be well to refer to a few propositions of patent law established by the supreme court, which are important in this controversy. In the first place, it is now well settled that one who buys patented articles of manufacture from one authorized to sell them at the place where they are sold becomes possessed of an absolute property in such articles, unrestricted in time or place. *Wilson v. Rousseau*, 4 How. 646, 688; *Bloomer v. Mcquewan*, 14 How. 539; *Chaffee v. Belting Co.*, 22 How. 217, 223; *Mitchell v. Hawley*, 16 Wall. 544; *Adams v. Burke*, 17 Wall. 453, 456; *Birdsell v. Shaliol*, 112 U. S. 485, 487, 5 Sup. Ct. 244; *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879. The reason of the rule is stated in *Chaffee v. Belting Co.* as follows:

"When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. According to the decisions of this court in the cases before mentioned, it then passes outside of the monopoly, and is no longer under the peculiar protection granted to patented articles. By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is

no longer protected by the laws of the United States, but by the laws of the state in which it is situated. Hence it is obvious that if a person legally acquires a title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair it or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind."

In *Goodyear v. Rubber Co.*, 1 Cliff. 348, Fed. Cas. No. 5,557, Mr. Justice Clifford, then sitting in the circuit court, used the following language:

"Whether the inventor in any given case has a patent for the article manufactured, or only for the product or the material of which it is composed, the unconditional sale of the manufactured article carries with it the absolute dominion over the material, as well as over the manufactured article. Having manufactured the material, and sold it for a satisfactory compensation, whether as material, or in the form of a manufactured article, a patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters patent; and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, discharged of all the rights of the patentee previously attached to it, or impressed upon it by the act of congress under which the patent was granted."

In that case the question arose as to whether the respondents had the right, after having purchased certain patented articles of a licensee, to use the materials or product of which such articles were made for the purpose of making other articles, the right to which was covered by patent. The articles so made by the respondents were different from those made by the complainant, but they used the very same materials which went to make up the articles manufactured by complainant. It was claimed by the latter that his patent covered, not only the articles made, but also the materials or product out of which they were made. The respondents contended that the material used by the complainant had once been publicly sold by the license and permission of the complainant, that he had been paid a price satisfactory to himself, and that he could not therefore forbid or prevent the use of it by lawful purchasers for a lawful purpose. The court, as indicated in the language quoted above, sustained the contention of the respondents, and held that a sale by the patentee, or one authorized to sell, took the article out of the monopoly which the United States laws grant to patentees for a limited period of time, and that such sale covered, not only the article manufactured by the inventor, but the materials out of which such article was made.

In the cases of *Adams v. Burke* and *Hobbie v. Jennison*, both cited *supra*, the supreme court distinctly held that a purchase from a territorial assignee did not interfere with the right of the purchaser to use the patented article outside of the territory of such assignee, and in the territory of another assignee; and knowledge of the fact by the purchaser that there was an assignee for the territory into which the patented article was brought for use was held, in the last case, to make no difference in the application of the doctrine. In *Keeler v. Folding-Bed Co.*, *supra*, there was held to be no distinction, in principle, between the use and sale of a patented article outside of the territory in which it was bought by the pur-

chaser, though such use or sale might be in the territory of another assignee. This case involved a state of facts very similar to those which exist in the case now before the court. By the agreed statement of facts, it appeared that the complainants in that case were the assignees, for the state of Massachusetts, of certain letters patent granted to one Lyman Welch, for an improvement in wardrobe bedsteads, that the Welch Folding-Bed Company owned the patent right for the state of Michigan, and that the defendants purchased a carload of said beds from the Welch Folding-Bed Company, at Grand Rapids, Mich., for the purpose of selling them in Massachusetts, and that they afterwards sold, and were engaged in selling, the said beds in Boston. The conclusion in the court below (see *Folding-Bed Co. v. Keeler*, 37 Fed. 693, 41 Fed. 51) was that the defendants were not protected from the claim of the Massachusetts assignee by having purchased the patented articles from the Michigan assignee, and accordingly there was an injunction and final decree in favor of the complainants, from which an appeal was taken to the supreme court. In the opinion of that court, delivered by Mr. Justice Shiras, the absolute right of property which a purchaser of a patented article acquires therein was affirmed in clear and unmistakable terms. After referring to provisions in sections 4884 and 4898 of the Revised Statutes, giving the patentee the exclusive right to make, use, and vend his patented articles for a certain number of years, and to assign such right exclusively to the whole, or any specified part, of the United States, the opinion proceeds as follows:

"Where the patentee has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article of manufacture, it is obvious that a purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell or dispose of the same. It has passed outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. * * * Suppose, however, the patentee has exercised his statutory right of assigning, by conveying to another an exclusive right under the patent to a specified part of the United States, what are the rights of a purchaser of patented articles from the patentee himself within the territory reserved to him? Does he thereby obtain an absolute property in the article, so that he can use and vend it in all parts of the United States, or, if he take the article into the assigned territory, must he again pay for the privilege of using and selling it? If, as is often the case, the patentee has divided the territory of the United States into twenty or more specified parts, must a person who has bought and paid for the patented article in one part, from a vendor having an exclusive right to make and vend therein, on removing from one part of the country to another, pay to the local assignee for the privilege of using and selling his property, or else be subjected to an action for damages as a wrongdoer? And is there any solid distinction to be made, in such a case, between the right to use and right to sell? Can the owner of the patented article hold and deal with it the same as in case of any other description of property belonging to him, and, on his death, does it pass, with the rest of his personal estate, to his legal representatives, and thus, as a part of the assets to be administered, become liable to be sold? These are questions which, although already, in effect, answered by this court in more cases than one, are now to be considered in the state of facts disclosed in this record."

After referring to the cases in the supreme court on the subject of the rights which a purchaser of patented articles obtains, the learned justice continues:

"This brief history of the cases shows that in *Wilson v. Rousseau*, 4 How. 646, and cases following it, it was held that, as between the owner of a patent, on the one side, and a purchaser of an article made under the patent, under the other, the payment of royalty once, or, what is the same thing, the purchase of the article from one authorized by the patentee to sell it, emancipates such article from any further subjection to the patent throughout the entire life of the patent, even if the latter should be by any law subsequently extended beyond the term existing at the time of the sale; and that in respect of the time of enjoyment, by those decisions, the right of the purchaser, his assigns or legal representatives, is clearly established to be entirely free from any further claim of the patentee or any assignee; that in *Adams v. Burke*, 17 Wall. 453, it was held that, as respects the place of enjoyment, and as between the purchaser of patented articles in one specified part of the territory, and the assignee of the patent of another part, the right, once legitimately acquired, to hold, use, and sell, will protect such purchaser from any further subjection to the monopoly; that in *Hobble v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879, it was held that, as between assignees of different parts of the territory, it is competent for one to sell the patented articles to persons who intend, with the knowledge of the vendor, to take them for use into the territory of the other. Upon the doctrine of these cases, we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place."

The views expressed would seem to be conclusive of this case. But the learned justice immediately follows the above statement of the law with a reservation, which, counsel for complainant claims, renders what the court decided inapplicable to the facts of this case. It is as follows:

"Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws."

The precise significance of this reservation, in view of the broad and unambiguous language used in defining the absolute and unqualified property rights which a purchaser of patented articles acquires, it is not necessary to determine. The facts of that case, as is clearly indicated in the dissenting opinion of Mr. Justice Brown, established that the Standard Folding-Bed Company, doing business in Massachusetts, purchased articles of the patentee in Michigan, in the ordinary course of trade, for the purpose of resale in Massachusetts, knowing that the right to manufacture, use, and sell such articles within that state belonged to another. Whatever idea the court meant to convey by the expression "special contracts brought home to the purchaser," it does not appear to be applicable to this case. It is certain that there was nothing in the terms of the license to F. E. Myers & Bros. restraining a purchaser from selling, or otherwise disposing of, the vended articles in the territory reserved by the patentee to himself. It is true that Myers & Bros., the licensees, were prohibited by the patentee, and they agreed not to permit the horse hayforks covered by Jackson's patents to be sold, directly or indirectly, west of the Rocky Mountains. But there is nothing in the patent laws which restricts a purchaser of patented articles to any particular territory. Nor is this view prejudicial to the rights of a patentee. As was well said by Mr. Justice Shiras, in the concluding part of the opinion in the above case:

"The conclusion reached does not deprive a patentee of his just rights, because no article can be unfettered from the claim of his monopoly without paying its tribute. The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration."

It follows, therefore, that the controversy between complainant and respondent, in this case, does not arise "under the inherent meaning and effect of the patent laws," but is "a question of contract." The license to Myers & Bros. provided that they should not permit the patented hayforks to be sold, directly or indirectly, west of the Rocky Mountains; but Vaughan was not a party to this license. He was a perfect stranger to any contractual relation that existed between the patentee and his licensees. It was not binding on him, or any other purchaser not a party to the contract. It is a rule of the law of contracts, so elementary that it need hardly be stated, that one not a party to a contract is not bound by it, or his legal rights affected thereby to his prejudice. Conceding that, in the case at bar, the terms of the "special contract" between the patentee, Jackson, and his licensees, Myers & Bros., had been "brought home" to the respondent,—that is, that he knew of the agreement by Myers & Bros. not to permit hayforks to be sold west of the Rocky Mountains,—it is difficult to see how that knowledge could impair his right to purchase from the licensees within their territory, or affect his absolute right of property in the vended articles, unrestricted in time or place. No consideration passed from him that he would refrain from purchasing articles east of the Rocky Mountains from F. E. Myers & Bros., or that, having purchased such articles, he would not sell them in the ordinary course of trade; and his knowledge of the terms of the license did not render him subject thereto. The case might be different had the respondent knowingly purchased from some one who had no authority to sell, and the patentee thus been defrauded of his royalty. But such is not the case here. Vaughan purchased the horse hayforks at Ashland, state of Ohio, from Myers & Bros., who, undeniably, had the authority to sell east of the Rocky Mountains. Having purchased them, he obtained an absolute property in them, "unrestricted in time or place." *McKay v. Wooster*, 2 Sawy. 373, Fed. Cas. No. 8,847, and cases cited *supra*. He had the right to put them to any use, or dispose of them, as he saw fit. The patentee could not complain. The forks had, by the sale from the authorized licensee east of the Rocky Mountains, passed outside of the monopoly. The object of the patent laws, and the protection afforded the patentee by them, had, so far as these particular horse hayforks were concerned, been attained and consummated. The patentee had received the royalty through his licensees. If the doctrine, repeatedly enunciated by the supreme court, that the sale of a patented article takes it out of the monopoly, is to obtain at all, it is certainly applicable to this case.

Such being my determination, it is obviously unnecessary to consider the other questions involved in the alleged infringement. The bill will be dismissed, with costs.

FRANKLIN SUGAR-REFINING CO. v. FUNCH et al. (two cases).

(Circuit Court of Appeals, Third Circuit. April 15, 1896.)

Nos. 3 and 4.

1. ADMIRALTY—APPEALS—DECISION—PRACTICE—SECURITY ON CROSS LIBEL.

A decision denying a demand for security on a cross libel, under admiralty rule 53, on the ground of inexcusable delay in demanding it, if reviewable at all, should not be reversed unless it clearly appears that the court's action was unwarrantable. 66 Fed. 342, affirmed.

2. SAME—STAY OF PROCEEDINGS.

An appeal from an order refusing an application, on a cross libel, for security and stay, under admiralty rule 53, does not suspend the proceedings in the original suit.

3. SUIT ON GENERAL AVERAGE BOND—PRESUMPTION OF SEAWORTHINESS.

In a suit by a shipowner on a cargo owner's general average bond, which contained a recital that the ship, on her voyage, "encountered strong winds and a heavy sea, which caused the vessel to labor severely," *held*, that the libellant was entitled to a prima facie presumption that the ship was seaworthy at the commencement of the voyage. The Edwin I. Morrison, 14 Sup. Ct. 823, 153 U. S. 199, distinguished.

4. APPEAL—OBJECTIONS NOT MADE BELOW.

An objection, made for the first time on appeal, to the admissibility of an exhibit found in the record, *held* unavailing, because forbidden at that stage of the case by rule 12 of the circuit court of appeals for the Third circuit, and because the exhibit had been made part of the record by stipulation of counsel.

Appeals from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel in admiralty, filed December 7, 1894, by Funch, Edye & Co., trustees, for the owners of the steamship Sophie Rickmers, against the Franklin Sugar-Refining Company, upon a general average bond given by respondents as owners of cargo. On December 26, 1894, the respondents filed a cross libel. On March 12, 1895, after libellants had completed the taking of their proofs, the Franklin Sugar-Refining Company applied for an order under admiralty rule 53, requiring Funch, Edye & Co. to give security for such damages as might be recovered on the cross libel, and for a stay of proceedings on the original libel till such security was entered. The district court denied the application, on the ground that it was made too late. 66 Fed. 342. On the merits a final decree was rendered in favor of the original libellants, and the respondents have appealed.

Horace L. Cheyney, for appellants.

Edward F. Pugh and Henry Flanders, for appellees.

Before ACHESON, Circuit Judge, and WALES and GREEN, District Judges.

ACHESON, Circuit Judge. These two appeals are closely related, and they will be considered together.

1. The ground upon which the court below put its refusal to make an order under Sup. Ct. Rule 53, in admiralty, requiring the respondents in the cross libel to give security and for a stay of the

proceedings upon the original libel until security should be given, was that the application for security and stay was not made as "promptly as it might and should have been, nor until the original libelants had taken their testimony, and incurred the expense of doing so"; and that "to stay proceedings after this lapse of time and under the circumstances would seem to be unjust." The rule in question provides for the giving of security by the respondents in a cross libel, "unless the court, on cause shown, shall otherwise direct." The rule does not give to the libelants in a cross libel an absolute right to security, for, "on cause shown," the court may "otherwise direct." Here the court did otherwise direct, upon the ground of unreasonable delay in the application for the benefit of the rule. Now, assuming that, in the exercise of the authority with which it is invested by this rule, the court may commit an error that would subject its action to the reviewing power of this court, still there ought to be no reversal, unless it clearly appears that the action of the court was unwarrantable. It is not, however, evident to us, that the court below was wrong in holding that the cross libelants had been guilty of inexcusable delay. We perceive no ground to conclude that good and sufficient cause was not shown for the refusal of the court to make the order asked for.

2. The appeal in the suit upon the cross libel from the order refusing the application for security and stay did not operate to suspend the proceedings in the original suit, and the court committed no error in going on to final hearing therein.

3. The original libel was filed by Funch, Edye & Co., as trustees for the owners of the steamship *Sophie Rickmers*, upon a general average bond executed by the respondents (the appellants), who were cargo owners. With respect to the merits of the case, the only defense set up was that the vessel was unseaworthy. No evidence, however, was given on behalf of the respondents to sustain the allegation of unseaworthiness contained in their answer. The respondents took the position in the court below, and they insist here, that the burden of proving seaworthiness was upon the libelants, and that they failed to sustain that burden. The court below held that the libelants' proofs made out a *prima facie* case for them; citing *Railroad Co. v. Broadnax*, 109 Pa. St. 432, 440, 1 Atl. 228. In the brief of the appellant's counsel, it is admitted that that case was identical in proof with the present one. The supreme court of Pennsylvania there said:

"The execution of the bond was shown. The adjustment was proven to have been made in accordance with the laws and usages of the port of destination; and it cannot be doubted that the bond, with its recitals and the adjustment made pursuant thereto, constituted a *prima facie* case for the plaintiff. The court was right, we think, in refusing to charge the jury that the plaintiff was bound to prove the seaworthiness of the vessel, as a condition of his recovery."

It is contended by the appellants that the above-cited decision, and also the ruling of the court below in this case, are at variance with the views of the supreme court of the United States, as announced in the case of *The Edwin I. Morrison*, 153 U. S. 199, 14

Sup. Ct. 823. To this proposition, however, we are not able to assent. In the case of *The Edwin I. Morrison*, which was a suit by the cargo owner against the vessel to recover for damages to the cargo, the circumstances attending the injury to the cargo were such as to cast upon the shipowners the burden of showing seaworthiness. "It was for them," said the court, "to show affirmatively the safety of the cap and plate, and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated;" and it was held that the shipowners had failed to sustain the burden of proof to which the occurrence subjected them. In the present case the respondents' general average bond recites that the vessel, "in the due prosecution of her said voyage, encountered strong winds and a heavy sea, which caused the vessel to labor severely." In view of this admission, the libelants, we think, could well rest upon the presumption that the vessel was seaworthy at the commencement of the voyage, until that presumption was overthrown by proof. *Railroad Co. v. Broadnax*, supra; *Myers v. Insurance Co.*, 26 Pa. St. 192, 195; 2 Greenl. Ev. § 401; *Guy v. Insurance Co.*, 30 Fed. 695; *Earnmoor v. Insurance Co.*, 40 Fed. 847; *Pickup v. Insurance Co.*, 3 Q. B. Div. 594. The case made by the libelants, it will be remembered, was not met by any counter proof.

We have to add, however, that the libelants' case does not depend exclusively upon the presumption that the vessel was seaworthy when her voyage began. This record contains affirmative evidence that such was the fact. Among the exhibits found in the record is a copy of a report of survey of the vessel made immediately before she entered upon this voyage, which sets forth that "the ship was then tight and in seaworthy condition." The appellants, indeed, in a supplemental brief furnished us since the oral argument, assert that this paper was inadmissible, and in fact was not in evidence in the court below, and that it ought not to be considered here. But we are not at liberty to listen to this suggestion; for not only does rule 12 of this court forbid the allowance of the objection now made to the exhibit, but, by stipulation of counsel, this document was made part of the record upon this appeal.

The order appealed from and the decree in favor of the libelants are affirmed.

THE OREGON (JOSEPH et al., Interveners).

(District Court, D. Oregon. April 13, 1896.)

No. 2,486.

1. ADMIRALTY JURISDICTION—LIBEL FOR WRONGFUL DEATH—OREGON STATUTES. The Oregon statutes (section 371) give a right of action for wrongful death, when the deceased, if he had merely been injured, could have maintained an action. Section 3690 creates a lien on all vessels navigating the waters of the state for damages done by them to persons or property. Held, that the personal representatives of one wrongfully killed by a vessel have a lien on her for the damages, and may enforce the same in the federal courts. *The Corsair*, 12 Sup. Ct. 949, 145 U. S. 344, distinguished.

2. LIMITATION OF ACTIONS—COMMENCEMENT OF SUIT—LIBEL FOR COLLISION—INTERVENING PETITION FOR WRONGFUL DEATH.

After a vessel libeled for collision had been released on stipulation, the personal representative of a person killed in the collision filed an intervening petition to recover damages, under the Oregon statute. A recovery was had in the district court, but, on appeal, the supreme court held that the liability of the claimant on the stipulation could not be increased by the subsequent intervention of new claims, and that, when other libels are filed after the vessel's discharge, a new warrant of arrest must be issued, and the vessel again taken in custody. The court therefore reversed the decree, and remanded the cause for further proceedings, but without prejudice to the right of the court below to treat the intervening petition as an independent libel, and issue process thereon. By the Oregon statutes an action is deemed commenced as to each defendant when the complaint is filed and the summons is served on him, and an attempt to commence an action is deemed equivalent to the commencement thereof. *Held*, that the filing of the intervening petition without any attempt to arrest the vessel thereon was not the commencement of a suit against the vessel, so as to stop the running of the statute, and, the two-years limitation having expired before any attempt to issue process thereon, the claim was barred.

3. LACHES—EXCUSABLE DELAY—INTERVENTIONS IN ADMIRALTY.

Delay of interveners in a suit in rem in issuing process against the vessel, resulting from their erroneous belief that a stipulation under the original libel, on which the vessel had been released before the filing of their claims, was security for the payment thereof, will not be held as laches where the error was only disclosed by a decision of the supreme court, reversing a decision below in favor of the interveners.

C. E. S. Wood and Raleigh Stott, for libelants.
W. W. Cotton, for claimant.

BELLINGER, District Judge. In December, 1889, the steamship Oregon collided with the ship Clan Mackenzie. John Simpson, as master of the Mackenzie, and on behalf of that ship, began suit against the Oregon for damages resulting from the collision. The Oregon was thereupon arrested on process, and a monition to all persons interested was published. On January 2, 1890, the Oregon Short Line & Utah Northern Railway Company, as charterer of the Oregon for 99 years from January 1, 1887, filed a claim to the steamship, which was delivered to the claimant, on a stipulation in the sum of \$260,000, to abide and perform the decree of the court. After the discharge of the steamship from arrest, libels of intervention were filed by Simpson in behalf of himself and wife for loss of personal effects, in which were joined some 18 of the crew having like claims, and by James Laidlaw, British vice consul at this port, as administrator of the estates of Charles Austin and Matthew Reed, whose deaths were caused by the collision, and by James Joseph, another of the crew of the Mackenzie, injured by the collision. Exceptions were taken by the claimant to these libels of intervention upon the ground that the discharge of the Oregon from arrest precluded the parties from proceeding by intervention in the original suit. As to the intervention of Laidlaw, the further objection was made that the right of action for the deaths of Austin and Reed did not survive to the administrator. These exceptions were overruled in the district court, and the claimant was ordered to pay

into court the sum of \$35,531.19, to be applied first to the payment of the interveners' claims, and then to the payment of the claim of the original libel. On final appeal to the supreme court this decree, so far as it related to the interveners, was reversed. The court held that the liability of the claimant on its stipulation could not be increased by the intervention of new claims made after the stipulation was filed and the steamship discharged; that if, after a stipulation is given, and the vessel is discharged from custody, other libels are filed, a new warrant of arrest must be issued, and the vessel again taken into custody. The supreme court decreed as follows:

"The decree of the circuit court must therefore be reversed, with costs to the original libelants as against the steamship Oregon, and with costs to the Oregon as against the interveners, and the case remanded to the circuit court for further proceedings in conformity with this opinion; without prejudice, however, to the right of the court below, or of the district court, in its discretion, to treat the intervening petitions as independent libels, and to issue process thereon against the steamship Oregon, her owners or charterers, or to take such other proceedings thereon as justice may require." The Oregon, 158 U. S. 211, 15 Sup. Ct. 804.

In pursuance of the mandate of the supreme court on this order this court entered its order permitting the libels of intervention to stand as original libels from the date of their filing, and directing process to issue for the seizure of the Oregon. Exceptions are filed to the libels of intervention upon the ground that the claims made therein are stale, and are barred by the laches of each of said libelants; and that as to the claim of Laidlaw, administrator, the facts relied upon are not sufficient to entitle the administrator to the relief prayed for.

In support of Laidlaw's right to recover in this proceeding, as administrator, two sections of the Oregon statute are cited as follows:

"Sec. 371. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action had he lived against the latter, for an injury done by the same act or omission."

"Sec. 3690. Every boat or vessel used in navigating the waters of this state * * * shall be liable and subject to a lien * * * for all * * * damages or injuries done to persons or property by such boat or vessel."

It was held, when the case was first in this court, that the lien given by section 3690 accompanied the right of action given by section 371 to the representatives of deceased persons. This part of the opinion of Judge Deady is confined to a mere statement of the right of lien in favor of the personal representatives of the deceased persons, which it is assumed necessarily follows from the statute creating liens in favor of persons injured by boats and vessels. The Oregon, 45 Fed. 77. In *The Corsair*, 145 U. S. 344, 12 Sup. Ct. 949, the court refers to this case as one where "a lien was given by the state statute, and was enforced in the admiralty." A similar reference is made to this decision in *The City of Norwalk*, 55 Fed. 109. In the case of *The Premier*, 59 Fed. 800, Judge Hanford held, under a statute like that of this state, upon the authority of the decision

of Judge Deady in this case "and the apparent approval thereof by the supreme court of the United States in the case of *The Corsair*," that the rights conferred by these statutes are available to the representatives of deceased persons. The case was afterwards affirmed in the circuit court of appeals. *The Willamette*, 18 C. C. A. 366, 70 Fed. 874.

It is claimed that the decision thus made in this case is not conclusive of this question, since the decree as to the interveners was reversed in the supreme court. It is also contended that the principle of the decision in the case of *The Corsair* is against the right of the representatives of deceased persons to avail themselves of the lien of the statute. In that case the court says:

"As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. * * * The Louisiana act declares, in substance, that the right of action for every act of negligence which causes damage to another shall survive, in case of death, in favor of the minor children or widow of the deceased; and, in default of these, in favor of the surviving father and mother, and that such survivors may also recover the damages sustained by them by the death of the parent, child, husband or wife. Evidently nothing more is here contemplated than an ordinary action according to the course of the law as it is administered in Louisiana. There is no intimation of a lien or privilege upon the offending thing, which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed in rem."

The court cites at some length several cases under the English acts, among them the case of *Seward v. The Vera Cruz*, 10 App. Cas. 59-73, and it says that:

"While these cases turn upon the construction of the English acts, the courts have been guided in such construction by principles which are of general application both in this country and in England."

These cases arose under what is known as "Lord Campbell's Act," (9 & 10 Vict. c. 93), which is "An act for compensating the families of persons killed by accident." The Oregon statute in question (section 371) is derived from Lord Campbell's act, and is substantially like it. By the English admiralty court act of 1861, jurisdiction was given to the high court of admiralty over "any claim for damage done by any ship," and it was provided that this jurisdiction might be exercised either by proceedings in rem or by proceedings in personam. The question arose whether this right to proceed in rem under the admiralty act was available to the representatives of deceased persons under the act (Lord Campbell's act), which allowed such representatives to maintain an action for injuries resulting in death, where the deceased might have maintained such action had he survived. It was held that Lord Campbell's act was for the general case, and not for particular injury by ships, and that this pointed to a common-law action, to a personal liability, and was absolutely at variance with the notion of a proceeding in rem. It is contended for *The Oregon* that, if the right to proceed in rem under the admiralty act was not within the act which gave a right of action to the representatives of deceased persons, the right to proceed in rem to enforce the lien of section 3690, upon the same prin-

ciple is not within section 371. The answer to this is that there is no general rule of the maritime law that attaches a lien to personal torts; that a right to proceed in rem does not necessarily involve the existence of a lien in the sense in which we now understand it, but was originally only a means of compelling an appearance. The City of Norwalk, 55 Fed. 111. The refusal, therefore, of the supreme court to recognize a right to proceed in rem in favor of the representatives of deceased persons under a statute like ours does not decide against the right to enforce a statutory lien; on the contrary, such right is expressly declared to exist. The Oregon statute, unlike that of Louisiana, does not provide that causes of damage to another shall survive in case of death. It is substantially like Lord Campbell's act; and in the case of *Seward v. The Vera Cruz*, supra, the view held was (Lord Blackburn concurring), not that the cause of action survived, but that "a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym v. Railway Co.* [4 Best & S. 396], is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who, under such circumstances, suffers pecuniary loss by the death." In the case of *Pym v. Railway Co.*, cited in the foregoing quotation, it was argued in behalf of the defendant that the action maintainable under Lord Campbell's act by the personal representatives of a deceased person is "a mere continuance of that which would have accrued to the deceased if he had lived; but Erle, C. J., said: "The statute, as appears to me, gives to the personal representatives a cause of action beyond that which the deceased would have if he had survived, and based on different principles." 4 Best & S. 403. And so in *The City of Norwalk* the court considers the right "a new right," which is "none the less maritime because based upon state legislation, where the subject-matter is maritime." The fact that the right is new, and therefore does not include the right to proceed in admiralty in rem, does not affect the transaction which the statute has made the foundation of the right, and which is maritime in its character, since it grows out of the faults of navigation upon the navigable waters of the United States. The lien of the statute is enforced as an incident of the transaction upon which the new right of action thus created is based.

The state statute which gives to the representatives of deceased persons a right of action provides that such action shall be commenced within two years after the death, and this limitation is held to operate as a limitation of the liability itself as created, and not of the remedy alone (*The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140); and it is therefore to be distinguished from the limitation by a state statute of the remedy in a matter of which, owing to its maritime character, admiralty has jurisdiction. It is contended for the intervention of Laidlaw that the filing of his libel of intervention within two years was the commencement of an action within the mean-

ing of the statute. The statute of Oregon provides that "an action shall be deemed commenced as to each defendant when the complaint is filed and the summons is served on him, and that an attempt to commence an action shall be deemed equivalent to the commencement thereof, when the complaint is filed and the summons delivered with the intent that it shall be actually served, to the sheriff," etc.¹ In this case there was no attempt to serve process upon the Oregon, and no intent to proceed against her can be inferred from what took place. On the contrary, the object of the intervention appears to have been to recover from the sureties in the stipulation given before the intervention was filed for the release of the ship from the seizure made under the original libel. No new warrant of arrest was issued upon the petitions of intervention. The claim against the sureties was prosecuted until the supreme court decided adversely to it in 1895. These petitions do not constitute the commencement of actions against the Oregon, allowing them the character of independent libels. *Knowlton v. Watertown*, 130 U. S. 327, 9 Sup. Ct. 539, 542. The filing of libels is not enough. There must be, in the case of a ship, a warrant of arrest served, or, if not served, at least attempted to be served. The intent to proceed against the particular defendant must be thus shown. From 1890 to 1895 the interveners prosecuted their claims as claims for which the sureties in the stipulation were liable, and they had a decree in the district court to that effect. Upon the reversal of that decree in the supreme court, they shifted their position, and for the first time sought to reach the steamship by proceeding in rem. Upon their petition to this end the order was made in the supreme court under which this court was allowed in its discretion to treat the petitions of intervention as independent libels, and to issue process thereon against the Oregon. The object of this was to avoid the bar of the statute. Now if, without this order, the statute had run, the order was ineffective for the purpose intended. The court cannot relieve a party from the bar of the statute, nor impair rights which have vested under it. If the order of the court was necessary to give to the petitions of intervention the effect of proceedings that would interrupt the running of the statute, such effect could only operate from the date of the order; and it is conceded that without the order the court had no jurisdiction to entertain the intervening petitions. So that, in either view of the question, the proceeding, so far as *Laidlaw* is concerned, is barred.

As to the other interveners, no such fixed and arbitrary period of time in bar of their right is established; and while courts of equity, as a general rule, in determining the question of laches, proceed upon the analogy of statutes of limitation, yet the court will always adopt a shorter or longer time, if the circumstances of the particular case require it. The delay that has taken place in the prosecution of these claims is due to the erroneous belief of the interveners that the stipulation filed by the claimant for the release of

¹ Hill's Am. Laws, §§ 14, 15.

the Oregon upon the original libel to recover for the loss of the Clan Mackenzie was security for any claim that might be filed against such vessel up to the amount of the stipulation, and so Judge Deady of this court held. The prosecution of these claims against the owners of the vessel, however ineffective for other purposes, was sufficient to advise such owners that the interveners asserted these claims, and relieves the interveners of any imputation of laches. It is not every delay, but unreasonable delay, from which such an imputation arises. The grounds of laches are equitable. It is only when there has been such delay as is inconsistent with good faith, or as operates to the injury of the party proceeded against, that the bar of laches is allowed; and that is not this case.

It is argued that if the interveners had caused the arrest of the Oregon at the time of the interventions the lessee company would have provided security for the claims, and that, such lessee having in the meantime become insolvent, the owners of the Oregon are prejudiced by the fact that such security was not given. But this result is in no way attributable to the delay that has taken place. The owners were at all times advised of the liability of the leased property for damages of this character. If they did not secure themselves against it, they might have done so. The nature of the claims was made clear in the proceedings had upon the interventions. They knew that such claims were being prosecuted in good faith, and were enforceable against the Oregon in a proper proceeding; and the circumstances were such as to advise them that such a proceeding would be resorted to if the decision should be in favor of the sureties on the stipulation under which the ship was released.

The exceptions are sustained as to the intervention of Laidlaw and overruled as to the other interveners.

HINE et al. v. NEW YORK & BERMUDEZ CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

1. CONSTRUCTION OF CHARTER PARTY—FITTINGS FOR ASPHALT CARGOES.

A charter party negotiated for the owners by shipbrokers provided for voyages to South America, not south of the river Platte, "including Guanaco, Venezuela," and contained a stipulation, written into the printed form, that the ship was to be fitted "with shifting boards and bulkheads suitable for carrying asphalt cargoes safely, to be done by owners' agents, but at charterers' expense." *Held*, that the description "owners' agents" did not bind the brokers, individually, to make the fittings, in place of the owners, but, on the contrary, imposed on the owners the duty to deliver the vessel suitably fitted, as specified, for asphalt cargoes, they having been notified that such cargoes were to be loaded. 68 Fed. 920, affirmed.

2. SAME—ACQUIESCENCE OF CHARTERERS—INSPECTION AND ACCEPTANCE.

Shifting boards not being permanent structures, a ship may be properly fitted with "suitable shifting boards," if they are on board, though stowed away until the necessity for their use arises; and therefore the fact that charterers, having a right to have the vessel thus fitted, have an opportunity to go aboard and inspect her before delivery and acceptance, does not estop them from afterwards asserting that the vessel was not so fitted.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel in admiralty by Wilfred Hine and another against the New York & Bermudez Company to recover from the latter, as charterers of the steamship San Domingo, certain expenses incurred at a port of refuge, and charter hire for the period of detention therein. The district court dismissed the libel (68 Fed. 920), and libelants have appealed.

J. Parker Kirlin, for appellants.

Geo. A. Black, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The libelants are owners of the steamship San Domingo. They engaged the firm of Bowring & Archibald, shipbrokers in New York City, to effect a time charter of their vessel. Negotiations ensued between this firm and W. H. Hurlbut & Co., representing the respondents, which resulted in a charter executed by Bowring & Archibald, agents for owners, and by the New York & Bermudez Company, through its president. The material parts of the charter party are as follows:

"The said agents agree to let, and the said charterers agree to hire, the said steamship for a trip of about two calendar months from the day of delivery * * * in New York. * * * she being then stanch, strong, and every way fitted for the service, * * * and to be so maintained during the continuation of this charter party; to be employed in such lawful trades, between safe port ^{and} or ports in British North America (not north of River St. Lawrence) ^{and} or United States of America ^{and} or West Indies ^{and} or South America (not south of River Platte), *including Guanaco, Venezuela*, as charterers or their agents shall direct."

All of this clause was a part of the printed form used, except the words italicized. The words, "South America (not south of River Platte)," were broad enough, by themselves, to include any port in Venezuela. The insertion, therefore, of the words, "*including Guanaco, Venezuela*," was a distinct, positive, and explicit notice to the owners that their vessel was being chartered for use in trade with that port, and was to be stanch, strong, and in every way fitted for such service as employment in that trade would require of her.

Next follows a clause providing for payment by owners of wages, provisions, and stores. This is followed by a provision requiring charterers to pay for coals, port charges, etc.,—both clauses being part of the printed form. Then comes the clause which, by reason of the careless and inartificial way in which it was expressed, has caused the litigation now before this court for determination. It is in ink, containing provisions not contemplated by the printed form, and reads as follows:

"Steamer to be fitted with shifting boards and bulkheads suitable for carrying asphalt cargoes safely, to be done by owner's agents, but at charterers' expense."

It will be noticed first that this clause clearly and explicitly notified the owners that, at whatever of the stipulated ports the charterers found asphalt, it might be expected they would load the vessel with it. The clause also contemplates that something shall be done to the ship in order to fit her for carrying such cargoes. The owners contend that this fitting is to be done by the charterers, and, in support of this contention, call attention to the circumstance that the clause is written under the same subdivision in the charter party which contains the provisions as to charterers paying for coals, port charges, etc. Inspection of the original document, however, shows that this argument is wholly without force. The clerk who undertook to fill up the printed form evidently wrote the clause in the first blank space he found large enough to contain it. Alternatively, the owners contend that it was to be done by Bowring & Archibald individually; the words "owners' agents" being, as they contend, mere descriptio personæ, and used for the purpose of identifying that firm. This would be a most strained and unnatural construction. The charter party is a bipartite agreement. The construction contended for would introduce a third party, individually responsible for defaults in the performance of acts for the doing of which it received no consideration. Evidence was introduced by the libelants explanatory of the situation of the parties, and which discloses the negotiations that led up to the making of the charter party. When the charter was first talked of, Guanaco was not referred to. It was subsequently named as one of the ports. Asphalt was spoken of as probable cargo, and, when the parties had about got to terms as to rate of hire, charterers wished the owners to pay the expense of putting in the fittings necessary for that sort of cargo. Bowring & Archibald, acting as agents for the owners, declined to go to this expense, whereupon the charterers agreed to pay it, but still expressed a desire to have the fittings put up, or their putting up seen to, by Bowring & Archibald. There seems to have been some impression that Bowring & Archibald's long experience as steamship owners and agents would tend to insure the work being done properly. But all this in no way operates to require an unnatural construction of the clause. A phrase which states that a certain piece of work is to be done by "owners' agents" plainly imports that it will be done by agents of the owners, not by agents of the charterers. That the charterer is to pay the expense entailed does not change the provision for doing the work; and if the particular agents who represent the owners have superior knowledge and experience, and may be expected to use superior judgment in prescribing the details of the work, that knowledge and experience may presumably benefit the owners, but will not relieve them of the obligation to do the work which they have stipulated shall be done by their agents. We concur, therefore, in the conclusion expressed by the district judge, as follows:

"The clause in question was a substantial and necessary part of the charter. The nature of the cargo—a peculiar one—is not elsewhere referred to. Special fittings for such a cargo were necessary to be made by some one;

and, as the clause in question is made a part of the charter itself, I feel bound to construe it in connection with the previous clause, providing that the ship 'shall be in every way fitted for the service,' and as an amplification and further specification of what the service was expected to be, and what was necessary to make the ship fit."

The charter party, therefore, when executed by owners' agents, bound their principals, the owners, when notified that an asphalt cargo was to be loaded, to deliver the *San Domingo* "tight, staunch, strong, and in every way fitted for" such service, "with shifting boards and bulkheads suitable for carrying asphalt cargoes safely." Apparently, this stipulation was entered into by owners' agents without any consultation with their principals. It was, however, within their authority, as shipbrokers and agents for the owners, to make such stipulation. It was, moreover, reasonably to be expected that having, as agents, thus increased their principal's obligations beyond the measure expressed in the usual printed form of charter party, they would continue to act as agents for owners, in complying with such special stipulation. In other words, having pledged the ship to a warranty of the seaworthiness of additional fittings to be put in by them, it might fairly be supposed that they would personally superintend the doing of the work, thus giving their principals the benefit of the special knowledge and experience they were supposed to possess. The contrary seems to have been the case. Having negotiated the charter, executed the charter party on behalf of owners, and thus, presumably, earned their commissions, they turned the business of fitting up the *San Domingo* to safely carry asphalt cargoes over to the captain, who had never had any experience with such cargoes. The *San Domingo* being in Philadelphia, Bowring & Archibald sent for the captain to come to New York, for consultation with the charterers. Upon his arrival they sent him with a clerk to the charterer's office. There he received some general instructions, but none as to shifting boards, or the kind of bulkheads needful to keep the asphalt from shifting. He returned to his ship, in Philadelphia, and, agreeably to the advice of Bowring & Archibald, consulted L. Westergaard & Co., steamship agents in Philadelphia, as to the best man for doing the fitting up, and, on the latter's advice, employed a firm of ship carpenters to do the work. The carpenter to whom the work was intrusted did not know how many tons of asphalt the vessel was going to carry. He had never fitted up a vessel for asphalt, and made no inquiries as to what fittings were necessary for such a cargo. The captain, who understood that asphalt was about like pitch, informed him that the cargo was a nasty one to carry, that it would run, and that the bulkhead had to be made extra strong. The carpenters lined the ship's sides with plank, to protect it against the sticky contact of the asphalt. They also took down the cross bulkhead already in the fore hold of the ship, and rebuilt the same so as to enlarge the temporary coal bunker between that bulkhead and the engine room. No other work was done, no shifting boards placed, nor any prepared and put on board; and in this condition the vessel was delivered to charterers, and sailed from Philadelphia to take her cargo of as-

phalt at Guanaco. "Shifting boards" are temporary partitions dividing the hold or holds, in which they are placed fore and aft. Their thickness and strength naturally vary with the cargo they are intended for. Their object is to prevent cargo in bulk from shifting from one side to the other, thus producing a list which, unless checked, will itself induce still more cargo to shift to the downward side. The evidence shows conclusively that, in order to carry Guanaco asphalt safely, such fore and aft division of the hold in which it is carried is absolutely essential. It is softer than Trinidad asphalt, and when dumped into a vessel's hold, in the climate of Guanaco, it soon gets into about the consistency of thin dough, runs together, and finds its level. There is some evidence to the effect that shifting boards are not needed with Trinidad asphalt, and it is argued that since the usual commercial asphalt comes from Trinidad, provision for safely carrying asphalt does not necessarily require shifting boards. The difficulty with this suggestion, however, is that the charter party expressly calls for shifting boards. The ship carpenter who was recommended by the firm in Philadelphia as "the best man for doing this fitting up" put in no shifting boards, because no one instructed him to. The firm in Philadelphia whom Bowring & Archibald instructed the captain to consult with did all they undertook when they recommended the ship carpenter. The captain did not direct the carpenters to provide shifting boards, because, although he had a copy of the charter party in his possession, he never read it until after he sailed from Philadelphia for Guanaco. Bowring & Archibald, the owners' agents, who had inserted the clause prescribing the fitting up for asphalt cargoes, and who knew that shifting boards were to be part of such fittings, did not see that they were provided before delivery of the vessel, for the reason, apparently, that after they had closed the contract they gave no further attention to carrying it out. If they had supervised the work which the contract specified should be done by "owners' agents," they surely could not have failed to provide the shifting boards they had agreed should be provided; and since, in our opinion, the catastrophe would not have happened, had the vessel been provided with a complete set of sufficient shifting boards, the loss in this case is undoubtedly due to the failure of the owners' agents to carry out the terms of the stipulation which they pledged their principals to carry out.

The San Domingo sailed in due course for Port of Spain, where she was to touch and report to charterer's agent, and thence to Guanaco. Having by this time read the charter party, the captain, on the voyage down, put up shifting boards fore and aft in the forward hold, and shored or braced them up, where needed, against the ship's sides. The timber used was such as he had aboard; part of it being a temporary between-decks, which was laid when carrying fruit. In the after hold there was a tunnel shaft rising about seven feet high from the bottom of the ship, which, for that distance, sufficiently answered the purpose of a fore and aft partition. No shifting boards were placed immediately above this tunnel, and

in fact there was not sufficient timber on board available for the purpose, nor could any be procured ashore. After the asphalt had been loaded into the after hold to a height of some two feet above the top of this tunnel shaft, some shifting boards—part of which were abstracted from the charterer's agent at Guanaco—were placed in this hold, extending up to the top of the cargo, which rose a little way above the between-deck beams. The vessel sailed in due course from Guanaco. On the first day out she took a list to starboard, which increased on the second day, while she lay in the harbor of Port of Spain. On the morning of the third day it was found that some of the shifting boards in the forward hold had been carried away,—not broken, but lifted out of place,—and that the forward bulkhead on the starboard side was burst through, the asphalt flowing into the temporary coal bunker. The shifting boards in the upper part of the after hold were intact. Without going into further details, it is sufficient to say that the list increased to such a dangerous extent that it became necessary to beach the vessel, discharge and store her cargo, and put up new fittings, in order to complete the voyage. There are three theories to account for the catastrophe. The respondents insist, and the district judge found, that the principal cause was "the bursting of the bulkhead, which may have been due either to insufficient supports, or to weak, brittle material, some of which, consisting of hemlock, the evidence shows, was undoubtedly used in the construction." If this were the cause, the ship would be responsible, for the reason that a structure which her owners had undertaken should be "suitable to safely carry" asphalt cargo had broken down without unusual strain. The second theory is that the vessel having, from some cause or other, a slight list to starboard, the shifting boards in the fore hold gave way, and that the asphalt, flowing to starboard, heaped itself up against the temporary cross bulkhead to such an extent as to subject it to a strain far greater than its builders had any reason to expect. Upon this theory it might be found that the cross bulkhead was sufficiently strong to carry asphalt cargoes safely, but certainly there must have been some defect in the shifting boards, or in the way in which they were put up, for which, since they were part of the fittings required, the ship would be responsible. The third theory is that, under the influence of a slight list to starboard, the semifluid asphalt in the after hold made its way from port to starboard through the space above the tunnel shaft, where there were no shifting boards, and that, as the quantity on the starboard side gradually increased, the list increased likewise, until, by reason of the recession of the asphalt from the starboard side of the shifting boards in the fore hold, and the heaping up of the same upon the port side of those boards, they gave way, whereupon the asphalt heaped up to starboard sufficiently to break through the temporary bulkhead. This theory, which is advanced by appellants, seems to us the most reasonable one. But, even if the damage were caused in this way, the ship is nevertheless responsible. Had she protected the after hold with shifting boards upon the top of the tunnel

shaft, there would have been no place through which the asphalt could have flowed from port to starboard so as to increase the list sufficiently to break down any of the partitions. The reason the ship was unable thus to protect herself against the shifting action of the cargo was the failure to provide her with suitable shifting boards before she sailed from Philadelphia, and for such failure, as has been shown before, the owners are responsible.

"Shifting boards," as the name implies, are not permanent structures; and a ship may properly be said to be fitted with "suitable shifting boards," if they are aboard, although stowed away until the necessity for putting them in place may arise. The circumstance, therefore, that the charterers had a chance to go aboard the ship at Philadelphia, and see her fittings, before delivery was accepted, does not estop them from now insisting that she did not have on board the material which the charter party stipulated she should carry for the purpose of putting up the temporary partitions when required. Nor do we find in the testimony as to the sayings and doings of Capt. Cann, who was the agent for the charterers' asphalt business in Port of Spain and Guanaco, sufficient to excuse the shipowners from carrying out the terms of their written contract. Whatever authority Cann had,—and that is not very clearly shown,—he certainly had none to alter the contract, or waive the obligation of complying with its terms.

When she was in the port of refuge the San Domingo was furnished with a fore and aft bulkhead in the after hold, and a double plank fore and aft bulkhead in the forward hold. These bulkheads, which were required by the surveyors at Port of Spain, were paid for by the owners, and have not been paid for by the charterers. We are inclined to the opinion, from the testimony, that these structures were more elaborate and expensive than the occasion warranted. With such a cargo as this, it is evidently "the first step that costs." Once let a small quantity get over to the wrong side of the ship by an unobstructed path, and the list will continue to increase till nothing but a permanent structure as solid as the ship's side can resist the strain. But the feeble movement of the first installment may, no doubt, be effectually checked by a much slighter obstacle. The catastrophe already experienced, however, had probably made the surveyors overcautious. The claim is made by libelants that the cost of these fittings should be allowed to them. The district judge disallowed the claim, as not within the issues raised by the pleadings. The charterers undoubtedly are chargeable with the necessary expense of supplying sufficient fore and aft partitions, but it does not follow that they are to pay the increased cost of putting up such partitions in a port of refuge. If there were evidence in the case showing what would be a fair and reasonable price for supplying shifting boards suitable for safely transporting asphalt cargoes, in the port of Philadelphia, at the time the vessel was fitted up, we would be inclined to allow libelants to recover that amount, irrespective of the form of their pleading, and thus avoid circuitry of action, but there is no such evidence in the case. The decree of the district court is affirmed, with costs.

THE C. P. MINCH.

TALBERT et al. v. ELPHICKE et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

1. SALVAGE—SERVICES OF MEMBERS OF CREW—SHIPWRECK AND ABANDONMENT.

In every case where compensation in the nature of salvage has been awarded to seamen, either the voyage has been terminated by shipwreck, or the ship has been abandoned by all, or by all except the salvors, under circumstances showing conclusively that the abandonment was absolute, without hope or expectation of recovery, or that the seamen had been by the master unmistakably discharged from the service.

2. SAME.

A schooner was anchored near shore on a dark, squally night, in a heavy sea, when, by a change of the wind, she was swung round towards the shore, so that she began pounding on a sandbar, and dragging her anchor. The master directed the yawl boat to be lowered, and told the crew to get ready to go ashore. The mate, cook, and one seaman refused to go, and were left on board. On reaching the shore, the master went for a tug, which agreed to go out next morning. After he had left, the mate took soundings, found deeper water towards the stern, and let out the anchor chain until the schooner was in deep water, where she rode quietly until morning. The master then rejoined her, and the voyage was completed, and wages paid to the crew. *Held*, that there was no evidence of a final abandonment of the schooner by the master, and that those who remained on board were not entitled to salvage. 61 Fed. 511, affirmed.

Appeal from the District Court of the United States for the Northern District of New York.

This libel was brought by the mate and a seaman, being two of the crew of the schooner C. P. Minch, to recover salvage compensation for services rendered during a voyage from Portage Entry, a port on Lake Superior, to Buffalo, N. Y. The voyage was completed, neither the vessel nor her cargo of stone sustaining loss or damage, and libelants, with the rest of the crew, paid off in Buffalo. The facts upon which the claim for salvage is based are stated in the opinion. The district court, Northern district of New York, dismissed the libel (61 Fed. 511), and libelants have appealed.

Geo. S. Potter, for appellants.

Geo. Clinton, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The general rule of law governing claims of this character is thus stated by Mr. Justice Story, delivering the opinion of the supreme court in *Hobart v. Drogan* (The Hope), 10 Pet. 108:

"Seamen, in the ordinary course of things, in the performance of their duties, are not allowed to become salvors, whatever may have been the perils or hardships or gallantry of their services in saving the ship and cargo. We say in the ordinary; for extraordinary events may occur, in which their connection with the ship may be dissolved de facto, or by operation of law, or they may exceed their proper duty, in which cases they may be permitted to claim as salvors."

It is provided in Act June 7, 1872, §§ 32, 33, now sections 4525, 4526, Rev. St. U. S., as follows:

"Sec. 4525. No right to wages shall be dependent on the earning of freight by the vessel; but every seaman or apprentice who would be entitled to demand and receive any wages if the vessel on which he has served had earned freight, shall * * * be entitled to claim and recover the same of the master or owner in personam, notwithstanding that freight has not been earned. But in all cases of wreck or loss of vessel, proof that any seaman or apprentice has not exerted himself to the utmost to save the vessel, cargo, and stores, shall bar his claim.

"Sec. 4526. In cases where the service of any seaman terminates before the period contemplated in the agreement, by reason of the wreck or loss of the vessel, such seaman shall be entitled to wages for the time of service prior to such termination, but not for any further period."

This legislation relieved seamen from the operation of the harsh rule that payment of their entire wages was dependent on the earning of freight, although the catastrophe occurred near the end of a long voyage. Before its enactment, courts had frequently held that where, under the operation of the rule, wages, as such, could not be recovered, a sum equal to their wages might, in proper cases, be allowed to the seamen. Some cases justify this allowance as an exception to the rule that "freight is the mother of wages"; but in other cases it is referred to as a sort of qualified salvage. *The Neptune*, 1 Hagg. Adm. 236; *The John Taylor*, Newb. Adm. 341, Fed. Cas. No. 2,482; *The Two Catherines*, 2 Mason, 319, Fed. Cas. No. 14,288; *The John Perkins*, 21 Law Rep. 91, Fed. Cas. No. 7,360; *The Dawn*, 2 Ware, 126, Fed. Cas. No. 3,666. And there are cases in which seamen have been awarded an amount of salvage greater than their lost wages. A brief statement of the circumstances under which such awards, whether equal to or in excess of wages, have been made, and of the circumstances attending certain cases where they have been refused, will best indicate what merit there is in the libelants' claim in the case at bar. Probably, the following enumeration does not include all the cases in which such awards have been made to seamen, but it does include all to which either counsel has referred, and all which, within the brief period at our disposal, we have been able to discover:

In *The Neptune*, 1 Hagg. Adm. 236, the ship was driven by a gale on to the French coast, stranded, and broken up so that only a small part of the ship, and no part of the cargo, could be saved. For most meritorious services after the voyage came thus to an untimely end, the seamen were awarded their wages.

In *Taylor v. The Cato*, 1 Pet. Adm. 48, Fed. Cas. No. 13,786, *Warder v. La Belle Creole*, 1 Pet. Adm. 31, Fed. Cas. No. 17,165, and *Weeks v. The Catherina Maria*, 2 Pet. Adm. 424, Fed. Cas. No. 17,351, the vessel foundered at sea, the crew and part of the cargo being saved by another vessel.

In *Adams v. The Sophia*, Gilp. 77, Fed. Cas. No. 65, the brig was wrecked near the Capes of the Delaware; vessel and cargo a total loss, but some of the rigging and spars saved.

In *The Dawn*, 2 Ware, 126, Fed. Cas. No. 3,666, the vessel was gotten into Bermuda, but in so damaged a condition that she was sold as a wreck. The court allowed wages and expenses home.

In *Cartwell v. The John Taylor*, Newb. Adm. 341, Fed. Cas. No.

2,482, the vessel was wrecked on the south coast of Cuba; a total loss, some part of her tackle, apparel, and furniture only being saved.

In *The Two Catherines*, 2 Mason, 319, Fed. Cas. No. 14,288, the vessel was shipwrecked in Narragansett Bay, and soon afterwards sank; the crew saving only a part of the sails, rigging, cables, and appurtenances.

In *The Triumph*, 1 Spr. 428, Fed. Cas. No. 14,183, the vessel was in collision off Cape Cod. The master and all the crew rushed on board of the colliding vessel, except libellant (the cook), who was asleep below. By the time he got on deck, he saw the last of his shipmates climbing aboard the other vessel. He hailed and begged to be taken off, but the master of the other vessel refused to wait, although the master of the *Triumph* begged him to do so. The libellant rigged the pump, found the leak, patched it up as well as he could, and managed to navigate the vessel after a fashion until another vessel came to his assistance. He was awarded salvage beyond the amount of his wages.

The *Le Jonet*, L. R. 3 Adm. & Ecc. 556, was also in collision. All but the mate escaped to the colliding vessel, which bore away. The mate got *Le Jonet* before the wind, and kept her so for some hours, till the wind moderated, when he laid the vessel by the wind, and hoisted a signal for assistance. She was sighted and taken in tow by a steamer, the mate steering her, and brought into Hull, with eight feet of water in her hold. Sir Robert Phillimore held that the contract of the mate had been dissolved, because of the final abandonment of the ship by the master and all the crew, except the mate, who voluntarily stayed on board, and awarded him full salvage for meritorious services.

The crew of *The Olive Branch* (1 Low. 286, Fed. Cas. No. 10,490) were abandoned by the master, who deserted near the home port. She soon afterwards stranded. There was no mate, and the men got the ship off shore, and saved her, with considerable difficulty and danger. Judge Lowell, however, held that they were not salvors; evidently on the ground that their contract was not terminated, either by discharge or by abandonment of the vessel, for the master's departure had nothing to do with the coming storm, and the case was the same as if he had lawfully gone ashore, leaving the men in charge, or had been lost overboard.

In *Newman v. Walters*, 3 Bos. & P. 612, the ship *Betsey* struck on the rocks off Chichester. Being in apparent danger, the captain got into the pinnace with three of the crew, and made his escape. The pilot was drunk. The mate and the rest of the crew requested plaintiff, a free passenger, who had been a sea captain, to take charge. He did so, and was awarded salvage, because he was a passenger. Lord Alvanley says:

"The crew, indeed, ought not to desert the ship so long as they can possibly remain on board; and, if the mate in this case had saved the ship by doing what the plaintiff did, he would not have been entitled to claim a compensation in the nature of salvage."

In *The Aguan*, 48 Fed. 320, the steamship stranded on Roncador Island, and became a total loss. The chief officer and 4 men went in a boat to Corn Island for a small steamer, which came and took the passengers and 31 of the crew to Greytown. All hope of saving the *Aguan* was abandoned. The small steamer would not take any more, and the captain and 7 men were left on Roncador Island, to guard some specie still on the wreck, and wait for the return of the steamer. She did not come. A storm threatened, and it became apparent that the *Aguan* was about to break up. They took the specie ashore, and, the steamer not arriving in three days, they got a small sailboat, and carried the specie to Greytown. They were awarded salvage.

In the case of *The Blaireau*, 2 Cranch, 240, the ship, on her voyage from Martinique to Bordeaux, was at 10 o'clock p. m. run down by a Spanish man of war, which inflicted serious injuries on and about her bow. Before morning there were 3½ feet of water in the hold, and the Spanish commander, not being able to wait for an attempt to repair her, took her crew and passengers on board his ship, excepting one man, Thomas Toole, who was prevented from going into the first boat, and afterwards refused to go in the second boat. Toole, by cutting away the anchors and bowsprit, which had been left hanging, lightened her bows, put her before the wind, and hoisted a signal of distress. In this situation she was found the next day by another ship, and eventually brought into port. It was held that he had been discharged from all further duty under his contract, so far as any act whatever could discharge him, when he and the vessel were abandoned by the master and crew in mid-ocean, to the mercy of the waves, and he was awarded full salvage.

The Umattilla, 29 Fed. 252, ran upon a rock on an inhospitable coast near Cape Flattery, many miles from succor. She was stove in. Upon taking off the fore hatch, the hold was found to be full of water, and it was supposed she would sink the moment she slid off the reef. The master and crew abandoned her absolutely. The mate and two seamen voluntarily remained on a life raft in the vicinity of the vessel. The captain and the rest of the crew reached the mainland about an hour and a half from the time they left the ship, which was lost to sight, by reason of the falling snow. Subsequently, the steamer slid off the reef, and the party on the raft, perceiving that she was not sinking, boarded her, and got her under way for the Columbia river. With the assistance of a steamer subsequently encountered, the vessel reached Esquimalt Harbor safely. In deciding that the mate and his companions on the raft were entitled to salvage, the court says: "No one, not even the salvors, appears to have entertained a hope that the ship could be saved,"—and reached the conclusion, which the evidence fully justified, that the master and crew quitted the ship without any hope of saving her, and with no intention of returning to and resuming possession of her.

In *Mesner v. Bank*, 1 Law. Rep. 249, Fed. Cas. No. 9,493, the steamer was in collision, and began to sink. Some of the crew es-

caped on the colliding boat. Others got into small boats, and lay alongside. Subsequently the engineer got aboard her with an ax, cut a hole in the promenade deck, and got \$46,000 out of the captain's office. When he left the steamer, the water was over the guards. The court, by Davis, District Judge, says:

"The navigation of the boat was abandoned, but the circumstances of the case do not present a case of derelict. The situation of the New England was deplorable, but not desperate. She was left, indeed, by all on board, under an impression that she was sinking; but the master and a part of the crew remained about her in their boats, and very soon entered on board again, for saving the property of the passengers and owners, as might be practicable. It would be carrying the doctrine of derelict to an undue extreme to consider this a case of absolute abandonment. The *Emulous*, 1 Sumn. 207, Fed. Cas. No. 4,480."

The *Florence*, 16 Jur. 572, met with bad weather, and was abandoned in the Bay of Biscay, by order of the master. All went aboard the steamer *Montrose*, and were landed at Vigo. The British consul put them on another steamer, for conveyance to England. They fell in with the derelict. The mate and part of the crew volunteered to return to her, and, with the help of others, brought her to Corunna. Salvage was awarded to them by Dr. Lushington, who, on the subject of abandonment, uses language which will be found to be quite pertinent to the facts in this case:

"First. The abandonment must take place at sea, and not upon a coast; for, if a ship be driven upon a coast, and becomes a wreck, and the mariners escape to the shore, the contract inures to this extent, at least, that if they act as salvors, and successfully, so as to save enough to pay their wages, they will be entitled to them, though not to salvage. If they do not so exert themselves, their wages are lost. * * * I use the words 'at sea' emphatically, for I hold there is a very wide distinction between an abandonment at a distance from land, in the open ocean, and the quitting of a ship on the coast, where there may exist a fair expectation of returning, where the *spes recuperandi* is probable."

The facts in the case of *The John Perkins*, 21 Law Rep. 87, Fed. Cas. No. 7,360, were as follows: A fishing schooner, called the *Wyvern*, and three other vessels, including the *John Perkins*, were accidentally inclosed in a large field of ice, which extended along the shores of Massachusetts Bay. Though the vessels were imbedded, the field of ice was moved by the wind and sea. In this condition these vessels remained for several days, drifting helplessly with the field of ice, which was constantly becoming thicker and more dangerous, by the piling of masses on each other, which the intense cold at once rendered solid. The crews became alarmed for their own safety. On Saturday, February 11th, the crew of the *Wyvern*, with the exception of one Nickerson, left her, and went ashore, over the ice. Nickerson thought this attempt more dangerous to him than it was to remain on board, and he therefore remained. About noon of Sunday, the 19th, the crew of the *John Perkins* left her, and went, first, on board the *Acorn*, one of the other vessels inclosed in the ice, and, during the afternoon, went on shore, together with the crews of the two other vessels, deeming it to be hazardous to life to remain. The wind was blowing a gale, and there can be no doubt that the condition of all the vessels was one of extreme peril. Sub-

sequently, a collision between the John Perkins and the Wyvern, which would probably have caused the destruction of both vessels, was prevented by the act of Nickerson, who cut the cable of the Wyvern. Of the claim that Nickerson was to be considered a salvor of the Wyvern, Mr. Justice Curtis says:

"Though the master and crew of the Wyvern temporarily left the vessel, under the pressure of the danger arising from the force of the wind, it was their intention to return on board; and, though they undoubtedly considered the danger imminent, there is no reason to say, upon the evidence, that they thought the condition of the vessel hopeless. They not only intended to return, but expected to return. And they at no time were far enough distant to lose sight of the vessel in the daytime, or to be unable to return promptly when the gale should abate. This was, therefore, not any case of a derelict vessel; nor were those of the crew who went on shore, or the libellant [Nickerson], who remained on board, absolved from their duties as seamen; the latter to do anything which he might find practicable for the safety of the vessel while he remained on board."

Of this case of *The John Perkins*, Judge Sprague, delivering the opinion in *The Triumph*, supra, says:

"The master and all her crew but one left her by reason of danger from the ice, with the intention of watching her from the shore, to contribute to her preservation as far as might be in their power, and to return to her if practicable, and they actually did return to her. None of the seamen were discharged. They were allowed by the master the option of going ashore for the time being, or of remaining on board. One chose to remain, but all continued under his authority and subject to his command."

The Acorn, 3 Ware, 98, Fed. Cas. No. 10,252, was one of the boats imprisoned in the same field of ice as the John Perkins. Libelants were two of the crew who remained on board after the rest of the steamer's company had gone on shore. It was held that they were "not absolved from their contract."

Upon the question as to what is sufficient evidence of abandonment, reference may be had to *Clarke v. The Dodge Healy*, 4 Wash. C. C. 651, Fed. Cas. No. 2,849, which in some respects resembles *The John Perkins*, supra. She was caught in a solid cake of ice in Delaware Bay, and drifted down in the direction of the Cross Ledge Shoals, where she was abandoned by her pilot officers and crew, who came on shore at Ben Davis' Point, bringing with them, in their boats, their colors, compass, quadrants, clothes, bedding, and other articles, as many as the boats would stow. This was by the pilot's orders (the master was temporarily absent, in Philadelphia, and the first mate in command), and was induced by the apprehension that she would drift upon Cross Ledge Shoals, and be cut to pieces, or overwhelmed by the ice. The pilot, while expressing his apprehensions, added that, if she should escape drifting on the shoals, she would return with the tide the next morning, nearly to the same place where they then were, when the officers and crew could return to and take possession of her. Certain oyster men boarded the deserted vessel, and began operations to save her. Thereupon the mate, with four or five volunteers, returned to the brig, but was told by the oyster men that they had, and meant to hold, possession of her. The mate then left. The brig was subsequently saved. There was no question in this case of seamen's salvage, but the court dis-

cusses the subject of abandonment. It is suggested that, when such a question arises, one's actual intention is best determined by acts, rather than by declarations, contemporaneous or subsequent. After discussing all the facts, Judge Washington says:

"I am, in short, quite satisfied that an abandonment of the brig, without the intention to return to her in case she should escape the danger that threatened her, was at no period of time in the contemplation of the mate; and that, when he spoke of her being abandoned, he was far from annexing a technical meaning to the phrase, but merely intended to express the danger he apprehended her to be in, and his abandonment of the possession of her until the danger should be over, or should appear to be less imminent. I consider the brig as having at no period of time been out of the constructive possession of the owners. * * * She was deserted on account of an immediate danger, and only during such danger; but *animo revertendi* if the danger should pass away. She was watched by the mate, and was always in his view whilst on shore."

The *Warrior*, 1 Lush. 476, is an instructive case on the subject of discharge. The ship went ashore on a rocky beach in the Canary Islands, beat heavily, and in half an hour filled with water. The master and crew immediately quitted her, and went ashore. The next day, the master formally, in writing, discharged all officers and crew. Thereafter, some of the crew, at the suggestion of the mate, returned to the ship, and, by working for several days, succeeded in saving part of the ship's stores and a considerable amount of cargo. The ship was broken up. The court held that there was no abandonment, but that, although there was some doubt if the master was justified in discharging the officers and crew, still, since there was no evidence of collusion between them, and he did in fact discharge them, their contract should be considered terminated, and they were held entitled to salvage.

From this review of the authorities, it is apparent that, in every case where compensation in the nature of salvage has been awarded to seamen, the voyage has terminated by the shipwreck of the vessel, which has either gone to the bottom or left her bones on the shore, or she has been abandoned by all, or by all except the salvors, under circumstances which show conclusively that the abandonment was absolute, without hope or expectation of recovery, or the seaman has been by the master unmistakably discharged from the service of the shipowner.

The facts in the case at bar are as follows: The schooner sailed from a port on Lake Superior for Buffalo. When she had reached a point on the lake about abreast of No. 10 Life Saving Station, the wind was blowing a gale from the southeast; whereupon her sail was shortened, and her course directed towards White Fish Point. She dropped anchor under the lee of the point, less than a mile from land, in $4\frac{1}{2}$ fathoms of water, the vessel drawing 13 feet. A short distance from her, and between her and the land, there was a gravelly, sandy bar, where the water was shoal. Towards midnight the wind died down, the glass fell, and everything indicated a coming storm. About midnight the wind veered to W. N. W., blowing hard. This put the schooner off a lee shore. A heavy sea arose, and the night was rainy, dark, and squally. The schooner swung around

towards the shore, dragging her anchor, until she reached and commenced to pound upon the bar. The master directed the yawl boat to be lowered, and told the crew to get ready to go ashore. All these facts are undisputed. There is a conflict of testimony between the captain and the mate as to exactly what conversation passed between them. The mate insists that the captain told him to get his bag, and get into the boat, as they were going to leave; that he refused, replying that he was going to stay aboard as long as she stayed together, to which the captain replied that he was a very foolish man, and would probably drown himself. All this the captain explicitly denies, and it is not material one way or the other. The utmost that can be claimed for it is that the master was alarmed for his own safety, as well as for that of the others on board, and thought the wiser course would be for all to go ashore, instead of remaining aboard throughout the night. The master and three of the seamen thereupon took some of their clothes and effects, got into the yawl boat, and went ashore. The mate and the other libelant, besides the cook and two passengers, remained on board. It appears that, had all embarked in the yawl, the risk of individual shipwreck was probably greater than if some of them remained on the schooner, because, although her situation on a lee shore, with a sandy bar under her, upon which she was beginning to pound, was naturally an unsafe one, which would expose her, should the gale increase without any change in the direction of the wind, to the risk of being cast ashore, it was not imminently perilous. The mate testifies that, at the time the others left in the boat, he was not terrified, because there was nothing to be frightened at; that he thought she could be saved; and that, "if a man worked right, she could be got off." After the boat had left, the libelant Talbert took soundings, and, discovering that there was deeper water astern and amidships, gave the schooner more chain, the vessel swinging over the bar into deeper water, where she was held by her anchor, riding out the gale until daylight. Early the next morning, a tug appeared. A line was passed to the schooner, and, with the tug's assistance, the vessel moved slowly out onto the lake, where, sail being made, she cast off from the tug. The libelants then started for the Sault, and the tug went into White Fish Point, whence she soon returned to the schooner, with the captain and the other three seamen. This same tug was lying under the lee of the point when the schooner first came to anchor, and her presence there was noticed by the captain and others. When the wind shifted during the night, the tug steamed around to the other side of the point, where she tied up to a dock at the fishing station. The captain and the three seamen in the yawl reached the shore in safety, at a place about two miles and a half from the end of White Fish Point, and about a quarter of a mile from the schooner. A fire was lit on the beach, and two of the seamen remained by it all night. The captain was ignorant of the fact that the tug had gone around the point, and went at once to find her. Being informed of her change of position, he got a lamp from a house near where he landed, so that he could find the

path across the point to the fishing station, where he was informed the tug might be found. Accompanied by one of the seamen, he set off at once, and made his way through the woods to the place where the tug lay. The master of the tug, a disinterested witness, testifies:

"[The captain] told me his schooner was ashore, and wanted me to go to her assistance; and I told him the weather was not fit for me to go around there. He told me to try; he would like to have me go around, and, if I could not do anything else, to save the crew."

The master of the tug refused to go then (it was about 2 a. m.), but promised to start as soon as it was daylight. The captain thereupon went back to the other side of the point, to return the lantern that he had borrowed. Progress through the woods was slow; so that, although the distance was not much over a mile and a half, it took him nearly an hour. About 3 a. m. the weather began to moderate, and, as it came to daybreak, he started to go back to the tug, when he saw her coming around the point, her master having started a little earlier than he promised. When the tug and schooner drew off into the lake, the captain and the three seamen again crossed the point to the dock, abandoning their yawl boat, and, when the tug returned, got on board of her, and regained the schooner.

It is manifest that these facts, which are undisputed, do not bring the case within either of the three categories above set forth. Even if the mate's statement of the conversation between himself and the captain be the correct one, it certainly did not operate as a discharge of the mate, or of the others of the crew who remained on board, from the obligations of their contract with the shipowner. The captain's story is that he said to the mate: "We have got to go ashore, and get assistance, and get her out of here;" and, when the mate refused to go, he went himself, taking the three seamen with him. Nor was there any abandonment. The case is on all fours with *The John Perkins*, supra, and *Clarke v. The Dodge Healy*, supra, where the vessel was "deserted on account of an immediate danger, and only during such danger, but animo revertendi if the danger should pass away." The acts of the captain in hurrying at once to the tug, and the request he made of its master, show conclusively that he had not abandoned all hope of saving the schooner. And certainly there was no shipwreck.

The decree of the district court is therefore affirmed, with costs.

EARNMOOR STEAMSHIP CO. v. NEW ZEALAND INS. CO.

(District Court, N. D. California. April 16, 1896.)

No. 10,287.

1. GENERAL AVERAGE CHARGES—INJURIES TO TUGS.

Incidental injuries to tugs, such as the breaking of hawsers and the loss of a propeller while engaged in pulling off a stranded ship, under a contract of hiring by the day, are to be deemed as comprehended in the con-

tract price, and cannot be allowed, in making a general average adjustment, against the various interests in the stranded ship and cargo.

2. SAME—ABANDONMENT OF VOYAGE—FREIGHT.

Where various interests in a stranded vessel and cargo, in order to avoid "greater general average expenses," made an agreement for the allowance of the freight to the charterers as a condition of the abandonment of the voyage, *held*, that such agreement was not binding on insurers who had not joined in or assented to it, even though the terms of the agreement would not have prejudiced them.

3. SAME—SALE OF CARGO—FREIGHT.

The abandonment of a voyage, after a stranding at its commencement, and the sale of a cargo of coal, is not such a sacrifice in the face of impending danger of physical injury, as will make the freight a charge in general average. Nor is it sufficient that such cargo must have been stored in barges pending repairs estimated to require 30 or 40 days, with a possibility of being frozen in by approaching winter.

Libel in personam to recover pro rata of a general average adjustment.

Page & Eells, for libellant.

Andros & Frank, for respondent.

MORROW, District Judge. This is an action by the Earnmoor Steamship Company, a British corporation, against the New Zealand Insurance Company, to recover \$997.41, as the proportion of general and particular average charged against it by an adjustment made up and presented on July 23, 1889, to the various insurance companies interested in the loss sustained by the perils of the sea to the British steamship Earnmoor, the property of the libellant. The libellant has also brought suit in this court against two other insurance companies,—one, the South British Fire & Marine Insurance Company of New Zealand; the other, the Sun Insurance Company. These two suits arise out of the same subject-matter, and involve the identical questions to be determined in the case at bar. The agreed statement of facts and testimony taken in the case at bar is made applicable to these two additional suits. The facts are, briefly, as follows: On the 1st day of March, 1888, the New Zealand Insurance Company issued its policy of marine insurance for the term of one year from March 8, 1888, whereby it insured Alfred Earnshaw, on account of whom it might concern, in the sum of \$1,500 on the steamship Earnmoor, valued as follows: Hull, etc., \$89,725; machinery and boilers, \$36,375; total, \$126,100. On the 19th day of January, 1888, the South British Fire & Marine Insurance Company of New Zealand made a similar policy, whereby it insured on said vessel, on a like valuation, the sum of \$5,000. On the 1st day of March, 1888, the Sun Insurance Company made a similar policy, whereby it insured on said vessel on a like valuation, the sum of \$5,000. Each of said policies was against the perils of the seas and other usual perils. On January 10, 1889, during the life of the policies above referred to, the ship sailed from Philadelphia on a voyage to St. Thomas, laden with a cargo of coal. She left her wharf about 6 p. m., in charge of a pilot. About three hours later, when near Edgemoor, proceeding down the Delaware river, she struck a sunk-

en rock, and passed over it. She began to fill rapidly, and, to avoid sinking in deep water, was run ashore on the Delaware side. Owing to the water in her forward hold, the vessel was considerably down by the head, and it was impossible to drive her very high on the bank. As a consequence, when the tide rose, her decks were submerged. A diver was employed to stop the leak, and lighters and steamtugs were sent to her assistance, and a considerable portion of her cargo was discharged, whereby the vessel was floated. She was then towed to Wilmington, Del., the remainder of the cargo taken out, and the vessel docked and repaired. After a considerable portion of the cargo had been lightered, it became evident, the vessel still remaining ashore, that the salvage operations and subsequent repairs to the vessel would occupy considerable time. A survey was thereupon held, and, in accordance with its recommendations, in order to avoid greater general average expense, the voyage was abandoned. Her cargo of coal was sold. A general average statement was, in due course of time, made up, and presented to the various insurance companies on July 23, 1889. Objections were raised by the respondent to the general average adjustment. It appears from the general average statement that in the adjustment \$43,344.07 was charged to particular average on the vessel, and \$44,589.44 was charged to general average, of which \$40,510.70 was charged against the vessel, \$1,759.15 against freight, and \$2,319.59 against the cargo. The libellant now concedes the correctness of all the charges to which he originally objected excepting two, which are as follows: (1) The allowance for damages to the wrecking outfit of Peter Wright & Sons, incurred in the rendering of assistance to the steamship. The amount allowed was \$1,012.31, of which sum respondent's share of liability is \$12. (2) The allowance of freight paid to the charterers as a condition of relinquishing the voyage. The average adjustment shows that the amount charged to general average as freight was \$4,431.90, of which the respondent's pro rata, after the freight has paid its own share in general average, would be about \$50. In addition to the agreed statement of facts, the depositions of several witnesses in Philadelphia and New York were introduced.

The objection to the item for damages incurred to the wrecking outfit to Peter Wright & Sons, in rendering assistance to the steamship, is, in my opinion, well taken. Without entering into an analysis of the testimony that bears on this question, it is sufficient to say that, whatever incidental damages the tugs engaged in pulling the Earnmoor off the strand and in righting her may have sustained to their hawsers, and, in the case of the tug Argus, the loss of her propeller, these were deemed to be included and comprehended in the contract price for the services rendered. This was not a salvage service. The tugs were hired at a stipulated sum per day, and there is no question but that this compensation covered ordinary wear and tear resulting from the performance of that service. Evidence was introduced, however, seeking to establish that the contract, which was a verbal one, also provided that the owners

should be compensated for any extraordinary injury that might happen to their tugs while assisting in these wrecking operations. But this testimony is far from being satisfactory. Had one of the tugs been lost while rendering the service, I do not think that it could be seriously contended, under the evidence adduced, that the interests affected by the general average adjustment would be expected to contribute to the loss of the tug. That being so, there is no more reason to assume that the loss of a propeller or of hawsers should be compensated for as an extraordinary expense and as a subject of general average. In other words, in the absence of any clear and unambiguous stipulation to the contrary, the tugs took the risks of these accidents while rendering this service. These risks inhered in the business in which they were engaged. This item will, therefore, be disallowed.

The objection to the item making an allowance as a general average charge for the freight paid to the charterers as a condition of relinquishing the voyage raises a question of considerable difficulty. The agreed statement of facts, the report of the surveyors, and the testimony of some of the witnesses all concur upon the proposition that, in order to avoid greater general average expenses, the voyage was abandoned. To accomplish this end, some disposition had to be made of the freight interest. The ship carrier had the right to do one of two things: either to refit the vessel, or to engage another, and thus earn his freight. *Herbert v. Hallett*, 3 Johns. Cas. 93; *McGaw v. Insurance Co.*, 23 Pick. 405, 411; *Saltus v. Insurance Co.*, 14 Johns. 138; 1 Pars. Shipp. & Adm. § 6, pp. 231-239. The intake cargo consisted of 2,607 tons of coal. It was accordingly agreed, "for the benefit of all concerned," to abandon the voyage, sell the cargo, pay the freight, and allow it as a charge in general average. This last stipulation is in these words: "That freight at the rate of \$1.70 per ton, originally loaded, shall be allowed in general average." The parties who entered into and signed this agreement, which was introduced in evidence, were (1) Alfred Earnshaw, managing owner of the steamer Earnmoor; the Earnline Steamship Company, time charterers of the Earnmoor; the Berwind White Coal Mining Company, charterers for the voyage to St. Thomas; the Berwind White Coal Mining Company, owners of the cargo; the British & Foreign Marine Insurance Company, underwriter on the cargo; and the Western Assurance Company, underwriter on the freight. But the respondent, the New Zealand Insurance Company, was not a party to this agreement, nor was it consulted. The same is true of the other insurance companies, undertakers on the vessel. It does appear, however, that these companies, with the exception of the respondent company and the other companies sued in this court, when advised of the adjustment and the agreement with respect to the allowance of freight as a general average charge, acquiesced in this item. The respondent and the other companies referred to did, however, object to this and other items. It is claimed that they cannot be bound by an agreement to which they were not parties, and which they have not ratified.

The reason given for not consulting the underwriters on the vessel was stated by Alfred Earnshaw, managing owner of the Earnmoor, who was present at the wrecking operations, and superintended them to a large degree, to be "that there were so many of them, and most of them far away, that it would be practically impossible to communicate with them, and obtain their consent." But this reason is not a satisfactory one. The respondents could have been communicated with by cable. Mr. William A. Walker, a witness for the respondent, and advisory agent in New York of the three companies proceeded against, testified that when advised of the disaster to the Earnmoor, he sent Mr. Frank S. Martin, an expert mechanical engineer and naval architect, to oversee the repairs, and report to him in New York. Mr. Martin made several reports, but never advised Mr. Walker of the agreement in question. The latter was not aware of any such arrangement until the statement of the adjustment was submitted to him by Martin, when he then objected to this and other items. Martin testified that he had participated in making up the adjustment, but he states positively that he had nothing to do with the discharge of the coal, nor with the compromise under which it was sold, and freight allowed. The other witnesses testify that the agreement made was in every respect a proper and reasonable one; that it resulted in the saving of greater general average charges. How much it would tend to save does not clearly appear. Mr. Walker, the representative for the insurance companies who object to this item, admits that the charge for freight would have been "fairly put in that adjustment as to parties who consented to the same, but, as to parties who refused to pay the same, they were at liberty to go without paying it, if we made such a case." The repairs, it is stated in the adjustment report (page 34), would take from 40 to 60 days. It was testified that during this time the cargo of coal would have to be stored on barges, and that there was some danger of the river being frozen up by the approaching cold weather. How imminent this danger was does not appear, but it was referred to by some of the witnesses as a reason, among others, for selling the coal. The expenses which, it was testified to, would be saved by the sale were expenses connected with the storing of the cargo on barges while the repairing was going on and of reloading. It also appears that the cargo, being somewhat damaged, would sustain further injury and loss by being stored, reloaded, and forwarded in its damaged state. What this would amount to was not testified to. The intake of 2,607 tons was valued at \$2.60 per ton, or the sum of \$6,492.85. It seems that 109½ tons were totally lost by the accident. The remaining 2,497½ tons were sold for \$5,319.35, being \$1,173.50 (18.15 per cent.) less than cost. Now, while it would seem from this statement of the facts that the sale was justified as a matter of convenience and sound business sense, yet the question arises whether, in the absence of any assent to this sale and the charging of freight as general average, the respondents are bound by it. I am clearly of the opinion that they are not bound by the agreement, not having been parties thereto, nor having ratified

the same. While it may be that the terms of the agreement would not have prejudiced them in any substantial degree, and while it was probably the best thing that could have been done under the circumstances as an economical measure, still the fact remains that it was not agreed to by the respondents, and their rights in this regard must be respected.

The next inquiry is whether this item can be allowed upon principles which obtain in determining general average. The well-settled rule of the admiralty law is that, to entitle the carrier ship to full freight, the cargo must be transported to its destination, and be ready for delivery. The only exception is where the nonarrival has been occasioned by the default or waiver of the shipper. The *Nathaniel Hooper*, 3 Sumn. 542, Fed. Cas. No. 10,032; *Drinkwater v. The Spartan*, 1 Ware, 149, Fed. Cas. No. 4,085; *Herbert v. Hallett*, 3 Johns. Cas. 93; *Saltus v. Insurance Co.*, 14 Johns. 138; *Clark v. Insurance Co.*, 2 Pick. 104; *McGaw v. Insurance Co.*, 23 Pick. 405; *Luke v. Lyde*, 2 Burrows, 882; *Anderson v. Wallis*, 2 Maule & S. 240; *The Gazelle and Cargo*, 128 U. S. 474, 9 Sup. Ct. 139. However, in this case, the shipper did waive further transportation by the agreement referred to. But, confessedly, this waiver is insufficient to make this allowance of freight a general average charge, and the respondents liable as undertakers on the vessel, if the element of sacrifice is lacking. In *Insurance Co. v. Ashby*, 13 Pet. 331, it was held that the safety of the property, not that of the voyage, constituted the foundation of general average; and in *McAndrews v. Thatcher*, 3 Wall. 347, it was declared that neither goods nor any interest are liable to contribute in general average for any sacrifice or expenses incurred subsequent to ceasing to be a risk. It is also the well-settled rule that the sale of a cargo as a matter of convenience and from prudential considerations merely will not be sufficient to make the payment of freight a general average charge. The reason of the rule is that there cannot be said to be any element of sacrifice unless made in view of some present danger. The whole subject is discussed by Judge Brown in *Bowring v. Thebaud*, 42 Fed. 797, with his usual clearness:

"The primary requisite for a general average charge is the existence of some common peril to be averted; next, some sacrifice voluntarily made, or some expense voluntarily incurred, by one part interest, beyond that chargeable to it by law, for the safety of the whole. The quantum of common danger necessary to justify a general average act—i. e. a voluntary sacrifice of a part for the safety of the whole—is not nicely scrutinized. When the sacrifice happens in the course of the voyage, the determination of the amount of danger that requires it is left to the judgment of the master, to be exercised reasonably and in good faith. * * * The nature of the requisite danger is not that of mere probable loss, such as delay in reaching a market, or loss of expected profits, but some threatened physical injury. 'Periculi imminenti evitendi gratia'; says the ancient statute of Marseilles (Emerig. Ap. c. 12, § 39, p. 603), and such was the Roman law (1 Pard. Lois Mar. 107). Lown. Av. (6th Ed.) 352. And in text-books and decisions this primary condition of a common peril threatening the safety of the whole is constantly reiterated. Gourel. Gen. Av.; 2 Lown. Av. 39; 2 Arm. Ins. (6th Ed.) 855; per Story, J., in *Insurance Co. v. Ashby*, 13 Pet. 331, 339; Grier, J., in *Barnard v. Adams*, 10 How. 270, 303; *Hobson v. Lord*, 92 U. S. 397, 399. In the case last cited, Mr. Justice Clifford says (page 399): 'Property not in peril requires no such

sacrifice, nor that any extraordinary expense should be incurred. * * * Where there is no peril, such sacrifice presents no claim for such a contribution; but the greater and more imminent the peril, the more meritorious the claim against the other interests, if the sacrifice was voluntary, and contributed to save the adventure from the impending danger, to which all the interests were exposed.' It is unnecessary to multiply decisions. They all import an impending danger of physical injury as the primary condition and initiative of a general average charge. The mere completion of the voyage, where that is in no way necessary to the safety of the cargo, is not sufficient for a general average charge."

In the case at bar there was no impending danger of physical injury to the cargo of coal. There was some evidence to the effect that while the repairs would be going on the barges might be frozen in by the approaching cold weather. But the testimony in this regard was not sufficiently satisfactory to justify the court in finding that there was an "impending danger of physical injury" to the cargo of coal by reason of frosts which, perhaps, might set in. The danger must be present and imminent, and the sacrifice made in good faith by reason of, and for the purpose of averting, that danger. In the case of *McGaw v. Insurance Co.*, 23 Pick. 405, which was an action against the insurers of the freight, it appeared that the vessel met with an accident on the 16th of June, 1836, and was ready to take a cargo, after having been repaired, on November 1st of that year. On the 1st of August, 1836, a month and a half after the accident, the consignor of the cargo required the master of the vessel to send forward or deliver up the sound portion of the cargo forthwith, and the master, believing that he could not repair his vessel in a reasonable time, yielded to the request. The court, through Chief Justice Shaw, held that the master should not have delivered up the cargo without the payment of freight, and that, therefore, the loss of the particular freight insured was caused by the voluntary act of the insured, and not by any of the perils insured against. In the course of the opinion the learned justice said:

"It is now well settled by a series of cases that if a vessel is damaged by one of the perils insured against, and in consequence thereof is obliged to put back, or seek a port of refuge, and unlade and repair, the master, if he can refit his ship and proceed in a reasonable time, may retain the cargo, and carry it to its place of destination, and will then earn his full freight. * * * And it makes no difference in this respect that by such detention and retardation of the voyage the arrival of the cargo at the place of destination will be so late as to disappoint the purposes of the shippers by the change of the season, loss of market, or otherwise. It is not within the scope of the insurer's contract that the vessel or cargo shall arrive at any particular time, but only that the vessel shall not be prevented from proceeding to the port of destination and carrying the cargo by any of the perils insured against. Nor does it make any difference if the cargo is damaged, and unfit to be shipped, if it remains in specie, and can be carried to the port of destination, as the shipowner is not responsible for the damaged condition of the goods, whether such damage arise from a principle of internal decay or from perils of the sea. In such cases it is held that, as between the shipper and shipowner, the latter is entitled to his freight, although the goods have become utterly worthless; and that he has his remedy for his freight, not only by a lien upon the goods (which, in the case supposed, would avail him nothing), but also by an action against the shipper on his contract for the carriage. * * * Whether the vessel can be repaired and made ready to take the

cargo within a reasonable time is a question which must depend much upon the circumstances of the case, such as the place where the vessel is, or can readily be brought to, whether labor and materials can be readily had or promptly obtained; and this must be determined by consideration applicable to the vessel alone, and will not be influenced by the consideration that the cargo will be deteriorated by the delay, or lose the proper season for a favorable market, or for a particular sale which the shippers have in contemplation."

After alluding to the peculiar circumstances of the case in hand, the learned justice continued:

"Under these circumstances it might be the wisest and most judicious course, and most beneficial to the owners, for the master to give up the cargo thus partially lost and damaged, and not attempt to earn a freight upon the transportation of these particular goods, at the cost which it would have required; when his vessel could be employed as beneficially, or more so, elsewhere, as soon as she could be put in a condition to be employed at all. He might even have an offer for a better freight elsewhere, when this cargo was delivered up. But it follows, as a necessary consequence, that if the voyage on which freight was insured by the defendants was relinquished upon prudential considerations, when it might have been prosecuted, and the freight earned, the loss of the particular freight thus insured was caused by the voluntary act of the assured and their agents, and not by any of the perils insured against."

Such being the law declared by high judicial authority, it is difficult to see how, under the circumstances of this case, the allowance of freight as a general average charge, in pursuance of the agreement referred to, can be justified. It is true that in *Insurance Co. v. Ashby*, supra, it was held that the freight of a vessel, totally lost, by being run on shore for her preservation and that of the crew and cargo, ought to be allowed to the owner of the vessel as a subject of general average, the cargo of the vessel having been saved by the stranding. But, in the case at bar the vessel was not totally lost, nor does it appear affirmatively that the cost of repairs would have been so great as to amount, in the law of marine insurance, to a constructive total loss. She could have been repaired within a period lasting from 40 to 60 days, and have then proceeded on and completed her voyage. The further question arises incidentally whether this period of time should be considered reasonable. What amounts to a reasonable time within which to refit or repair is, manifestly, a question depending upon the facts of each individual case. It is one relative to the circumstances and situation in which a particular vessel and her cargo are placed. As was said by Kent, J., in *Herbert v. Hallett* (page 98):

"What is convenient time to refit must depend upon the particular voyage to be performed, and the time and place of the accident. No definite time is prescribed, nor does the matter appear to be susceptible of any definite rule. Under the circumstances of the present case, I cannot undertake to say that two weeks was an unreasonable time, and that the verdict ought, for that reason, to be set aside."

I do not think that a period of 40 to 60 days can be considered, under the circumstances of this case, unreasonable.

The question of freight pro rata itineris can hardly be said to arise in this case. The distance traveled, after leaving Philadelphia, when the accident happened, was only 30 to 40 miles. The vessel

was bound for St. Thomas, Danish West Indies. The service rendered to the shipper cannot, therefore, have been productive of any substantial benefit. As stated in *McGaw v. Insurance Co.* (page 412), the "shipowner could obtain no freight pro rata itineris, because no substantial or beneficial part of the transportation of the goods had been accomplished." See, also, *Herbert v. Hallett*, *supra*. The item of freight as a general average charge will therefore be disallowed.

A decree will be entered in accordance with this opinion.

THE ALLER.

THE AMERICA.

NORTH GERMAN LLOYD et al. v. SOULE et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

COLLISION ON ANCHORAGE GROUNDS—STEAMER WITH TUG AND TOW.

A vessel which undertakes to navigate over anchorage grounds takes the risk of determining whether other vessels which she finds there are navigating or at anchor. *Held*, accordingly, that a steamship which, on leaving Hoboken, attempted to pass to the westward of a bark and tug on the anchorage grounds southeast of the Statue of Liberty, supposing them to be under way, and bound for the East river, was solely in fault for a collision with the bark, it appearing that the tug was merely holding the latter up against the tide, while she was getting in her anchor, and that neither of them did anything to mislead the steamship. 59 Fed. 491, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This case comes here on appeal from a decree of the district court, Southern district of New York, which held the steamship *Aller* solely responsible for a collision which happened on April 4, 1893, in the harbor of New York between the *Aller*, outward bound, and the bark *Enos Soule*, then in tow of the steam tug *America*. Having sustained serious injury, the *Soule* libelled both steam vessels. The district court, however, held that no fault of the *America* was shown, and dismissed the libel as to her. 59 Fed. 491.

Wm. G. Choate, for appellant the *Aller*.

Geo. Bethune Adam, for appellee the *America*.

Harrington Putnam, for appellees *Soule* and others.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. It is hardly necessary to add anything to the discussion of the case by the district judge. Upon such facts in the case as are either conceded, or established beyond question by the proof, and assuming all the disputed facts to be as the *Aller* contends they were, the decision of the district court should be affirmed. No one pretends that the *Soule* was in any fault. She had arrived from Hong Kong with an East India cargo on April 2, 1893, and anchored with 45 fathoms of chain at a point about 350 or 400 yards to the southeast of the Statue of Liberty. This point

is well within the anchorage ground in the upper bay of New York, as defined and established by the secretary of the treasury under the act of May 16, 1888. There was contention in the court below as to whether the Soule was or was not upon anchorage ground, but the Aller, upon this appeal, concedes that she was. On the morning of April 4th, the tugboat America came alongside, and made fast to the Soule's port quarter. It was flood tide, and, before the America arrived, the bark was heading southerly. In order to assist in raising the anchor, and getting her under way, the tug turned the bark around from the southward easterly, until she was heading somewhere in the direction between the Battery and the East river bridge, as variously put by the witnesses. Some of them make her heading N. N. E., which would be nearly for the North river; but the heading may be assumed, as stated in the appellant's brief, as being generally in the direction of the East river. The tug was then engaged in holding her up to her anchor, while the crew of the bark, working an old-fashioned windlass on her forward deck, were slowly heaving anchor. The engine of the tug was working all the time, to keep her in position, generally working backwards a little, to resist the drift of the flood tide, which tended to carry her over her anchor. When the tug took hold of the Soule, she had about 30 fathoms of chain out, having been anchored in seven fathoms of water, with 45 fathoms of chain, and at the time of the collision she had still about 15 fathoms of chain out. As soon as the cable began to shorten, the anchor, although still on the bottom, ceased to bite, and, under the influence of the tide and of the tug, the bark dragged her anchor more or less. By the time of the collision, she had thus moved some 300 feet or more to the northward and eastward, but her anchor was still on the bottom, and we entirely concur with the district judge in the finding that she was not under way.

The Aller left her pier in Hoboken about 9 o'clock, and, when somewhere between pier 8 and the Battery, got sight of the America and the Soule on her starboard bow, and a mile or more away. Those in charge of the navigation of the Aller supposed the tug and tow were under way, and bound for the East river. Exactly what signals were given by the Aller is in dispute, but it is conceded that her navigators made up their minds to run to the westward of the tug and tow, changed her course, to carry out this maneuver, and failed to accomplish it safely, because the America and her tow did not move on in the direction of the East river, as those on the Aller supposed they would. Under a hard a-port wheel, the Aller left the channel, and ran over the anchorage ground, till she struck the Soule on the starboard bow, cutting into the bark from six to ten feet. The Soule, being concededly free from fault, is entitled to recover against one or other or both of the steam vessels.

No fault on the part of the tug is shown. She had a right to come on the anchorage ground, to take up her tow, and to assist the latter by turning her head in the proper direction, and by hold-

ing her up against the tide, while the bark was heaving anchor. She was not yet under way, and the rules as to holding course and speed were not applicable to her. Nor does the evidence show that she did anything to mislead the Aller. The accounts given by the witnesses for the Aller as to signals exchanged are not consistent. Her answer alleges a single blast by the Aller, a double blast by the tug, and a single blast by the Aller. The captain and chief officer describe them as one blast by Aller, no answer; another blast by the Aller, to which the tug replied with two blasts. The pilot's story is two signals of one blast each from the steamer, and two replies of two blasts each from the tug. Some of the Aller's witnesses undertake to say that the tug gave no signals, but the evidence is overwhelming that she did give a response of two blasts. It appears, then, that the Aller announced an intention to leave the channel, and run over anchorage ground, so as to pass to the westward of the tug and tow, and asked the latter to co-operate; but, instead of assenting to this proposition, the tug replied that the Aller must keep to the eastward, and that she (the tug) would not co-operate in the proposed maneuver. No one suggests that the tug was in fault for answering the Aller's signal, when she was not herself navigating, and certainly the answer which she did give could in no way mislead the Aller into a belief that she would co-operate in carrying out the latter's proposed maneuver. The Aller's signal was supposed by the navigator of the tug to be a two-blast whistle, and he admits that, if he had understood it to be a single blast, he might have dragged his tow, anchor and all, sufficiently to the eastward to avoid collision. But we concur with the district judge in the conclusion that "the tug and bark, not being under way, and being engaged in heaving the anchor, and being stationary by land, were under no obligation to start up and drag their anchor, in order to get out of the way of the Aller." Having the tug and tow on her starboard bow, it was the Aller's duty to avoid them, and, since she failed to do so, without contributing fault on the part of either tug or tow, she must bear the loss. The mistake which she made in supposing that they were navigating may have been a natural one, due to the circumstance that the bark did not head to the flood tide, but towards the East river. It was probably induced partly by another mistake, namely, the belief that the tug and tow were not on anchorage ground, but in the channel. But it is a mistake for the consequences of which the steamship is responsible. A vessel which undertakes to navigate over anchorage ground takes the risk of determining whether other vessels which she finds there are navigating or at anchor (*Steamship Co. v. Calderwood*, 19 How. 241); and, when such other vessels are in no fault, she alone is responsible for the results of her mistakes in that particular.

The decree of the district court is affirmed, with interest and costs.

THE DAYLIGHT.

THE CIRCASSIA.

ARMSTRONG et al. v. BARROW STEAMSHIP CO.

FOSTER v. THE CIRCASSIA et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

COLLISION—STEAMER AND SAIL—SAILS OBSCURING LIGHTS—EVIDENCE.

Two lookouts, two navigators, and the wheelman of a steamer all testified that they were vigilant, but failed to see the green light of a schooner until too late to avoid collision, and even then only saw it dimly at first. It was conceded that the light was in place, and properly burning. The relative positions of the vessels, the length of the schooner's forestay sail boom, and the spread of the staysail were such that, with a list to starboard, and the bellying of the sail, the light might have been obscured. *Held*, that it was more probable that such was the case than that all the witnesses aforesaid should have been negligent or mistaken or untruthful in their testimony, and that the schooner should therefore be held solely in fault. 55 Fed. 113, affirmed.

Appeals from the District Court of the United States for the Southern District of New York.

Three libels were filed to recover damages arising from a collision which happened about 10 p. m., September 26, 1891, in the Atlantic Ocean, about 80 miles to the eastward of Sandy Hook, between the steamship *Circassia* and the schooner *Daylight*. The first two actions were brought by the owners of the respective vessels to recover damages claimed to have been sustained by each. The third action was brought against both vessels by the shipper of a quantity of apples on board the *Circassia*, claimed to have been damaged by detention of the steamer caused by the collision. The district court held the *Daylight* solely in fault (55 Fed. 113), and she has appealed.

Edward L. Owen and W. W. Goodrich, for the *Daylight*.

Harrington Putnam, for Barrow Steamship Co.

George A. Black, for Chas. Foster.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The opinion of the district judge is exhaustive, and sets forth in detail the movements of the respective vessels. Inasmuch as there is less dispute than usual on this branch of the case, and the appellant's argument practically charges error in the findings of fact only in those particulars which relate to the position of the schooner's forestay sail, it is unnecessary to discuss the testimony in detail. The schooner was sailing on the port tack, on a course of about S. W., with the wind two points abaft the beam. The wind was light to moderate, estimated by her officers as about a six-knot breeze, although she had since 6:30 p. m. covered a distance which would make her speed for the three hours preceding the collision considerably higher. The steamer was going at a speed of about 11 knots, on a compass course of E. $\frac{1}{4}$ S. The schooner first sighted the steamer's white light and red light on her starboard bow at a distance of two miles or more. This indicated that the steamer was crossing the *Daylight's* bow. No change being made in the steamer's course, and the vessels draw-

ing nearer together, the schooner burned a flash light, and just as it expired, the distance between the vessels being then a quarter of a mile or less, put her helm hard a-port. The steamer had one lookout on the stem, one on the lookout bridge, and the chief and third officer, who had charge of the navigation, on the main bridge, besides the quartermaster at the wheel underneath the main bridge. They did not perceive the schooner until she burned her flash light. After the dazzling effect of the flash had passed away,—a very few seconds only,—a green light was seen, which the steamer's witnesses say appeared "dull," "dim," or "glimmering." This was undoubtedly a very short time before collision, and as soon as it was seen orders were given to starboard the helm, and to stop the engines, and to put the same full speed astern. We need not discuss the evidence bearing upon the question as to which vessel first changed direction, or as to the ensuing maneuvers. The fault of neither vessel lies there. It lies much further back, and arose when the steamer failed to detect the presence of the schooner while the distance between the two was still sufficient to admit of such a change in the steamer's course as would give timely notice to the Daylight that her course was known, and would not be intersected by the Circassia. In other words, the vital question in the case is, "Why was not the schooner's green light seen in time?" It was a proper and sufficient light. All parties concede that. The appellant contends that all of the persons on the deck of the Circassia—lookouts, navigators, and wheelsman—failed to see it because they were not vigilant or attentive. They all testified and all insisted that they were vigilant. The steamer contends that the schooner's green light was obscured by the forestay sail. The witnesses from the schooner's deck all testified and all insisted that it was not so obscured. She was sailing on a course which would naturally bring her forestay sail as near as its cut, rig, and tackle would allow to the starboard light. Testimony was taken in the district court as to measurements and experiments made subsequently, and the judge reached the following conclusion:

"There were five persons on the steamer who were in a position to see the schooner's green light, four of whom ought to have seen it, if it was visible, before the torch light was exhibited. The interval was a considerable one. The night was not bad for seeing lights; and, if it was visible, nothing but simple negligence could have prevented its being seen. There is nothing to indicate that the officers were not reasonably vigilant and attentive to their duties. Under such circumstances, failure to see the light has been frequently held to be strong evidence that the light was not visible, and this ought to be deemed sufficient where, as in this case, there appears to have been a reasonable and sufficient cause for the obscuration of the light. The length of the forestay sail boom and the spread of the staysail were such that, with a list of the vessel to starboard, and the bellying of the sail, the green light might have been obscured when the vessels were in such relative positions as these. The only check to the obvious tendency to obscure the light would be scant play allowed the staysail sheet. But, even as the evidence stands upon that point, it does not seem to me that this would necessarily prevent obscuration."

The conflict of evidence necessarily left the case to be determined upon its inherent probabilities, and it seemed to the district judge

much more probable that the staysail did obscure the light to distant observers, than that all those on the deck of the steamer navigating directly across what was well known to be the track of a large fleet of coasting vessels were continuously negligent for a considerable space of time. This is an entirely reasonable disposition of the question, unless something which was overlooked in the case below, or something which is to be found in the new proofs, is persuasive to a different conclusion.

It is contended by the appellant that there are such discrepancies in the testimony of the steamer's witnesses as to what they saw immediately after the flash light as to cast discredit on their testimony that they were vigilant. An examination of their evidence does not lead us to this conclusion. Campbell, the lookout in the stem, on the forecastle head, after seeing the flash light on the port bow, saw the loom of the schooner's sails, and when very close saw her red light on the starboard bow. He furthermore says that he does not think he saw a green light, because it was a good while since, although he is not very sure about that; thinks he might have seen it; a blink of the green light off the port bow. Duffy, the second lookout, was on the lookout bridge, $7\frac{1}{2}$ feet above the deck and 70 feet aft of the stem. He stood, therefore, more to leeward of the Daylight than Campbell did. He saw the flash light off the port bow, and a little after the green light. "About thirty seconds before collision" he saw the red light on the starboard bow, a very little ahead. This witness was examined upon written interrogatories in San Francisco,—not always a very satisfactory method of eliciting testimony,—and his story as to what he saw subsequent to the first appearance of the green light is somewhat confused, but we do not find in it, as appellant contends, a contradiction of the other witnesses as to the green light being seen, at some time before collision, off the starboard bow. The chief officer and the third officer first saw the green light from the port side of the main bridge, nearly 60 feet aft of the lookout bridge. They were, therefore, still further to leeward of the Daylight than either Duffy or Campbell. The chief officer made it out with the naked eye, but the third officer only with the glasses. McDonald, the wheelsman, saw the flash light off the port bow. He is not very positive or definite as to when or where he saw other lights, but, as his attention was given to the wheel, this is not surprising. We find nothing in all this testimony to cast discredit on the steamer's theory of obscuration. Nor is the fact that the green light soon became bright to those on the steamer fatal to this theory. If, when first seen, it was not visible to the lookout in the stem, but was visible, though dimly, to those a little further to leeward, that fact would indicate that the interposed sail, if that was the cause, extended so little beyond the line of light that a trifling change in its position would remove the obscuration, and on the course the schooner was sailing a very slight change of her head to leeward would becalm the forestay sail sufficiently for it to come inboard enough to clear the light.

The appellant relies principally, however, on the evidence as to

measurements of and experiments with the forestay sail and its appurtenances. When the case was on trial in the district court, the last witness called by the *Circassia* was Vining, a port inspector, who visited the *Daylight* when she was lying in Brooklyn for repairs after this collision. He found the forestay sail furled to the boom, and the boom hanging by a topping lift from the mast, the boom lying amidships, and just swinging clear of the foremast. This witness undertook to testify to the length of the boom, height of the hounds from the deck, beam, and distance of the lights (which were fixed on the shrouds) inside the rail. It appears, however, that these were not all made with a tape line or other measure, but were estimated roughly. They cannot be accepted, therefore, as accurate. He testified that from what he saw he "judged" that, if the boom was out, say three points, off three points, the after-end of the boom would be about a foot inside of the rail, provided the rail ran straight without the curve that forms the bow of the vessel; and about a foot outside when the vessel narrows as she goes forward. He added that if the boom was off three points it would obscure the green light to an observer off the starboard bow. Vining's examination of the ship was on October 16, 1891, and his testimony was given on the trial in January, 1893. Thereupon the captain of the *Daylight* was recalled; the mate, who joined her in October, 1892, testified; and the *Circassia* was allowed to examine one Freeman, a port warden in Baltimore, who examined the *Daylight*, January, 1893, while lying in that port. Additional testimony was taken in this court. The *Daylight* called one of her owners (Manson) and a sea captain (Randall) to testify to measurements and experiments made in November, 1895, and an expert rigger (Low) who answered hypothetical questions based on such measurements. The *Circassia* called a sea captain (Eldridge) and an expert rigger (Scott). The result of all this testimony may be briefly stated. It is usual for schooners such as the *Daylight* to have their forestay sail so rigged as to keep the forestay sail boom "about abreast of the rail, or generally a little inside." After this accident, the *Daylight* shipped a new forestay sail boom. This was evidently after Vining's examination, for he found a boom which had been cracked and fished. The new boom is 21 feet 3 inches long, and clears the foremast by 1 foot. The old boom, as the captain testifies, when amidships, came within 3 inches of the foremast, or, as Vining expresses it, "just swung clear of the foremast." She also bent on a new forestay sail. This was meant to be the same size as the old one, but as late as 1893, when Capt. Nickerson testified, it had not got stretched out yet, and was "about a foot shorter on the foot" than the old one. The lights are still on the rigging where they were in 1891. The beam of the vessel at that place is 33 feet, and the distance between the lights 27 feet 11½ inches. The "tumble-in" of the shrouds therefore brings each light 2 feet 6¼ inches in-board. The sheet of the forestay sail, as is usual on such vessels, is rove through two single blocks on deck and a double block on the boom. A knot is made near the free end of the sheet to prevent it

from running through the block. It is manifest that the extent to which the boom and sail can move to starboard or port depends entirely on the length of this sheet from the place where it is made fast to the knot. And it is usual on such craft, as the expert rigger called by the Daylight testified, to keep the sheet short enough to keep the boom about abreast of the rail, or generally a little inside. Freeman, in January, 1893, found that the boom, without the sail set, would not swing nearer to the inside of the rail than 3 feet 6 inches, and that with the sail set and swayed up taut the boom would not come nearer than 6 feet 9 inches to the rail. Manson and Randall, in 1895, experimented with the end of the boom at various heights above the deck, and the furthest they could swing the boom off to starboard was 6 feet 3 inches inside of the rail. If this was the limit of its swing, the forestay sail would not obscure the starboard light. But a chain is no stronger than its weakest link, and no amount of subsequent measurement or experiment, no matter how careful and detailed it may be, will change the case from that made in the district court, unless it be shown that all the conditions attending the experiment were the same as they were at the time of the collision. Evidently the new boom is shorter than the old. The captain, it is true, testified that both were of the same length, but he had evidently no very accurate idea of the length, for he gave it as 16 feet, and the new boom is conclusively shown to be 21 feet 3 inches. Certainly it does not come as near to the foremast as the old one did. Randall and Manson found a sheet 45 feet long. They unrove it, and substituted, for the purposes of their experiments, a rope 57 feet 4 inches in length. Freeman conducted his experiments with the sheet he found in use, which he measured, and ascertained to be 57 feet 4 inches long; i. e. from the knot to the end that was made fast. This examination of Freeman's, however, was about the end of January, 1893, nearly 18 months after the collision. When we turn to the record for evidence that the same sheet, with the knot in the same place, or a sheet of the same length, was in use on the night of the collision, we find the testimony of the captain only. He testified in January, 1893, "We have got the same sheet we had then, and the same knot in it." It is the mate's duty to look after changing, shifting, or putting in new sheets or new ropes, but he reports to the captain before putting in new ones. It does not appear that a mate might not alter the position of a knot in a sheet without orders or without reporting. The case resolves itself, then, into a question of relative probabilities. Which is the more probable, that the captain was mistaken, when his attention was first called to the subject, 18 months after the accident, in stating that the same identical sheet, with the knot in the same identical place, was still in use, or that the witnesses from the steamer were mistaken or untruthful in stating that the green light which came into view after the flash light was "dim," "dull," "very dim," or "glimmering"? We are inclined to the opinion that the captain is in error, since, even if the sheet were the same, the position of the knot might well have been changed, and he not know it. And if the evi-

dence of those on the steamer is to be credited,—and, in our opinion, it should be,—a temporary obscuration of the green light by the forestay sail is the only reasonable way to account for their failure to see the Daylight sooner.

The decrees of the district court are affirmed, with costs.

ROBINSON v. DETROIT & C. STEAM NAV. CO. HURLEY et al. v. THE CITY OF MACKINAW. HURLEY v. DETROIT & C. STEAM NAV. CO.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1890.)

Nos. 314, 315, and 316.

1. ADMIRALTY—COLLISION—OVERTAKING VESSEL.

The steamer M. was proceeding slowly up the Detroit river, near the Canadian side, on a dark and rainy, but not foggy, night, with the tug W. made fast to her starboard quarter. The steamer C. was also proceeding up the river, astern of the M., and at a much greater speed. As the C. approached the M., intending to pass the latter on the starboard hand, between her and the Canadian shore, the captain of the C. thought he saw indications that the M. intended to round to, in the direction of the Canadian shore; but, being in doubt, he checked the speed of his own vessel, and ported his helm, bringing her also round in the direction of the Canadian shore, but gave no signal. At this time, the tug cast off from the M., and, making a sharp turn, headed for the Canadian shore. Before the headway of the C. could be checked sufficiently, or her head turned far enough, to avoid it, she ran into the tug, seriously injuring the latter and throwing two men, one of whom was the managing owner of both the tug and the M., into the water, where they were drowned. The tug was undermanned, and had no lookout, and her captain did not see the C.; and the lookout on the C. did not distinguish the lights of the tug from those of the M., or know of the presence of the tug alongside the latter. *Held*, that the C. was in fault, both in failing to signal her intended course, as she overtook the M. and the tug, and also in porting her wheel and rounding to, in the same direction in which she supposed the M. to be turning, instead of passing under the M.'s stern to port.

2. SAME—LIABILITY OF TUG MADE FAST TO VESSEL.

Held, further, that the tug, which was made fast to the M., and, when cast off, took the course which the officers of the C. supposed the M. was about to take, was so far identified with the M. that it could take advantage of the fault of the C., with respect to the M., which fault was the legal cause of the collision with the tug.

3. SAME—UNDERMANNING.

Held, further, that the tug was also in fault in failing to have its full complement of men, and thereby failing to keep a proper lookout, and that the damages to it must be divided between the tug and the C.

4. SAME—INJURY FOR CAUSING DEATH.

An action, by libel in personam, for damages for death, under statutes like Lord Campbell's act, in force where the cause of action arises, can be entertained and carried to decree in a federal court of admiralty. The City of Norwalk, 55 Fed. 98, and The Transfer No. 4, 20 U. S. App. 570, 9 C. C. A. 521, and 61 Fed. 364, followed.

5. SAME—CONTRIBUTORY NEGLIGENCE.

In such suits, contributory negligence of the libellant is a bar to recovery. Accordingly *held*, that there could be no recovery for the death of

the owner of the tug, who must have known that the tug was short-handed, and was responsible for the negligence of her master.

6. SAME—PASSENGER.

Held, further, that as to the other person drowned, who was a mere passenger, under the law of the province of Ontario, where the accident occurred (found as a fact to be the same as the law prevailing in the federal courts), the negligence of the tug could not be imputed to him, and he was entitled to recover against the owners of the C., the owners of the tug not being parties to the proceedings before the court.

Appeals from the District Court of the United States for the Eastern District of Michigan.

These are appeals from decrees of the district court of the United States for the Eastern district of Michigan in admiralty, dismissing one libel in rem against the steamer City of Mackinaw and two libels in personam against the Detroit & Cleveland Steam Navigation Company, the owner of the steamer City of Mackinaw, for damages, arising out of a collision which occurred on the Detroit river between 10 minutes after 10 and 15 minutes after 10, central standard time, on the night of May 28, 1892, between the steamer City of Mackinaw and the steam tug Washburn, whereby the tug was considerably damaged, and John Hurley and William Robinson, who were on board the tug, were thrown into the water, and drowned. The Detroit & Cleveland Steam Navigation Company, under general admiralty rule No. 59 (which permits the claimant of any vessel proceeded against, or any respondent proceeded against in personam, in a suit for damages by collision, to bring into the cause any other vessel or person alleged to have been guilty of fault or negligence in the same collision, so that such other vessel or person shall be proceeded against in the same suit for such damages as if the vessel or person had originally been made a respondent), brought in the steam tug Washburn to answer to the claims of the representatives of the persons who were drowned. The tug Washburn, appearing, claimed the benefit of limitation of the liability provided for in sections 4283-4286 of the Revised Statutes of the United States. Due appraisalment was had thereunder. The court below dismissed all the libels. The libelants in each case appeal to this court, and the three causes have been heard together upon one record.

The City of Mackinaw is a side-wheel passenger steamer, 203 feet long, hailing from Detroit, and owned, as already stated, by the Detroit & Cleveland Navigation Company, a corporation of Michigan. Her regular route was from Detroit to Mackinac Island, between which points she made semi-weekly trips. The tug Washburn was a small harbor tug, owned by John Hurley and Timothy Hurley, of Detroit. It was 53 feet 6 inches in length, and 16 feet beam, used exclusively in river and harbor towing. The propeller Majestic, the movements of which have a material bearing on the issues in the case, was a steam propeller, also owned by the Hurley brothers, 291 feet in length, with a beam of 40 feet, employed in the freighting business upon the Great Lakes. Upon the night of the collision, the propeller Majestic was on her way up the Detroit river, bound from a Lake Erie port to Chicago, coal laden. John Hurley, one of her owners, called the tug Washburn to take him out to the Majestic, to enable him to transact some business with Capt. Lawless, her master, and to transfer some tow lines. The tug transferred the lines, put Mr. Hurley on board the propeller, and then went ashore again to get the engineer of the Majestic, Thompson W. Robinson, who was waiting at Shipman's coal dock, to be taken out to the propeller. Thompson W. Robinson was the regular engineer of the Majestic, but, during an absence of a few days, had procured his brother William Robinson to take his place. The tug returned to the Majestic with Thompson Robinson, went alongside the starboard side of the Majestic, and was made fast on her starboard quarter, where she received another tow line from off the fantail of the Majestic, and waited for John Hurley and William Robinson, to take them ashore. The Washburn had a stern light burning on a

pole at a proper distance from her deck. It was referred to by some of the witnesses as a common lantern. She also had her signal lights burning brightly. The *Majestic* had all her lights properly placed, and among them was a stern light at a considerable distance above her upper deck, and some 20 feet above the stern light of the tug. She also had a light upon her fantail. The night was cloudy, rainy, and dark, but good for seeing lights, and between 10 minutes after 10 and 15 minutes after 10, which was the time of the collision, a breeze of about 12 miles an hour was blowing from the south. The tug came alongside the *Majestic* the second time when the latter was abreast of the Detroit & Milwaukee Elevator, and well over on the American side, and remained fast to her starboard until just before the time of the collision. The Washburn and *Majestic* proceeded under a slow check, estimated at from 2 to 4 miles an hour by the land, or from 4 to 6 miles an hour through the water, on a course about E. by S., heading for the elevator in Walkerville, on the Canadian side.

The Mackinaw left her dock at the foot of Wayne street, in Detroit, below Woodward avenue, on her way up the Detroit river, passing Woodward avenue at 6 minutes after 10, standard time, hauled out into the stream, and passed about 200 feet on the port side of the revenue cutter Fessenden, which lay 800 feet out in the stream two blocks above Woodward avenue. From this point the Mackinaw took a course of E. $\frac{1}{2}$ N., and here she exchanged a two-blast signal with a steam barge coming down, passing it starboard to starboard. About the same time the master of the Mackinaw saw one-fourth of a mile ahead, and from 2 to 4 points on his port bow, some bright lights, which he supposed to be the anchor lights of vessels moored there. He soon discovered that the lights, or some of them, which afterwards proved to be those on the *Majestic*, were working over towards the Canadian shore. The Mackinaw was a fast vessel, and on her way up the river was going 10 miles an hour, or a little better, over the land, which is equivalent to about 12 or 13 miles an hour through the water. The courses of the two vessels converged and crossed a few hundred feet from the Canadian shore near Walkerville. The Mackinaw proceeded with unabated speed, overhauling the *Majestic* quite fast, and came within two lengths of her stern. The course of the Mackinaw lay directly up the river close to the Canadian shore. The course of the *Majestic* would have carried that vessel into the shore if unchanged. When within two lengths of the *Majestic*, the master of the Mackinaw became doubtful as to what the *Majestic* intended to do, and, judging that she was about to round to, ported his helm, and checked. The officers and the men of the Mackinaw state that they did not know of the presence of the tug on the starboard quarter of the propeller, and were unable to distinguish her lights from those of the propeller. The master of the Mackinaw intended to pass the *Majestic* on the starboard hand of the *Majestic*, between her and the Canadian shore. His doubt as to her future movements, however, and his fear lest she might round to, led him to port and check. Just about this time, the tug Washburn, with William Robinson and John Hurley aboard, cast off from the *Majestic*; and, for fear of suction by the big screw of the *Majestic*, the master of the tug rang up his engine, and moved the tug forward along the starboard side of the *Majestic*, from the rear gangway, until about midships, gradually sheering off. At that point the master checked down, and looked out from the starboard door of his pilot house up and down the river, and, seeing no vessel in either direction, put his wheel aport, swung the tug to starboard, rang up his engine, and took a course directly towards the Canadian shore. Very shortly after he had rung up his engine, he saw some colored lights. Whether they were the lights of the Mackinaw or railroad switch lights upon the shore is in dispute. Whatever the fact, they caused him to blow two whistles. Immediately after this blast, he saw the dark form of the Mackinaw bearing down on his starboard side, and then followed the collision. While the tug was engaged in freeing itself, and swinging off from the *Majestic*, the master of the Mackinaw, growing more anxious and doubtful concerning the situation, ordered his wheel still more aport, and stopped his engines. Just then the lookoutsman of the Mackinaw heard the exhaust of the tug. He and the captain and the mate

of the Mackinaw caught the glimmer of her green light about 75 to 100 feet off the port bow, and heard her blast of two whistles. As soon as the green light was seen, the master of the Mackinaw signaled to reverse her engines. Both vessels were swinging to starboard, and the head-reaching of the Mackinaw was sufficient to carry her bow into the starboard side of the hull of the tug through a full bunker of coal against her boiler, so as to break a plate therefrom. Her speed at the time of the collision was estimated by her officers to have been about five miles an hour. She struck the tug a point or two abaft the beam, and not at right angles. The collision threw Hurley and Robinson into the water, and, before they could be picked up, they were drowned. The tug, after it was released by the backing of the Mackinaw, its engine and machinery still being in operation, ran aground near the Canadian shore, and sank. The master of the tug caught the stem of the Mackinaw at the time of the collision, and climbed up over her bow. The rest of the crew of the vessel were saved, and taken off the tug after she went aground on the Canadian shore. The *Majestic*, after the tug had swung off from her, changed her course two points to port, and proceeded up the river, her officers supposing from the fact that the tug had gone towards the Canadian shore that the collision which they witnessed had not resulted in serious damage. The tug had but four men in her crew, though her papers called for five. She had no lookout. Her master acted as master, as wheelsman, and as lookout. The Mackinaw was properly manned. Her captain and mate were on the hurricane deck, near the pilot house, and she had a lookout forward on the promenade deck, "in the eyes of the ship." The captain, mate, and lookoutsman on the Mackinaw stated that they did not see the stern light on the tug at all, although they were watching the *Majestic* with great care. The captain of the tug states that he did not see the lights of the Mackinaw at all, but that, after he climbed over her bow, he went and found that her signal lights were burning brightly. These lights were about 28 feet above the water, in a screen 4 feet in length and 90 feet from the stem of the vessel. The officers of the *Majestic* state that there was smoke upon the water that night, through which the Mackinaw appeared to them off their starboard quarter. This is the testimony also of the men upon the tug. The officers and men of the Mackinaw deny that there was any smoke which could obscure their lights, because the wind was from the southeast, as they say, and was carried over their port quarter to the Canadian side. The evidence of the men on the *Majestic* and on the tug tended to show that the wind was from the southwest. The evidence from the Signal Service office records was conflicting, but probably the correct record showed the wind from the south at the time of the collision. The district court held that the collision arose through the gross fault of the tug in not having a proper lookout, and in running across the Mackinaw's bows without giving any notice of her presence, and acquitted the Mackinaw of fault.

John C. Shaw, for appellants.

Wells, Angel, Boynton & McMillan, F. H. Canfield, and H. D. Goulder, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). Rev. St. § 4233, provides rules for preventing collisions on the water in navigation of vessels of the navy and of the mercantile marine of the United States; and, although subsequent acts have been passed which relate to the navigation by such vessels upon the high seas and in all coast waters of the United States, section 4233 is still in force as to navigation in the harbors, lakes, and inland waters of the United States, and the merchant marine of the United States.

on the Detroit river are therefore governed by this section of the Revised Statutes. The North Star, 10 C. C. A. 262, 62 Fed. 71.

Rule 22 of section 4233 provides that every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel. Rule 23 provides that where, by rule 22, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule 24. Rule 24 provides that, in construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger. Section 4401 provides that all vessels navigating the Great Lakes shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this title. Section 4405 provides that the board of supervising inspectors shall establish all necessary regulations required to carry out, in the most effective manner, the provisions of this title; and such regulations, when approved by the secretary of the treasury, shall have the force of law.

Among the regulations of the supervising inspectors established in accordance with the previous section is rule 8:

"When steamers are running in the same direction, and the pilot of the steamer which is astern shall desire to pass on the right or starboard hand of the steamer ahead, he shall give one short blast of the steam-whistle as a signal of such desire and intention, and shall put his helm to port; and the pilot of the steamer ahead shall answer by the same signal, or, if he prefer to keep on his course, he shall give two short and distinct blasts of the steam-whistle, and the boat wishing to pass must govern herself accordingly, but the boat ahead shall in no case attempt to cross her bow or crowd upon her course."

It is in evidence that the collision occurred on the Canadian side of the Detroit river, and it is contended on the part of the appellees that the Canadian rules of navigation are different from those governing vessels of the United States in the waters of the United States. There is no proof in the record that, in making it obligatory upon passing vessels to signal their intentions, the rules of navigation under our law are different from those in force in Canadian waters; and, in the absence of such proof, we must assume that they are the same as the law of the forum. In the case of *The Scotland*, 105 U. S. 24, Mr. Justice Bradley, in delivering the opinion of the supreme court, said, on page 29:

"In administering justice between parties, it is essential to know by what law or code or system of laws their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and lia-

bilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case."

See, also, *The State of Alabama*, 17 Fed. 847, 855.

It may be added that we are glad to avoid a conclusion which would vary the rules of navigation for American steamers as they pass and repass the imaginary national boundary line, in the Detroit river. See the language of Mr. Justice Brown on an analogous difficulty in the case of *The Delaware* (decided by the supreme court March 2, 1896) 16 Sup. Ct. 516.

There is some conflict of evidence in this case, but not as much as is usual in collision cases. In the opinion filed by the learned district judge, the main facts are stated much as we should have found them were this an original hearing; but we differ widely from the conclusions which he draws from those facts as to the culpability of the steamer *Mackinaw* in respect to the collision. In our opinion, the learned judge gave to the fact that the *Mackinaw* was properly manned, and that the tug was not, too great weight in determining whether the *Mackinaw* was at fault. The ordinary presumption that follows from such facts may be conceded, but it is not a conclusive presumption, and must yield if overcome by the plain inferences from proven or admitted circumstances.

We find two faults in the navigation of the *Mackinaw*: First, in failing by signal to establish an agreement with the *Majestic* as to how she should pass; and, second, in porting her wheel instead of passing under the stern of the *Majestic*, when she had reason to believe that the *Majestic* was about to round to under a port wheel. Until the *Mackinaw* checked when 400 feet astern of the *Majestic*, she was going over land 10 miles an hour, or better, and about four times as fast as the *Majestic*. She was gaining on the *Majestic*, therefore, 660 feet, or more than three times her length, every minute. When she was three lengths astern, her officers knew that, at this speed, in less than a minute their vessel would be abreast of the *Majestic*. The captain had had, from the time he made out the *Majestic* and her course, the clearly-formed intention to pass on this starboard hand. It certainly became his duty to signify this intention when, in so short a time, he must carry it into effect. Supervisor's rule No. 8 would be useless, indeed, if it applied only to an overtaking vessel when her bow is lapping the stern of the overtaken vessel. The purpose of the signal is to solve the doubt in the mind of each pilot or master as to the course of the other vessel before the vessels are so near each other that the doubt may be dangerous. It is to render certain to each master the proper course of his own vessel. The *Mackinaw*, at full speed, could not be stopped, even by reversing her engines, in less than three of her own lengths. With this limit on the control of her action, it was clearly reasonable that, when she was but this distance astern of a vessel moving so slowly as the *Majestic*, she should indicate her intention to pass by signal. But it is said that, when she was two lengths astern, her captain became doubtful of the intention of the *Majestic*, and checked, because he feared she

was about to round to. This doubt was an additional reason why he should indicate his intention by signal. In *The Great Republic*, 23 Wall. 20, which was the case of a collision between an overtaking and an overtaken vessel, the supreme court laid down the rule that a pilot, when close to a vessel before him, making movements which are not intelligible to him, should make and exchange signals, and ascertain positively her purposed movements and maneuvers. By a single short blast, the captain of the *Mackinaw* might at once have ascertained from the *Majestic's* reply whether she was about to round to or was going up the river. Why did he not give it? The answer is that he did not then know on which hand he would pass her, and so, for the time, he ceased to be a passing vessel, and was not within the operation of rule 8. This excuse cannot be a true one. His intention to pass on the starboard hand remained, but he only checked down for fear the *Majestic's* movement might make it dangerous to attempt it. It is inexplicable that he ported his wheel when he checked, unless he still retained his purpose to pass the *Majestic* between her and the Canadian shore. By porting, he was making it more difficult to do anything but to carry out this purpose. What his evidence really means is that he had the same intention as before, but he was doubtful whether the *Majestic* would let him carry it out; and, thus interpreted, it only emphasizes his fault in not definitely ascertaining by signal what the fact was. He was still within rule 8 and his attempted excuse for not complying with it, instead of relieving him from its obligation, only makes clearer the mandatory character of its injunction upon him.

But, if he did not choose to signal and establish an agreement with the *Majestic*, it was certainly the duty of the captain of the *Mackinaw* to take every reasonable precaution to keep out of the way of the vessel ahead. *The Governor*, Fed. Cas. No. 5,645; *Whitridge v. Dill*, 23 How. 454; *The Great Republic*, 23 Wall. 20. If he feared that she was going to round to under a port wheel, then his maneuver, to be entirely safe, was to starboard his helm, and pass under the stern of the *Majestic*. There was ample room—nearly the whole width of the river—to the port hand of the overtaken vessel. If the *Majestic* had rounded to, the vessels would have become crossing vessels; and, under the directions for the seventh situation described in the seventh of the supervising inspector's rules, the proper course of the *Mackinaw* would have been to starboard and pass to port under the *Majestic's* stern. And, without regard to the regulations, this was the safe course, which the situation as it presented itself to the *Mackinaw's* captain clearly enjoined upon him. Instead of this, he ported his wheel, and carried his vessel towards the very path which the *Majestic* must take if she did what he feared she was about to do. It is true that he checked, and shortly after stopped, and shortly after reversed; but even then his vessel was going five miles an hour when she struck the tug, which, but 30 seconds before, had left the side of the *Majestic* in a straight course for the Canadian shore. The captain of the *Mack-*

inaw failed, upon cross-examination, to give any satisfactory explanation for his failure to signal or to pass under the stern of the *Majestic* at this juncture. We give a portion of it:

"Q. You thought this steamer, the *Majestic*, or whatever it was, was going to round to, probably, did you? A. I was not sure what he was doing. He appeared to be working across my course. Q. You turned to your second mate, and asked him if he thought that fellow was going to round to, down the river? A. Yes, sir. Q. Because the lights were going so straight across? A. Well, they were bearing across my course. Q. And, if he was rounding to, you think he was rounding to under a port helm? A. Yes, sir. Q. And so you ported your wheel? A. Yes, sir. Q. Would that be the proper maneuver, in your judgment? Should you not starboard your helm, and go under his stern? A. I wanted to see what he was going to do. I was not decided. I hadn't decided yet. Q. But you ported your helm? A. Yes, sir. Q. And you found your boat was not swinging fast enough, and you said, 'Port some more'? A. Yes, sir. Q. And all that time you were swinging towards the point to which this boat would be going, heading on, so you would meet her head-on if she were rounding to? A. I was swinging all the time. Q. Would it not be better, if that boat were rounding to, as she appeared to be, if you had gone under starboard helm? A. I didn't know what she was going to do. That is what I stopped for, to find out. Q. You were porting all the time? A. Yes, sir. Q. Why did you port instead of starboard? A. Because I wanted to see what he was going to do; I was uncertain. Q. You thought maybe he was going to cross your bows? A. I was not sure; he kept bearing across that way. Q. And you found you were not swinging fast enough to port, and so you ported some more? A. Yes, sir. Q. Were you not swinging fast enough for what? A. Well, she kept coming towards me, and I ported more, so as to give him more room. Q. This was all after you got up how close to him? A. Well, we were probably little less than four hundred feet or twice the length of our boat; somewhere about that. Q. When you ported a little more? A. Yes, sir; he was closer when I ported a little more. Q. How much closer? A. I could not say exactly. Came up on him some, perhaps half the length of the boat. Q. You hadn't done anything but check at that time? A. When I ported more? Q. Yes, sir. A. I just rung to back about the same time,—or to stop, I should say."

This evidence is quite persuasive in its effect to show the fault of the *Mackinaw* in failing to establish an agreement by signal and in porting. The very awkward course of the *Mackinaw*, and the lame explanation of it by her captain, indicate that the *Mackinaw* had gone much nearer to the *Majestic* than two lengths before she checked and ported, and that, when the occasion arose for her to avoid a possible danger, she was so near the *Majestic* as to make it impossible for her to pass under the stern of the vessel she was overtaking, and her only possible maneuver was to port. Indeed, when pressed at the hearing for the reason why the *Mackinaw* did not starboard instead of porting, her counsel suggested as a reason that she was lapping the stern of the *Majestic*. If this be true, this only increases her fault in not signaling at an earlier time, and shows a gross fault in putting herself in a position so near the *Majestic* as to render collision probable. The *Majestic* did not change her course from the time she was first observed by the *Mackinaw* until the collision, and it is by no means clear what gave the captain of the *Mackinaw* the impression that she was about to round to. It is difficult to escape the suspicion that the sudden porting, checking, and stopping were due rather to some indication of the tug's presence on the

scene than to anything in the course of the *Majestic*; but, as the district judge credited the denial of this by the officers and men of the *Mackinaw*, we yield to his better opportunity to weigh the credibility of their testimony, and accept the explanation that it was the failure of the *Majestic* to starboard her wheel which troubled the captain and mate of the *Mackinaw*. On any theory, the faults of the *Mackinaw* in her navigation with respect to the *Majestic* are clear.

But it is argued that, because no collision with the *Majestic* did occur, the tug *Washburn* cannot complain of faults in the navigation of the *Mackinaw* with reference to a possible collision with the *Majestic*. We cannot concur in this view. Undoubtedly, the faults of the *Mackinaw* must have been the legal cause of the collision with the tug, to justify her condemnation. It may also be admitted that a vessel cannot be condemned for failing to observe precautions prescribed in passing or overtaking another vessel when there is nothing to indicate to the one that she is passing or overtaking the other, or, in other words, that the presence or absence of negligence in a person's conduct must depend on the knowledge which he has or ought to have of the situation with respect to which he is called upon to act. *Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co.*, 22 U. S. App. 102, 111, 9 C. C. A. 314, 318, and 60 Fed. 993. It is also true that the district court found that the captain and crew of the *Mackinaw* did not know of the presence of the tug at the side of the *Majestic* until just before the collision. Until the tug left the side of the *Majestic*, however, the tug, whether she was seen or not, was identified with the *Majestic*, and had the right to act upon the hypothesis that any vessel which was following close upon the *Majestic* with the intention to pass her would indicate this by the usual signal. What was due to the *Majestic* in this respect was due to her consort, the tug, even though those upon the *Mackinaw* were unaware of her presence, because, until sheering off, the tug was, in a legal sense, part of the *Majestic*. It is the duty of the overtaken vessel, under rule No. 8, not to cross the bow of the overtaking vessel, and not to press upon her course. The signal is to notify the vessel ahead that the duties enjoined upon an overtaken vessel are hers if she agrees to the signal. If, therefore, the *Mackinaw* had signaled her intention by one blast, and the *Majestic* had acquiesced by the same signal, it would have been a gross fault for either the *Majestic* or the tug to round to. Such a signal from the *Mackinaw* would certainly have prevented the tug from swinging off from the side of the *Majestic* across the path of the *Mackinaw* towards the Canadian shore. If this was due from the *Mackinaw* to the men in charge of the tug, as we have said, and if it would have prevented the collision, it was the legal cause of the accident. Moreover, the second fault of the *Mackinaw* in not passing under the stern of the *Majestic* was likewise a legal cause of the collision with the tug. The tug took the course which the *Mackinaw* expected the *Majestic* to take. The tug turned somewhat more quickly than the *Majestic*

could have turned; but, upon the facts found by the district court and a careful consideration of the evidence, it is clear to us that, had the *Majestic* rounded to, a similar collision with her would probably have followed the *Mackinaw's* extraordinary course. The identity of the *Majestic* and the tug continued, therefore, down to the time of the collision so far as the care and duty of the *Mackinaw* were concerned; and the owners of the tug may justly claim that, had the *Mackinaw* acted prudently with respect to what she feared would be the course of the *Majestic*, the collision would have been avoided.

But, while the *Mackinaw* was at fault, we are of opinion that the tug was not free from fault. She was short in her crew, and it is probable that if she had had a lookout, whose only duty it would have been to look up and down the river, to observe whether the passage across the river was free, he would have seen the lights of the *Mackinaw*, and the collision would have been avoided. It is contended by the counsel for the tug that the lights of the *Mackinaw* were obscured by smoke. This was possibly true to some extent. The wind was shifting just at the time of the accident from southeast to south, or possibly from south towards the southwest; and it may be that the smoke from one vessel or the other circled about and settled down for a short time between the tug and the approaching steamer. The evidence of the officers and men of the *Majestic* is quite strong with respect to this matter, and justifies the inference that there was some obscuration of the light. Indeed, the presence of smoke between the tug and the *Mackinaw* is the only reasonable explanation of the failure of the officers and men on the *Mackinaw* to observe the stern light of the tug after she had cast off from the *Majestic*, and it is the one accepted by the district court. But, while there was some dimming of the lights by the smoke, it was not of such a character that a steady, close, and attentive observation from the tug would not have overcome the difficulty. The failure of the tug to have a lookout was a direct violation of the regulations, and it may be fairly presumed that, if the tug had been properly manned, the accident might have been avoided. The *Ariadne*, 13 Wall. 478. Before the execution of such a maneuver as the tug proposed to carry out, it would have been the duty of a lookout upon the tug to look up and down the river in the usual path of vessels at that point. He could have done so by stepping to the starboard side. His opportunity and duty would have been quite different from that of a lookout in the eyes of a large vessel like the *Mackinaw*, on which the cabins amidships would have prevented such observation to the rear. The result is that the accident occurred from both the fault of the tug and the *Mackinaw*, and that the damages caused by the collision to the tug must be divided between them.

There remains to be considered the liability of both steamers for the loss of life. The collision in question, as already stated, took place in the Canadian waters of the Detroit river, and within the

jurisdiction of the province of Ontario. The libelants below introduced in evidence chapter 135 of the Revised Statutes of Ontario of 1887, in which it is enacted that "where the death of a person has been caused by such wrongful act, neglect or default as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to a felony"; and that "every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action a judge or jury may give such damages as he or they think proportionate to the injuries resulting from such death, to the parties, respectively, for whom, and for whose benefit, such action has been brought; and the amount so recovered, after deducting the costs not recovered from the defendants, shall be divided amongst the above mentioned parties in such share as the judge and jury advise and direct." It never has been directly affirmed by the supreme court of the United States in a case presenting the question that an action by libel in personam for damages for death under statutes like Lord Campbell's act, in force where the cause of action arises, can be entertained and carried to decree in a federal court of admiralty, but the question has been most exhaustively considered by Judge Brown, of the district court of New York, in the case of *The City of Norwalk*, 55 Fed. 98; and it is evident from a consideration of the language used by that learned admiralty judge that he has no doubt of the power and duty of the court of admiralty to enforce rights under such statutes on libels in personam. The authorities which he masses and the reasons which he arrays in support of his conclusions leave nothing to be desired. He refers to the language of Mr. Justice Brown, upon the supreme bench, in the case of *The Corsair*, 145 U. S. 335, 347, 12 Sup. Ct. 949, as follows: "If it [the local law] merely gives a right of action in personam for a cause of action of a maritime nature, the district court may administer the law by proceedings in personam." The decision in *The City of Norwalk* was affirmed on appeal by the court of appeals of the Second circuit, sub nomine *The Transfer No. 4* (20 U. S. App. 570, 9 C. C. A. 521, and 61 Fed. 364); and, until there is a decision to the contrary in the supreme court, we consider the law settled in favor of the propriety of such an action in federal courts of admiralty. The *St. Nicholas*, 49 Fed. 676. In *Monaghan v. Horn*, 7 Can. Sup. Ct. 409, which was referred to as evidence in this case by a Canadian barrister called as an expert, it was held that no recovery for loss of life by negligence could be brought in a Canadian vice admiralty court except in conformity to Lord Campbell's act, but it was plainly intimated that, when brought by the representatives of the deceased named in the act, the ad-

miralty jurisdiction to enforce the act would be sustained. See, especially, the judgment of Mr. Justice Henry.

We come, then, to the question how far the recovery of the representatives of the deceased persons is to be affected by the negligence of the tug. It seems to be well settled by the law of England and by the law of this country that rights of action arising in admiralty under Lord Campbell's act and similar acts are to be enforced according to the principles of the common law, and that contributory negligence is a complete bar to a recovery. This was settled in the case of *The Bernina*, decided by the house of lords of England (13 App. Cas. 1), by the court of appeal of England (12 Prob. Div. 58), and by the admiralty division of the high court of judicature (11 Prob. Div. 31). It is also decided in this country, in the case of *The A. W. Thompson*, 39 Fed. 115, and *The City of Norwalk*, 55 Fed. 98. In the absence of evidence that the law of Ontario is different, the same rule must be enforced in the case at bar. The recovery of Mrs. Hurley, as administratrix of her husband, is therefore completely barred, because he was the managing owner of the tug, must have been familiar with the fact that the tug was without a lookout and short-handed, and was responsible for the negligence of the master of the tug, who was his agent.

William Robinson, however, was a mere passenger upon the tug, and there was no relation of agency between him and the master of the tug, and he had nothing whatever to do with the manning of the vessel. Under the decision in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, it is certain that, within the federal jurisdiction in this country, the negligence of the owners of the tug, or their servants, cannot be charged to him or his representatives, and, therefore, that his representatives can recover damages, both from the owners of the Mackinaw and from the owners of the tug. The owners of the tug, however, are not made parties defendant to this suit. Under the fifty-ninth admiralty rule, the owners of the Mackinaw did bring in the tug as a respondent, but the tug is not liable in rem under the Canadian act. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949. Nothing but a personal action will lie against her owners; and, as no decree in rem can be rendered against her, she must be dismissed. The result is that the decree, if one is to be rendered in favor of William Robinson's administrator, must be entered for all the damages against the Detroit & Cleveland Steam Navigation Company, the owners of the steamer Mackinaw.

It is contended, however, that under the common law of the province of Ontario, in the dominion of Canada, the negligence of the owners of the tug is to be imputed to a passenger on the tug as contributory negligence, and bars his recovery for personal injury against the steamer, and that the same rule is applicable in an action for loss of life under Lord Campbell's act, by his administrator, in a libel in personam for damages. As the collision was in Canadian waters, and within the province of Ontario, the rights and liabilities of the parties are fixed and are to be determined by the

law of Ontario. The *Scotland*, 105 U. S. 24. This is, of course, foreign law, and as such is to be proven as a fact. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469.

Evidence of an expert, a barrister, at Windsor, Ontario, was offered by the respondent, for the purpose of showing that the judgment in the English case of *Thorogood v. Bryan*, 8 C. B. 115, stated the law as it is in force in Ontario; and that case, it is conceded, supports the proposition that the contributory negligence of the tug must be imputed to Robinson, though a passenger. The evidence of the barrister is quite unsatisfactory. In the Canadian cases which he cites (*Castor v. Uxbridge Tp.*, 39 U. C. Q. B. 113; *Nichols v. Railway Co.*, 27 U. C. Q. B. 382; *Winckler v. Railway Co.*, 18 U. C. C. P. 250), there is no discussion of the question, and no citation by the court of *Thorogood v. Bryan*; and it is not by any means clear that the driver in each of those cases was not in fact the servant or agent of the person injured. He admits on cross-examination that the case of *Thorogood v. Bryan* has been completely repudiated and overruled in England, in the case of *The Bernina*, 12 Prob. Div. 58, by the court of appeal, and by the house of lords, 13 App. Cas. 1. He concedes that the decisions of the privy council of England are those of a court directly superior to the courts of Ontario and the supreme court of Canada. He states that there has been no reported case decided in Ontario in which the effect of *The Bernina* decision upon the law of that province has been considered, and he states that it is problematical whether the appellate courts of Canada would follow the house of lords or their own previous decisions. This leaves it for the court to construe, and give effect to, his evidence. He refers to the decisions of the judicial committee of the privy council as authoritative in Canada, and among these is that of *Trimble v. Hill*, 5 App. Cas. 342. In that case the privy council was considering the appeal and decision of the supreme court of New South Wales in construing a colonial wager act. The act was in the same words as an act of the English parliament. The English court of common pleas had construed the English act one way, and its construction had been followed by the supreme court of New South Wales. Subsequently, the court of appeal of England had overruled the decision by the English common pleas; and the supreme court of the colony, coming again to consider the question declined to follow the court of appeal of England, and stood by its previous decisions. The privy council held that, in so doing, the supreme court of New South Wales erred. They said:

"Their lordships think the court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the court of appeal, by which all the courts of England are bound, until a contrary determination has been arrived at by the house of lords. Their lordships think that, in colonies where a like enactment has been passed by the legislature, the colonial courts should also govern themselves by it. The judges of the supreme court, who differed from the chief justice, were evidently reluctant to depart from their own previous decision in the case of *Hogan v. Curtis*, 6 New South Wales R. 292; but they might well have yielded to the high authority of the court of appeal which decided the case

of *Diggle v. Higgs*, 2 Exch. Div. 422, as the English court which decided *Batty v. Marriott*, 5 C. B. 819, would have felt bound to do if a similar case had again come before it. Their lordships would not have felt themselves justified in advising her majesty to depart from the decision in *Diggle v. Higgs*, unless they entertained a clear opinion that the construction it has given to the proviso in question was wrong, and had not settled the law; since, in their view, it is of the utmost importance that, in all parts of the empire where English law prevails, the interpretation of that law by the courts should be as nearly as possible the same. Their lordships, however, do not dissent from, nor do they desire to express any doubt as to, the correctness of that decision, which, it may be assumed, has settled the vexed question of the construction of a not very intelligible enactment."

If this be the effect of a decision of the English court of appeal in respect to a statute, there would seem to be no doubt of the controlling influence of the decisions of the house of lords upon questions of the common law throughout the British empire. In view of this result which follows from the cross-examination and admissions of the expert himself, the result of *The Bernina* decision of the house of lords upon the validity of the doctrine of *Thorogood v. Bryan*, in the province of Ontario, is not so problematical as the witness seemed to think. We find as a fact that the law of Ontario is that which has been pronounced to be the English common law by the house of lords in *The Bernina Case*.

It remains to state what the action of this court must be. The decree of the district court dismissing the libel in personam of John Hurley's administratrix is affirmed. Its decree dismissing the libel in personam of Robinson's administrator is reversed, with directions to direct an inquiry into the question of the amount of damages accruing to the libelant, and the apportionment of the same for the benefit of the beneficiaries named in the Canadian statute from the loss of Robinson's life, and to enter a decree for the amount thus found and apportioned in favor of libelant, against the *Detroit & Cleveland Steam Navigation Company*. The decree of the district court dismissing the libel in rem of the owners of the tug against the steamer *Mackinaw* is reversed, with directions to direct an inquiry into the damage suffered by the tug from the collision, and to enter a decree for one-half the amount so found in favor of the owners of the tug against the *Mackinaw*. The costs in this court and in the district court in the *Robinson* case will be taxed against the *Detroit & Cleveland Navigation Company*. The costs in this court in the *Hurley* case will be taxed against the appellant. The costs in this court and in the district court will be taxed against the *Mackinaw* in the libel of the *Washburn*.

ST. LOUIS & E. R. CO. v. BOSWORTH.

(Circuit Court of Appeals, Seventh Circuit.)

No. 274.

COURTS—JURISDICTION—COMITY.

The S. R. Co., the owner of a right of way for a railroad, made a lease thereof to the C. R. Co., which, besides providing for the common use of the proposed line, stipulated that, when the road was completed, the S. Co. would convey to the C. Co. the road constructed on the right of way, but if, prior to the tender of the deed, the C. Co. should fail to perform any of the covenants of the lease, the S. Co. might declare the lease and contract void. The S. Co. agreed to pay the C. Co. a specified rate of interest on the cost of construction of the road, for the use thereof, for a failure to pay which the right of user might be suspended until the amounts due were paid. Shortly after the road was completed and put in use, the S. Co. served notice on the C. Co. that it declared the lease void, for certain alleged violations by the C. Co., and demanded a surrender of the premises. Thereupon, the C. Co. filed a bill, in a state court, asserting performance and its right to a deed, and secured a temporary injunction, restraining the S. Co. from declaring a forfeiture of the lease. Thereafter, a receiver of the C. Co., appointed by a federal court in a foreclosure suit, served notice on the S. Co. that certain sums were due to him, on account of maintenance, interest, etc., and that, if such sums were not paid, he would suspend the S. Co. from the use of the road. The S. Co. thereupon, in a petition in the foreclosure suit, applied for an injunction to restrain the receiver from enforcing this notice. *Held*, that the proposed action of the receiver involved no interference with the jurisdiction of the state court or violation of its injunction, the scope thereof having been simply to restrain the S. Co., at the request of the C. Co., which was represented by the receiver, from ousting the latter company from the possession and management of the road; and as the obligation of the S. Co. to pay for the use of the road continued, and the receiver was clearly entitled to collect the sums accruing on the lease, before as well as after his appointment, the injunction should be denied.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

J. L. Blair and Samuel P. Wheeler, for appellant.
Bluford Wilson, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This appeal is from an order of the circuit court denying an interlocutory order of injunction. The application for the order was made in the consolidated case of the Mercantile Trust Company of New York against the Chicago, Peoria & St. Louis Railway, wherein by an order passed September 21, 1893, the appellee, C. H. Bosworth, was appointed receiver, and directed to take possession of the road and of "all property, rights, powers, privileges, and franchises, and equities," of the last-named company. In the consolidated case were included petitions in the nature of creditors' bills. On July 17, 1890, the appellant, the St. Louis & Eastern Railroad Company (which will be designated herein as the "St. Louis Company"), being the owner of a right of way through a part of Madison county, Ill., made a lease thereof to the Chicago, Peoria & St. Louis Company (which will be called here the "Chicago Company"), which was about to lay its track near the

same line. The contract of lease contained numerous and detailed provisions for the common use of the proposed line and the terminal lines into East St. Louis. It was stipulated that, after the road was completed and open for running operations, the St. Louis Company should convey to the Chicago Company, by a good and sufficient deed, the road constructed upon the right of way covered by the lease; the deed to be so expressed as to reserve and secure to the grantor the same rights of user perpetually of the line of road over the right of way as was provided for in the indenture of lease, but if, prior to the execution or tender of such deed, the Chicago Company should "fail to pay, perform, or fulfill any of the rents, covenants, or agreements of this lease," the St. Louis Company, its successors or assigns, after first giving ninety days' notice of its intention to do so, might declare the lease and contract forfeited and void. For the use of this part of the road, the St. Louis Company agreed to pay to the Chicago Company a specified rate of interest upon the cost of construction, including the consideration paid for the lease; and, while it was stipulated that a failure to pay should not cause a forfeiture of the right of user, it was agreed that, in case of a failure continued for three months after a payment was due, the right of user might be suspended until the amounts due, with interest, should be paid. The road was so far finished as to be open for running operations in 1891; but in August, 1892, the St. Louis Company caused to be served upon the Chicago Company a notice, dated the 22d of that month, to the effect that on account of certain violations of the terms of the lease on the part of the Chicago Company, recited in the body of the notice, the lessor intended to declare, and did thereby declare, the lease and contract forfeited and void, and did demand that possession of the premises be surrendered on the 1st day of December, 1892. Thereupon the Chicago Company brought its bill in the circuit court of Madison county, Ill., setting forth the contract between the parties, alleging performance on its own part and its right to a deed of conveyance of the right of way, and praying that the defendant, the St. Louis Company, be restrained from attempting to declare a forfeiture of the lease, and that, upon final hearing, the injunction be made perpetual, and on the 13th day of December, 1892, obtained of the judge of that court, at chambers, the order asked, with the statement added "that the said injunction writ so ordered shall not be so construed as to in any way or manner interfere with the St. Louis and Eastern Railway Company, by its agents and servants, from jointly using said railway in the same manner the same is being used at this time, and is provided for in the indenture of lease set out on the face of the bill filed in this case." In March, 1893, the St. Louis Company answered this bill, denying its material allegations, and setting up at great length affirmative matter designed to show that, having violated the conditions of the lease, the Chicago Company was not entitled to a deed of the right of way. All these facts and others of which any statement here is deemed unnecessary the petitioner before us brings forward, and then charges in substance that on the 12th day of June, 1895, the receiver served upon the petitioner a

notice to the effect that there was due and owing by petitioner to the receiver the sum of \$9,548.78 on account of maintenance, use of tracks, interest, and taxes, and a further sum of \$5,752.29 on account of interest due to the 31st day of December, 1894, and advising the petitioner that in case of failure on the part of the petitioner to pay said sums by the 1st day of July, 1895, he will suspend the petitioner from any use of the road; that the sum of \$9,548.78 claimed to be due is for maintenance and other charges under the terms of the lease accrued prior to the appointment of the receiver, and that the sum of \$5,752.59 is for the amount of interest accrued since the appointment of the receiver, as the same would be computed were the lease in force; that petitioner is ready to pay that portion of the cost of maintenance and operation accrued prior to the receivership, computed at the same rate it has been computed and paid since the receivership, to wit, \$3,504.80, but denies liability to pay the interest charge or any part thereof, whether accrued before or after the appointment of the receiver; that, as the officer of the court in possession, the receiver has power to exclude the petitioner from the use of the property, and to inflict irreparable injury, for which the petitioner can have no remedy in a court of law.

"Two questions," it is said in the brief for the appellant, "are thus presented by the bill, viz.: (1) In view of the issue in the suit pending in Madison county circuit court, involving, as it necessarily did, the question whether the appellant had effectually terminated the lease, and, by the alleged tender, had stopped the running of interest, could the receiver ignore the suit thus pending and the issue therein, and enforce the summary provision of the lease by ejecting the appellant from the use of the road? (2) In view of the further fact that the receiver was seeking, in a summary way, to enforce the collection of a claim that had accrued prior to his appointment, had he, under the provisions of the mortgages, any right so to do?"

It was admitted at the hearing that the suit in the state court had been voluntarily dismissed. If still pending, as it was when the order appealed from was made, it would afford, as we think, no reason for reversing that ruling. If, as the appellant contends, the proposed action of the receiver would have disturbed the status created by the order of the state court, or, in other words, would have been a violation of that order, then it was within the power of that court, we suppose, to deal with the receiver as with any other person acting in contempt of its authority; and there was no necessity for applying to the federal court which had appointed the receiver, although there was no impropriety in doing so. We are of opinion, however, that the action of the receiver involved no interference with the jurisdiction of the state court, nor violation of its injunction. The receiver represented the Chicago Company, upon whose petition and for whose protection the injunction was issued. The scope of the order was simply to restrain the St. Louis Company, pending the suit, from attempting to oust the Chicago Company from the possession and management of that portion

of the road which was covered by the lease. Under the bill, the order could not have been broader, and the appended provision that the writ should not be construed to interfere with the use of the road by the St. Louis Company under the contract was a needless precaution against an impossible misconstruction. There is certainly nothing in the order which can be deemed to signify that the St. Louis Company should continue to use the road under the contract without discharging the current obligations thereby imposed upon itself, or that the Chicago Company, or the receiver as its representative, should not move in the manner provided by the contract for the enforcement of those obligations. It is a mistake to say that, by so doing, the receiver, after restraining his adversary, was proceeding to do the very act the legality of which had been submitted to the state court for its summary action. Though arising out of the same contract, the issues involved in this application are not the same as those of the suit in the state court.

Under the second proposition, it is contended, upon the authority of *Hook v. Bosworth*, 12 C. C. A. 208, 24 U. S. App. 341, and 64 Fed. 443, that the receiver had no authority to receive or to enforce payment of an indebtedness which accrued prior to his appointment. The dispute in that case, however, was between the receiver, on one side, and, on the other, the railroad company, mortgagor, and its president and treasurer, over moneys earned on a contract for carrying the mails before the receivership was ordered; and the decision is manifestly inapplicable to a case between the receiver and a debtor of the company. The record before us shows an order putting the receiver in possession, not simply of the mortgaged road, rolling stock, and other property used in operating the line, but of all the rights and property of the Chicago Company; and, under such an order, it is not for a debtor of the company to question the authority of the receiver to collect money due the company, or to use any means which the company itself, if still in control, might use to enforce payment. It is only in very clear cases of error that an appeal from an order granting or refusing a preliminary injunction should be sustained. See *Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g Co.*, 16 C. C. A. 220, 69 Fed. 250; *Thompson v. Nelson*, 18 C. C. A. 137, 71 Fed. 339.

The order of the circuit court is affirmed.

SCOUTT v. KECK et al.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1896.)

No. 546.

1. REMOVAL OF CAUSES — DIVERSE CITIZENSHIP — NECESSARY AND FORMAL PARTIES.

An agent or trustee, appointed by both parties to a sale of lands to hold the deed, purchase-money notes, and mortgage securing them until certain conditions are performed, is a necessary, and not a merely formal, party to a suit for specific performance brought by the vendor against him and the vendee, wherein part of the relief sought is a decree compelling

such trustee to record the deed and deliver the notes and mortgage in accordance with the contract; and if the complainant and the trustee are citizens of the same state, the suit is not removable by the vendee, though he be a citizen of a different state. *Wood v. Davis*, 18 How. 467; *Bacon v. Rives*, 1 Sup. Ct. 3, 106 U. S. 99; *Construction Co. v. Simon*, 53 Fed. 1,—distinguished.

2. SAME—SEPARABLE CONTROVERSY.

Complainant purchased land from K., giving her his notes for deferred payments, and afterwards sold the land to M., making a deed therefor, which, together with M.'s notes and mortgage for the purchase money, were placed in the hands of one T., as trustee, to collect certain of the notes when due, and thereupon record the deed, and to deliver the proceeds of the notes collected and the remaining notes and the mortgage to complainant, on the latter's furnishing an abstract showing perfect title in himself. After the notes and mortgages had been placed in T.'s hands, a tripartite agreement was made between complainant, K., and M., whereby, among other things, complainant was to assign M.'s notes and mortgage to K., in discharge of his debt to her, and T. was to hold and collect the same for her benefit. Afterwards complainant brought a suit for specific performance against M. and T., also making K. and her husband parties defendant, on the ground that they refused to join as complainants, but not alleging any default on their part. *Held*: (1) That even if the bill did state two or more separable causes of action, that neither of said causes of action was wholly between citizens of different states; (2) that the bill disclosed but a single cause of action; (3) that for both reasons the cause was not removable to the federal court on the ground of a separable controversy.

Appeal from the Circuit Court of the United States for the District of Nebraska.

John M. Thurston (Robert A. Moore was with him on brief), for appellant.

John L. Webster (Willard Eddy was with him on brief), for appellee R. H. Mather.

Elisha C. Calkins and Warren Pratt, for appellees Samantha Keck and Josiah L. Keck.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The decision of this case, so far as this court is concerned, hinges upon a question of jurisdiction. The suit was brought originally by Will J. Scoutt, the appellant, against Samantha Keck, Josiah L. Keck, William C. Tillson, and R. H. Mather, the appellees, in the district court of Buffalo county, state of Nebraska, from which court it was removed by the defendant R. H. Mather to the circuit court of the United States for the district of Nebraska, where it was eventually tried, resulting in a decree for the defendants dismissing the bill of complaint. The plaintiff, Will J. Scoutt, and the defendants Samantha Keck, Josiah L. Keck, and W. C. Tillson were citizens and residents of the state of Nebraska, while the defendant R. H. Mather was a citizen of the state of Connecticut. The defendants Samantha Keck and Josiah L. Keck are husband and wife. The suit was brought for the specific performance of a contract for the purchase and sale of a tract of land situated in Buffalo county, state of Nebraska, which, prior to the month of June, 1891, was owned by Mrs. Keck. The bill of complaint, which was filed on June 30, 1892, contained, in substance,

the following allegations: That by virtue of a contract which was made by the plaintiff, Will J. Scoutt, in June, 1891, with Samantha Keck and her husband, the latter parties had become obligated to convey to the plaintiff the land which forms the subject-matter of the present controversy for the price and sum of \$18,000, of which sum \$4,500 was to be paid in cash on the execution of the deed, and the balance in three equal annual installments. That in August, 1891, the plaintiff, Will J. Scoutt, being the owner thereof in the manner aforesaid, sold the land, and executed a deed therefor in favor of the defendant R. H. Mather, for the sum of \$34,000. That the latter person executed his notes for the purchase money, which were made payable to the plaintiff in the following amounts, and at the following dates, to wit: One note, for \$3,000, due November 1, 1891; one note, for \$3,000, due February 1, 1892; one note, for \$2,500, due May 1, 1892; and three notes, for the sum of \$8,500 each, due, respectively, on September 1, 1892, September 1, 1893, and September 1, 1894. That said R. H. Mather further executed a mortgage on the land in favor of said Will J. Scoutt to secure the payment of all of said notes. That thereupon the said deed, which was executed by the plaintiff, and the notes and mortgage, that were executed by the said Mather, were deposited with the defendant William C. Tillson, as cashier of the Kearney National Bank, with the following written instructions, and upon the following conditions:

"That the said Mather was to pay the three notes first maturing, and upon the payment of the same the said Tillson was to deliver to him the notes, and the said Tillson was to retain in safety deposit the money so paid until the plaintiff herein [Will J. Scoutt] should deliver to the said Tillson an abstract showing a perfect title to the said property in him; and upon the presentation to Tillson of the abstract showing perfect title, the said Tillson was to deliver to the said Scoutt the notes and mortgage [securing] the same, and record the deed from Scoutt and wife to Mather."

It was further alleged, in substance, that after the aforesaid deed, notes, and mortgage had been placed in the keeping of the defendant Tillson, an oral agreement was entered into by and between said Samantha Keck, R. H. Mather, and the plaintiff, Scoutt, whereby it was mutually agreed that Mather should pay to the defendant Tillson, on February 1, 1892, his two notes for \$3,000 each, which matured, respectively, on November 1, 1891, and February 1, 1892, and that said notes when so paid should be returned to Mather; that, in consideration of such payment, Samantha Keck should execute a warranty deed in favor of the plaintiff, Scoutt, for the premises in controversy, and deposit the same with said Tillson, together with an abstract of title showing a good title in her at the date of the conveyance; that the plaintiff, Scoutt, should thereupon assign to Samantha Keck the notes and mortgage which had been theretofore executed by Mather in payment for the land, and leave the same, when thus assigned, with Tillson, for collection; and that Samantha Keck should accept the notes and mortgage, when so assigned, in payment of Scoutt's indebtedness to her on account of his purchase of the land. By a further agreement between the plaintiff and Mrs. Keck, the

former was to receive $16/34$ of the proceeds of said notes when collected from the defendant Mather. The bill further alleged that, in accordance with the aforesaid tripartite agreement, Samantha Keck subsequently executed a deed in favor of the plaintiff, Scoutt, for the land in controversy, and delivered the same to Tillson, together with an abstract showing a good title in her at the date of the conveyance, and that she subsequently obtained from Tillson the two Mather notes, for \$3,000, that were to have been paid on February 1, 1892, and that she continued to hold said notes when the bill was filed. The plaintiff further charged that he had performed his part of the alleged agreement. He averred, however, in substance, that the defendant R. H. Mather had refused to pay the two notes, for \$3,000 each, which matured on November 1, 1891, and on February 1, 1892; that Tillson still held the remaining notes and mortgage that had been executed by Mather; that Mather had given Tillson directions not to deliver the same; that, in consequence of such directions, Tillson had declined to deliver said notes and mortgage, or to proceed with the collection thereof; and that he had refused to place the two deeds then in his hands on record. The plaintiff also averred that Samantha Keck was proceeding to collect the two notes, for \$3,000 each, which she had obtained from Tillson, and that she and her husband had refused to join with the plaintiff in a suit to specifically enforce the contract, for which reason he had made them parties defendant. The relief prayed for in the bill was as follows: First, that the defendant Tillson be compelled to place the two deeds in his possession on record, so as to vest the title to the property in controversy in the defendant Mather; second, that Tillson be compelled to deliver the notes and mortgage in his hands to the plaintiff and to Samantha Keck, or that he be compelled to proceed with the collection thereof, in accordance with the instructions given him by the plaintiff and said Mather when the notes were originally placed in his custody; third, that a judgment be entered against Mather for the three notes that were then past due, to wit, the notes that matured November 1, 1891, February 1, 1892, and May 1, 1892, and that the defendant Samantha Keck be required to bring into court the two of said notes which she had obtained from Tillson; and, fourth, that the defendants R. H. Mather and Samantha Keck be compelled to perform their agreement, and that the plaintiff have general relief.

The petition to remove the suit to the federal court was framed, and the endeavor is to sustain the right of removal, on two principal grounds: First, that when the parties are arranged upon the record according to their several interests, the controversy is between the plaintiff, Scoutt, and the defendant Samantha Keck, on the one hand, and the defendant R. H. Mather on the other; that the former persons are the real plaintiffs, who are seeking to enforce a specific performance of the contract made by Mather, who is the sole defendant; and that, as the parties to the controversy, when thus arranged, are citizens and residents of different states, the case was properly removed. The second contention is that the case discloses a separable controversy between Scoutt and Mather, and that

it was properly removed for that reason. We will examine these propositions in the order above stated.

The first of these contentions takes no account of the presence upon the record of the defendant William C. Tillson, who is a citizen and resident of Nebraska, but assumes that he is a formal and unnecessary party, whose presence for jurisdictional purposes may be ignored. In this we think that counsel are in error. According to the averments of the bill, Tillson was an agent or trustee, appointed by both parties to the contract, to hold certain deeds, notes, and mortgages, and to record the former and to deliver the latter on certain conditions heretofore shown, which, as the plaintiff avers, have been fulfilled. He had certain active duties to perform. He still holds the deeds and the mortgage, and all the notes, save two, which have come into the possession of the defendant Keck, and he declines, as it seems, to execute the trust or the powers that were thus reposed in him. The chief object of the suit is to obtain a decree compelling Tillson to record the deeds and to deliver the notes and mortgages, that being the only way in which the contract can be specifically enforced in the manner that was contemplated by the parties thereto. Moreover, all the other relief that is prayed for in the bill is merely supplementary or ancillary, and grows out of the fact that three of the notes had matured when the suit was filed, and that two of the overdue notes were at the time in the hands of the defendant Keck. The plaintiff evidently assumed that, because three of the notes executed by Mather had matured, he was entitled to pray for a judgment thereon, as well as for a decree compelling Tillson to record the deeds and to deliver the notes and mortgage, which was the principal relief that the plaintiff below sought to obtain. Under these circumstances we think that Tillson is a necessary party defendant, and that his presence upon the record as a co-defendant of Mather cannot be ignored. He has the actual and exclusive possession of the notes and mortgage which the plaintiff seeks to recover and he refuses to deliver the same. The case, therefore, cannot be distinguished in principle from the recent case of *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259. In that case a controversy arose between the plaintiff, a citizen of Missouri, and the defendant, a citizen of Kansas, relative to the right of possession of certain bonds that were in the custody of a bank, which was a corporation of the state of Missouri. The bank was made a party defendant to the suit, although it was a mere bailee of the bonds, having received them for safe-keeping, and having agreed to surrender them on the completion of certain work and on the return of a certain receipt. It was held, however, that, inasmuch as the suit was brought to obtain possession of the bonds which were in the bank's custody, the bank was a necessary party, and that the suit could not be removed to the federal court by its co-defendant, a citizen of Kansas, between whom and the plaintiff a real controversy existed as to the right of possession of the bonds. See, also, *Thayer v. Association*, 112 U. S. 717, 5 Sup. Ct. 355; *Railway Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738; *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154; *Pittsburgh, C. & St. L. Ry. Co. v. Baltimore*

& O. R. Co., 10 C. C. A. 20, 61 Fed. 705. So, in the case at bar, although Tillson has no interest in the notes and mortgage that are now in his hands, yet, as the suit is brought to compel him to surrender them to the plaintiff, and as they were originally placed in his hands under conditions that were imposed both by Scoutt and Mather, he is a necessary party to the suit. This case is unlike the cases of *Wood v. Davis*, 18 How. 467, 470; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3; and *Construction Co. v. Simon*, 53 Fed. 1,—which are relied upon to sustain the right of removal. In the first of these cases (*Wood v. Davis*) a suit had been brought by a citizen of Illinois against citizens of Pennsylvania, for an accounting concerning certain transactions, and to obtain the cancellation of a certain note, executed by the plaintiff, on the ground that it had been fully paid. An agent of the defendants, who was a citizen of Illinois, and in whose hands the note had been placed merely for the purpose of collection, was joined as a co-defendant of the nonresident defendants, and as against him a temporary injunction was asked to prevent him from surrendering the note to his principals during the pendency of the litigation. The suit was held to be removable to the federal court by the nonresident defendants, on the ground that the agent was merely a formal and disinterested party. But in the same case the court made the following remark, which will serve to distinguish it from the case at bar:

"This is not the case of a stakeholder, or holder of a deed as an escrow, where a trust has been created by the parties which is sought to be enforced by one of them. In all such cases the trustee may be a proper party, as he has a duty to perform, and which the court may enforce if improperly neglected or refused."

In *Bacon v. Rives*, it was held that the right of a nonresident defendant to remove a case to the federal court was not defeated by the fact that a resident of the state had been made a party defendant merely as an equitable garnishee, and to prevent him, during the pendency of the suit, from paying over certain funds which belonged to the nonresident defendant. And in *Construction Co. v. Simon*, which was a suit brought by the maker of a note against a nonresident indorsee and owner thereof, for the purpose of having the note canceled, it was held by Mr. Justice Jackson, who subsequently delivered the opinion in *Wilson v. Oswego Tp.*, above cited, that the fact that a banking corporation of the state, which held the note merely for collection, had been made a party defendant, would not prevent the nonresident owner and indorsee from removing the case to the federal court. It will be observed that in these cases the person who was adjudged to be a formal and unnecessary party was an agent or garnishee of one of the parties to the suit, who was under no obligation to the opposite party, and who had no active duty to perform; whereas, in the case now under consideration, the defendant Tillson occupied the relation of a trustee for both parties to the controversy, and in a certain event was under an obligation to deliver certain notes which are still in his possession, and to place certain deeds upon record, the performance of which duty the plaintiff now seeks to enforce. We think, therefore, that when the bill

of complaint is viewed as a whole, and a fair construction is placed upon its averments, it sufficiently appears that Tillson was a necessary and proper party to the relief sought by the plaintiff, and that the first ground of removal above stated cannot be upheld or sustained.

We have next to consider the question whether the bill of complaint disclosed a separable controversy which entitled the defendant Mather to remove the suit to the federal court on that ground. It is insisted in his behalf that the bill states two separable causes of action, to wit, one in favor of the plaintiff, Scoutt, against Mather, to enforce the contract of the latter to purchase the land in controversy from the plaintiff, and another cause of action in favor of the plaintiff against Samantha Keck, to compel her to sell and convey the land to the plaintiff. But, even if we should concede that this is a correct analysis of the bill, yet it is apparent that the controversy between Scoutt and Mather is not "wholly between citizens of different states," for the reason, already stated and shown, that Tillson is a necessary party defendant to that controversy, and he and Scoutt are citizens and residents of the same state. Even when a complaint or declaration discloses two or more causes of action, the suit is not removable unless, in the language of the removal act, "there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them." 25 Stat. 433, c. 866, § 2. And in the present instance neither of the alleged controversies can be said to fall within this provision of the statute. But we are not prepared to admit that the bill was filed to enforce two separable causes of action against different defendants. It was not framed, we think, upon any such theory, and is not susceptible of that construction. The bill shows, in substance, that a contract was first made by the plaintiff, Scoutt, to sell the land to Mather, on certain terms and conditions, and that the contract so made was subsequently modified, in some of its provisions, by a tripartite agreement between Scoutt and Mather and Samantha Keck. The bill was filed to enforce the original contract between Scoutt and Mather, as modified by the subsequent tripartite agreement, and for that reason it states a single, rather than a dual, cause of action. The bill alleges that Samantha Keck and her husband have already executed a deed in favor of Scoutt, and that they have delivered the same, together with an abstract of title, to the defendant Tillson, and that they are made parties to the present suit because they have refused to join therein as complainants. The bill does not show that they are in default in the execution of their part of the contract; but, in view of the tripartite agreement to which they were parties, and in view of the fact that they are entitled to share to a certain extent in the purchase money that is received from Mather, we think that they were properly made parties to the suit. The second ground of removal is not well taken.

In conclusion, it is proper to add that the record lodged in this court shows that the petition for removal was filed in the district court of Buffalo county, Neb., on August 1, 1892, before the time for filing an answer to the bill of complaint had arrived. It fails

to show, however, that the petition for removal was ever called to the attention of that court, or to the attention of the judge thereof, either on the day when an answer was due, or afterwards, or that said court or judge was ever asked to make any order with reference to the petition for removal. The record further shows that, long afterwards, to wit, on September 30, 1892, the defendant Mather made and filed in the state court a motion to dismiss the case as to him, and that said motion was argued and submitted, and eventually overruled. In view of these facts, appearing upon the face of the record, counsel for the appellant have insisted that the petitioner waived his right of removal, if such right ever in fact existed; and the judgment of this court is invoked on the latter point. But, inasmuch as we are satisfied, for the reasons already stated, that the case was not subject to removal, it is unnecessary to express an opinion with reference to the latter question. The decree of the circuit court dismissing the bill is vacated and annulled, and the case is remanded to the circuit court, with directions to remand it to the district court of Buffalo county, state of Nebraska.

CONDON v. CENTRAL LOAN & TRUST CO.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1896.)

No. 695.

APPEAL—TIME OF TAKING.

An appeal to the circuit court of appeals, not taken within six months, as required by the act establishing that court (26 Stat. 829, c. 517, § 11), must be dismissed.

Appeal from the Circuit Court of the United States for the District of Nebraska.

F. B. Tiffany, for appellant.

Curtis L. Day, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This was a suit in equity, to foreclose a mortgage on real estate, begun in the United States circuit court for the district of Nebraska by the Central Loan & Trust Company, the appellee, against Frank C. Condon, the appellant, and others. A decree pro confesso was entered on the 4th day of September, 1893; a motion, filed on the 28th day of November, 1893, to set aside and vacate the decree pro confesso, was overruled on the 9th day of January, 1894; and on the 29th day of January, 1894, a final decree of foreclosure was entered. On the 26th day of February, 1894, a motion was filed "to set aside the default and decree," which was denied on the 27th of April, 1894. This appeal was taken more than 15 months after the rendition of the final decree, and more than 12 months after the motion to set aside the decree was overruled. The appeal, not having been taken within 6 months, as required by the act establishing this court (26 Stat. 829, c. 517, § 11), must be dismissed, and it is so ordered.

In re GAMEWELL FIRE-ALARM TEL. CO. et al.

(Circuit Court of Appeals, First Circuit. April 23, 1896.)

No. 180.

1. APPEAL—EFFECT OF DECISION AND MANDATE—SUPPLEMENTAL PROCEEDINGS BELOW.

A decision by a federal appellate court finally settles as the law of the case everything which was before the court and was disposed of by it, so that after it the court below has no power to entertain a supplemental bill in the nature of a bill of review, based on newly-discovered evidence, unless such right is reserved, or permission given in the mandate.

2. SAME—PETITION TO APPELLATE COURT AFTER MANDATE.

A federal appellate court may ordinarily entertain an original petition for leave to file, in the court below, a bill of review, or a supplemental bill in the nature thereof, even when the application is made after the rendition of judgment by the appellate court, after the going down of the mandate, and after the close of the term at which the judgment was entered.

3. SAME—QUESTIONS FOR DECISION.

Upon the filing of such a petition two questions ordinarily arise: First, that of the materiality of the alleged new matter; and, second, that of laches. The question of materiality is mainly and ordinarily for decision by the appellate court; but the question of laches should ordinarily be left to the court below, which is apt to be more fully acquainted with the facts bearing on that question. In case the petition is granted, therefore, the usual order will be that the petitioner have permission to apply to the court below for leave to file further pleadings.

4. SAME—REHEARINGS IN PATENT CASES — NEWLY-DISCOVERED ANTICIPATORY MATTER.

Applications for rehearings in patent cases, based on alleged newly-discovered anticipatory publications should not be made the basis for new proceedings, unless strict rules are satisfied.

Petition by the Gamewell Fire-Alarm Telegraph Company and others for leave to file in the circuit court a supplemental bill in the nature of a bill of review.

This was a suit in equity by the Municipal Signal Company against the Gamewell Fire-Alarm Telegraph Company and others for alleged infringement of letters patent Nos. 359,687 and 359,688, granted March 22, 1887, to B. J. Noyes, for improvements in municipal signal apparatus. The suit was commenced in June, 1888, and in August, 1892, after a hearing on the pleadings and proofs, an interlocutory decree for an injunction and account was entered by the circuit court. 52 Fed. 464. From this decree defendants appealed to this court, which, on April 11, 1894, affirmed the same. 10 C. C. A. 184, 61 Fed. 949. After the going down of the mandate, the complainant took no steps to have an accounting, and nothing has been done in that regard to the present time. On June 12, 1895, defendants filed in the circuit court a petition for a rehearing, and for leave to file a supplemental bill in the nature of a bill of review, based on alleged newly-discovered evidence. On February 5, 1896, this petition was denied, Colt, Circuit Judge, delivering the following opinion:

"No right having been reserved in this case in the mandate of the circuit court of appeals, and no permission having been given upon application to that court for leave to file a supplemental bill in the nature of a bill of review, the defendants' petition must be dismissed. Southard v. Russell, 16 How. 547, 570; Kingsbury v. Buckner, 134 U. S. 650, 671, 10 Sup. Ct. 638; Bank v. Taylor, 4 C. C. A. 55, 53 Fed. 854, 866; Durant v. Essex Co., 101 U. S. 555; Watson v. Stevens, 3 C. C. A. 411, 53 Fed. 31, 34. The rule laid down in the above cases applies to interlocutory as well as to strictly final decrees, but does not apply to interlocutory orders for preliminary injunctions, which

are now made appealable under section 7 of the act of March 3, 1891. *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276, 282. Petition denied." Thereafter, and on April 7, 1896, the defendants, by leave, filed in this court, the complainant not objecting, an original petition, praying for an order granting leave to file in the circuit court a supplemental bill in the nature of a bill of review, setting forth the alleged newly-discovered evidence. The new evidence set forth in the petition consisted of three matters of alleged anticipation: (1) The prior use in Kansas City, Mo., of a device known as the "Wood Signal Box"; (2) the Henry patent, No. 295,249, for a combined fire and police alarm; and (3) the Siemens-Halske publication.

The petition showed that the Wood device was set up at the hearing in the circuit court, and was considered, both by that court and by this court on appeal; and that the defense based upon it was overruled, not because it would not have been an anticipation, but because the proof of its existence and use was not sufficient. The petition then alleged that after the decision of this court defendants discovered that the Wood device had, in fact, been in actual use for business purposes in Kansas City, Mo., long prior to the application for the patent in suit; that this fact was known to complainant prior to the hearing in the circuit court; that it thereupon sent an agent to Kansas City, who discovered a person having knowledge of the use there, and one of the boxes which had been so used; that, believing this to be the only box in existence, complainant, for the purpose of concealing it, and preventing the knowledge of such use from coming to defendants, paid to such person a retainer; and that the said box was taken into the possession of the complainant, or of some person connected with it. It was further alleged that, prior to the hearing in the circuit court, defendants had obtained an intimation of the Kansas City use, and thereupon had addressed a communication to an officer of the company which had there used the system, but received evasive replies, and that it again communicated with such officer, but was unable to obtain any response. The petitioners averred that all these facts were discovered after the decision of the case on appeal, and that they were prevented from obtaining an earlier knowledge by the said machinations and concealment on the part of the complainant. In respect to the Henry patent, the petition alleged that defendants had caused a thorough and exhaustive search to be made through the letters patent granted by this and other countries and through literature generally, for the purpose of discovering patented or published anticipating structures, and that, although this search was made at great length, and at much expense, by intelligent men, the Henry patent was overlooked, and was only discovered in the course of a subsequent search. The allegations in relation to the Siemens-Halske publication, and the reasons why it was not previously discovered, were much the same as those in relation to the Henry patent.

The petition contained various allegations showing the materiality of these three matters, and also in relation to its exercise of diligence in their discovery. To this petition the complainant in the infringement suit filed an answer, which was, in effect, a general denial of the allegations. Upon the questions raised by the petition and answer briefs were filed. The points made in opposition to the petition were summarized as follows in the brief of counsel: "(1) The petition is defective in the form of its prayer. (2) The petition is filed too long after the transmission of the mandate to the circuit court to entitle it to consideration. (3) On the face of the papers the 'newly-discovered evidence' is of such a nature that the defendants are presumed to have known it. Publications cannot, in the nature of things, be newly discovered. (4) The defendants are guilty of actual laches; their 'newly-discovered evidence' has been known to them for years. (5) The substance of the alleged new matter is insufficient on its face to affect the case."

Richard N. Dyer (Sam'l O. Edmonds was with him on brief), for petitioners.

Odin B. Roberts (James H. Lange was with him on brief), for respondent.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. The principal case to which this petition refers was a bill in equity to enjoin the infringement of certain patents. There had been in the circuit court a hearing on bill, answer, and proofs, and the usual interlocutory decree for an injunction and a master, and an appeal to this court. Thereupon this court, after argument, affirmed the decree of the circuit court, and a mandate issued in the usual form. After the receipt of the mandate by the circuit court, the respondents in the original cause, being the petitioners in the pending proceeding, filed in the circuit court a petition for leave to file a supplemental bill in the nature of a bill of review, based on alleged newly-discovered evidence. The learned judge of the circuit court passed down an opinion, which referred to many of the cases we shall cite, and properly declined to entertain the proceeding without the leave of this court. Thereupon we granted leave to file this petition in this court, and the respondent, the Municipal Signal Company, voluntarily appeared, and filed a general denial, reserving all questions of law. The petitioners support their case by affidavits, and there are no opposing proofs.

In the federal courts, the practice has been fully established as held by the circuit court, with reference to all proceedings by amendment, or supplemental in any form, which may delay or turn aside the complete execution of the judgment of the appellate court, or which may bring before that court anew substantially the questions disposed of on the first appeal. Equity rule 88 has no relation to this subject-matter, as it clearly concerns only petitions for rehearing filed prior to the taking of an appeal; and Rule 30 of the rules of the supreme court relates only to proceedings which have their beginning and end in that court. The reasons underlying the practice will be seen in the following from *Sibbald v. U. S.*, 12 Pet. 488, 492:

"When the supreme court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it. Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded."

The principles of this citation have been stated many times in the supreme court, but probably nowhere so pointedly as here. A late collection of the cases reaffirming them will be found in *Gaines v. Rugg*, 148 U. S. 228, 242, 13 Sup. Ct. 611, and the latest statement of them is in *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 255, 16 Sup. Ct. 291. So far as we can discover, the rule itself was first stated in *Southard v. Russell*, 16 How. 547, 570, in the following language:

"Nor will a bill of review lie in the case of newly-discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the court of chancery and house of lords in

England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits."

This case was reaffirmed by the supreme court in *U. S. v. Knight's Adm'r*, 1 Black, 488, 489, and *Kingsbury v. Buckner*, 134 U. S. 650, 671, 10 Sup. Ct. 638. The principle of it was applied in *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 413, 12 Sup. Ct. 188, and in the cases there cited, and also at length in *Rubber Co. v. Goodyear*, 9 Wall. 805. In *Ricker v. Powell*, 100 U. S. 104, it was not noticed so far as the record shows. The circuit court of appeals for the Second circuit apparently refused to apply the rule in *Marquand v. U. S.*, 6 C. C. A. 309, 57 Fed. 189, 190, stating that it was not within the province of that court, "in case a judgment of the circuit court is affirmed, to direct or suggest its action in regard to new trials upon newly-discovered evidence or newly-ascertained facts." Nevertheless the rule is too firmly established by the supreme court to be questioned, and, as said by it in *Southard v. Russell*, *ubi supra*, it is based on principles essential to the proper administration of the law and to the reasonable termination of litigation. It would be beyond endurance to permit subsequent appeals in the same case which are ultimately found to raise practically the same questions as those which have already come up and been determined; and whether such is the probability with reference to any subsequent appeal can be determined only by the appellate tribunal, which alone can fully understand the principles which governed its action, or which may continue to govern it. The rule was expressly recognized by the circuit court of appeals for the Seventh circuit in *Bank v. Taylor*, 4 C. C. A. 55, 53 Fed. 854, 866; and it, or its underlying principles, have been applied in this court in *Watson v. Stevens*, 3 C. C. A. 411, 53 Fed. 31; *Smith v. Weeks*, 3 C. C. A. 644, 53 Fed. 758, 763; *Woodward v. Machine Co.*, 11 C. C. A. 353, 63 Fed. 609, 611; *American Bell Tel. Co. v. U. S.*, 15 C. C. A. 569, 68 Fed. 542, 570, and *Cash-Carrier Co. v. Martin*, 18 C. C. A. 234, 71 Fed. 519, 520. In some of these cases before us it was so clear that the application had no equity that we refused it; but in none of them has the rule, or the proper practice under it, been fully stated. First we will observe that the supreme court has made no distinction arising out of any question whether the application is made before or after judgment, or before or after mandate issued, or before or after the close of the term at which the judgment is rendered. In some of the cases to which we have referred it is stated that the application may be made after judgment; and, unless it can be made after a mandate has gone down, and even after the term has adjourned at which the judgment was entered, there would evidently arise instances of the grossest injustice for which there could be no relief. We have no doubt that an application may be made, as in this case, after the judgment, after the issue of the mandate, and after the close of the term at which the judgment was entered, subject to certain limitations as to time arising out of the equitable doctrine of laches, and other possible exceptional limitations. *Ricker v. Powell*, 100 U. S., at page 109. While it is commonly said that,

after an appeal, a bill of review may be allowed on new matter, yet it is also said to be doubtful whether a bill can then be filed for error apparent on the face of the record. Daniell, Ch. Prac. (6th Am. Ed.) 1579; Southard v. Russell, 16 How., at page 570. The reason of the thing sustains this doubt, as without it there would be large indirect opportunities for rehearings in appellate tribunals in addition to those provided by their rules, with consequent protraction of litigation, and raising anew all the questions open on the first hearing, and presumed to have been then heard and disposed of or waived. It is probable that there may arise exceptions, as in cases of mere oversight; but we are not called on to discuss this question, as the petition here is based wholly upon alleged newly-discovered evidence.

The application made to the circuit court was for leave to file a supplemental bill in the nature of a bill of review. As the application was made after the interlocutory decree which we have described, but before a final decree, so that when made a bill of review, strictly speaking, would not have been the proper method of proceeding, its form seems to be sustained by the authorities. Story, Eq. Pl. § 421; Reeves v. Kingston Bridge Co., Fed. Cas. No. 11,661; Baker v. Whiting, 1 Story, 218, 233, Fed. Cas. No. 786. It may be that it is not necessary to maintain so strict a rule, now that the equity practice has been relieved from the ancient method of taking proofs on closed commissions, and now that, with the present practice, no substantial reason remains why a simple petition for a rehearing cannot take the place of a supplemental bill. Such a petition was admitted in Henry v. Stove Co., 5 Ban. & A. 108, 2 Fed. 78, and recognized as proper in Rob. Pat. § 1133, and notes thereto. This more liberal practice seems impliedly assumed as proper in Wiggins Ferry Co. v. Ohio & M. Ry. Co., already cited (142 U. S. 396, 413, 12 Sup. Ct. 188), and in the cases therein referred to, where the supreme court exercised, under very special circumstances, an equitable power to permit amendments and new proofs, although by strict rule the party appealed against was entitled to an affirmance. By reason, however, of the form of proceedings adopted by the petitioners, we need not determine this particular question, and we only refer to it in order that it may be seen that we have not overlooked it. In Rubber Co. v. Goodyear, already referred to (9 Wall. 805), the practice on an application of an analogous character to that at bar appears at length. It is there shown that questions of two classes arise on the face of this petition: First, that of the materiality of the alleged new matter; and, second, that of laches. In Rubber Co. v. Goodyear, the supreme court considered and disposed of both classes adversely to the petitioner, thus showing that we have full power in that direction; a power which we exercised in some of the cases already referred to. Nevertheless, there are substantial differences. So far as the question of materiality is concerned, it is evident that it is mainly for the appellate court, because, ordinarily, it only can judge properly with reference thereto. Yet, while ordinarily this question would be for the appellate court, there may be very peculiar circumstances under which we might

feel bound to remit it to the court below. On the other hand, the question of laches would ordinarily be for the court below. Ordinarily, the appellate court, in dealing with an appeal, considers only portions of the record, those portions necessary to bring before it the errors especially assigned; and it is usually ignorant of the details of the history of the case. It thus, ordinarily, fails to have before it the elements which would enable it to determine properly the question of laches; and, moreover, it should not, ordinarily, be required to investigate all the details of litigation which bear on questions of this character. Yet, as appeared in *Rubber Co. v. Goodyear*, and as appeared in some of the other cases to which we have referred, it may be so clear that the petitioner has been guilty of laches that the appellate court may well dispose of all questions. It must, of course, be ordinarily understood that if leave is granted as prayed for by the petitioners, it cannot be in the form asked for by them, namely, leave to file further proceedings in the court below, but that what may go from the appellate court is that the petitioner has permission to apply to the court below for leave to file as asked for by him. Except so far as otherwise indicated by the order of the appellate court, or as may appear in its opinion filed in connection with the order, the court below will always understand that its discretion is unfettered.

In the present case, the basis of the application relates to a claim of newly-discovered evidence with reference to three different particulars. The first is that a certain alleged anticipatory device, known as the "Wood Device," which was determined by this court in the opinion passed down on the appeal (*Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co.*, 10 C. C. A. 184, 61 Fed. 948) to have been purely experimental, has been ascertained to have been in prior use for commercial purposes. It is now claimed by the petitioners that the entire basis of the rejection of this device on the appeal was that it was experimental. An examination of the briefs, as well as of our opinion, sustains this proposition. As we shall remark further on, anticipatory matters, alleged to be newly discovered, are rarely accepted as the basis of proceedings of this character; but the circumstances appearing on the face of the petition are so peculiar that it seems to us that, if the petitioners satisfy the court below that they have not been guilty of laches, there would be a reasonable probability that the new proofs, if they sustain the allegations of the petition, would require reconsideration from us if the case should come here again.

The other alleged newly-discovered matters are a patent of the United States and a publication in a German periodical or newspaper. So far as these are concerned, the petitioners do not allege such peculiar circumstances as would justify any court in permitting the case to be reopened on this account. The rules stated by the supreme court as to the character of the proofs required to establish anticipatory matter as against a patent otherwise meritorious have been given in such terms as to make it apparent that a defense of this character is not favored unless when it has peculiar

merit. We may well refer in this connection to the opinion of Judge Wales, in behalf of the circuit court of appeals for the Third circuit, in *Philadelphia Trust, Safe-Deposit & Insurance Co. v. Edison Electric Light Co. of New York*, 13 C. C. A. 40, 65 Fed. 551, 552. The general interests of litigation require that applications for rehearings based on alleged anticipatory publications, which may well be presumed to be accessible to a search if sufficiently diligent, should not be made the basis of new proceedings unless strict rules are satisfied. As there is no limit to the amount of published material, there would otherwise be no end to the number of applications of this character which might be made, one after another. The question of laches involves in this case too many elements not considered by us on the appeal, and too many matters not appearing of record in this court, to require attention from us; and therefore it is remitted to the circuit court. We determine only that the petitioners may have permission to apply to the court below for leave to file their bill stated in the petition, first striking from it all alleged newly-discovered evidence except that which relates to the Wood device.

Ordered, that the petitioners present within one week the draft of an order conforming to the opinion passed down this day, giving reasonable notice thereof to the respondent.

A decree pursuant to this opinion was entered April 30, 1896, and reads as follows:

"The petition of the Gamewell Fire-Alarm Telegraph Company et al. for permission to present to the United States circuit court for the district of Massachusetts a petition for leave to file supplemental bill in the nature of a bill of review, having come on to be heard, now, after hearing Richard N. Dyer, Esq., on behalf of the petition, and Odin B. Roberts, Esq., in opposition thereto, it is ordered that permission be, and the same is hereby, granted to petitioners to present to the said United States circuit court for the district of Massachusetts, within ten days after the entry of this order, the annexed proposed supplemental bill in the nature of a bill of review, and to apply for leave of said circuit court to file the same, and proceed thereunder.

"By the Court.

John G. Stetson, Clerk."

The proposed supplemental bill annexed to the decree was based entirely on the alleged prior use of the "Wood Device."

STATE OF MINNESOTA v. GUARANTY TRUST & SAFE-DEPOSIT CO.
et al.

(Circuit Court, D. Minnesota, Fourth Division. May 6, 1896.)

1. JURISDICTION OF FEDERAL COURTS—STATE AS A PARTY.

A federal court has no jurisdiction, on the ground of citizenship, of a suit brought by a state against either its own citizens or citizens of other states.

2. OVERISSUES OF RAILROAD STOCK—MINNESOTA STATUTE—ACTION BY STATE.

The Minnesota statute prohibiting railroad companies from selling or disposing of any shares of stock until the same are fully paid, or issuing any stocks or bonds except for money, labor, or property actually received,

and declaring all fictitious stock or indebtedness void (Gen. St. 1894, § 2743), was enacted for the purpose of protecting stockholders and creditors against fictitious indebtedness, or watered stock, and gives the state no authority to protect such private rights by a suit in its own name.

This was a bill in equity by the state of Minnesota against the Guaranty Trust & Safe-Deposit Company, the Duluth & Winnipeg Railroad Company, the North Star Construction Company, the Safe-Deposit & Trust Company of Baltimore, and William C. Van Horne. The cause was heard on a motion by complainant for an injunction to restrain the sale of railroad property under foreclosure proceedings.

The bill of complaint alleges substantially as follows: That the Duluth & Winnipeg Railroad Company was organized in 1878 for the purpose of building and equipping a railroad from Duluth, Minn., to the northern boundary of the state. That between the years 1888 and 1892 the Duluth & Winnipeg Syndicate and the North Star Construction Company, its successor, built and equipped a hundred miles of that road on the following terms: That the syndicate, or its successor, was to obtain and pay for the right of way, construct, and equip the road, and for each mile so completed and equipped was to receive 100 shares, face value, \$10,000, of preferred stock; 150 shares, common stock, face value, \$15,000; and 20 bonds, face value, \$20,000; and might retain possession of and operate the railroad without being accountable for any of the net earnings. That the aggregate cost to the syndicate and construction company of said buildings and equipments did not exceed a million and a half dollars, but that there were issued in payment therefor, wrongfully and unlawfully, and in direct violation of the statute of Minnesota, to the North Star Construction Company, a million dollars, face value, preferred stock, a million and a half dollars, face value, of common stock, and two million dollars of mortgage bonds of the Duluth & Winnipeg Railroad Company, by the officers of the latter company. That in January, 1893, the stockholders of the construction company accepted a proposition, whereby one Van Horne, president of the Canadian Pacific Railroad Company, acquired the entire control, management, and operation of the construction company and the Duluth & Winnipeg Railroad, and continued to control and operate the same until the appointment of a receiver for the latter company. That said Van Horne caused to be appointed his own agents and servants as officers and directors of each of said companies, whereby the business affairs of those companies were so manipulated that the earnings of the Duluth & Winnipeg Railroad were reduced from over \$80,000 in 1893 to less than \$16,000 in 1894, thus seeking to wreck and ruin the railroad company, and bring about the sale of its property under the mortgage or trust deed. That under the control and direction of Van Horne, during the year 1892, bonds of the railroad company were issued to the amount of \$2,000,000, and that the same were issued without consideration or authority, and in fraud, of the people of the state of Minnesota. That on October 11, 1894, the Guaranty Safe-Deposit & Trust Company commenced an action against the Duluth & Winnipeg Railroad Company, the North Star Construction Company, and the Safe-Deposit & Trust Company of Baltimore to foreclose a mortgage or deed of trust for the \$2,000,000 worth of bonds against the railroad company; whereupon a receiver was appointed, and the railroad company filed its answer, admitting all the allegations of the bill of complaint, and consenting that complainant might have the relief prayed for in its bill. That on January 28, 1895, a decree was entered, by consent of the railroad company, for a sale of its property, that the Guaranty Trust & Safe-Deposit Company might bid at the sale, and in payment might surrender and deliver the bonds, notice whereof was duly published. That the suit brought by the Guaranty Trust & Safe-Deposit Company against the railroad company was baseless, collusive, and fraudulent. That the railroad company was not insolvent, but suit was commenced in furtherance of a design of Van Horne and his associates to reorganize the Duluth & Winnipeg Railroad Company, and

issue stock largely in excess of the actual cost of the railroad, in violation of the statute of Minnesota. And complainant avers that, unless restrained, said Van Horne and his associates will carry out said design, in fraud of the people, and in violation of the statute of Minnesota. The bill then sets up the following statute, among others (section 2743, Gen. St. Minn.), which, so far as material, provides: "That it shall not be lawful for any railroad company existing by virtue of any of the laws of this state, nor for any officer of any such company, to sell, dispose of, or pledge any shares in the capital stock of such company, until the shares so sold, disposed of, or pledged, and the shares for which such certificates are to be issued, shall have been fully paid, nor issue any stocks or bonds except for money, labor, or property, actually received and applied to the purpose for which such corporation was created, and all fictitious stock, dividends and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void." An injunction is then asked that the defendants be restrained from executing and carrying out the agreement set up; that an accounting be had to determine the actual cost of said railroad, and the present owners of claims against the same; that the railroad properties be sold for the purpose of paying the amount actually expended in the construction thereof, and the purchasers be permitted to issue securities against the properties of the reorganized company to an amount equal to the actual cost of the road; that any valid and subsisting claims against the railroad company may be applied as part payment pro rata upon the purchase of the property; that the outstanding stock and bonds heretofore issued by the railroad company be declared null and void; that the sale be enjoined pending this litigation, and the agreement heretofore referred to, if executed, be declared null and void.

H. W. Childs, Atty. Gen., and Geo. B. Edgerton, Asst. Atty. Gen.,
for the State of Minnesota.

Munn, Boyeson & Thygeson, for defendants.

NELSON, District Judge (after stating the facts). This motion is based upon a bill with accompanying affidavits, filed by the state of Minnesota, to enjoin and restrain a sale under a decree of foreclosure heretofore granted in the case of Guaranty Trust & Safe-Deposit Company against the Duluth & Winnipeg Railroad Company et al. No stockholder of the railroad company interposed any objection to the foreclosure. In my opinion, the motion must be denied, for the following reasons:

1. No federal question is involved. A state is not a citizen, and this court has no jurisdiction in a suit brought by a state against its own citizens or citizens of other states.

2. The state has no property rights in the original controversy.

3. The provisions of section 2743, Gen. St. Minn. 1894, relied upon by the attorney general, and which it is claimed give the state a standing in this court by a bill in equity to enforce the same, were enacted for the purpose of protecting stockholders and creditors against fictitious indebtedness, or "watered stock," so called; in other words, to protect private rights; and the state has no authority to protect such private rights by suit.

4. The bill is not ancillary or auxiliary to the main proceeding, but original, and some of its features are in the nature of a bill "quia timet"; that is, for the purpose of quieting apprehensions of probable or possible future violation of the statute.

5. Counsel is mistaken when he says that the state can secure relief, if entitled to any, nowhere else save in the original action,

and by this proceeding. The state, by informing bidders at the sale of what it intends to do, would not be cut off from proceeding against purchasers.

After such consideration as I have been able to give the matter in the limited time allowed, I am clearly of the opinion that the state has no standing in court under the proceedings instituted by it, and I decline to issue an injunction restraining the sale.

WESSON v. SALINE COUNTY.

SOCIETY FOR SAVINGS v. SAME.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

Nos. 163, 164.

1. WRIT OF ERROR—SPECIAL FINDINGS—RECORD.

A special finding of facts, like a general finding or verdict, is in itself a part of the record, and need not be embodied in a bill of exceptions; and it should not be accompanied by a general finding.

2. SAME.

The question for review upon a special finding, where a jury is waived in writing, is whether the facts found are sufficient to support the judgment (Rev. St. § 700); and the finding should be complete in itself, unaided by reference to bills of exceptions, though documents set out in the pleadings, or otherwise in the record, may be referred to without recopying.

3. SAME—STATEMENT OF SUM DUE.

In an action on bonds, a special finding should, by the better practice, state the amount due; but, if the data for computing it are given, the defect is not fatal.

4. MUNICIPAL BONDS—INNOCENT PURCHASERS—RECITALS.

Recitals in county bonds, that they are "issued pursuant to an order of the county court of said county, authorized by a majority of the legal votes cast at an election held in said county, pursuant to law," and under the provisions of certain statutes, and that they are in part payment of "a subscription to the capital stock" of a named railroad company, estop the county, as against an innocent purchaser, from showing that the bonds are void, because in fact issued as a donation to the railroad company, whereas the statute only authorized a subscription to its stock. *City of Evansville v. Dennett*, 16 Sup. Ct. 613, followed. *Post v. Pulaski Co.*, 1 C. C. A. 405, 49 Fed. 628, overruled.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

These were actions brought, respectively, by D. M. Wesson and by the Society for Savings against the county of Saline, Ill., to recover on certain county railroad aid bonds. In each case there was a judgment below for the defendant, and the plaintiff brought error.

James C. Connolly and Thos. C. Mather, for plaintiffs in error.

Samuel P. Wheeler, for defendant in error.

Before WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge. The decision of these cases, which were heard at the June session, 1894, has been delayed to await the answer of the supreme court to questions certified in the cases of

Graves v. Saline Co., 16 Sup. Ct. 526, and City of Evansville v. Dennett, Id. 613. The action in each case is in assumpsit on bonds for \$500 each issued by the county of Saline, Ill., bearing date October 8, 1872, and payable to the Cairo & Vincennes Railroad Company, or bearer, in the city of New York, 20 years after date, with interest thereon from November 1, 1872, at the rate of eight per centum per annum, evidenced by coupons payable semiannually. Each bond is signed and attested by the county judge and clerk of the county court of Saline county, bears a certificate of registration by the auditor of public accounts for the state, and contains the following recitals:

"This bond is one of two hundred of like tenor and amount, of the same issue, and is issued pursuant to an order of the county court of said county, authorized by a majority of the legal votes cast at an election held in said county, pursuant to law, on the fifth day of October, A. D. 1867. This bond is also issued under the provisions of an act to incorporate the Cairo & Vincennes Railroad Company approved March 6, 1867, and under the provisions of an act to amend said act approved February 9, 1869; also, under the provisions of an act entitled 'An act to fund and provide for the payment of the railroad debts of counties, townships, cities and towns, approved April 16, 1869,' and is in part payment of the subscription to the capital stock of the Cairo & Vincennes Railroad Company, in the total sum of one hundred thousand dollars (\$100,000.00)."

Issue was joined by a plea of nonassumpsit, and upon written waiver of a jury the cases were submitted for trial to the court, which, besides a general finding for the defendant, made in each case a special finding of facts, which, needlessly, is embodied in a bill of exceptions. A special finding, like a general finding or verdict, is in itself a part of the record. It ought not to be accompanied with a general finding. *British Queen Min. Co. v. Baker Silver Min. Co.*, 139 U. S. 222, 11 Sup. Ct. 523. The question for review upon a special verdict or finding is whether the facts found are sufficient to support the judgment (Rev. St. § 700); and it is manifestly important, especially to the party having the burden of proof, that all the facts essential to the relief sought shall be explicitly and fully stated. The finding should be complete in itself, unaided by references to bills of exception, though documents set out in the pleadings, or otherwise in the record, may be referred to without recopying.

The special finding in each of these cases states "that the plaintiff is the owner and holder, and became such, before due, for value, in the usual course of his business, of the following bonds sued upon in this case, to wit." And there follows a description, by number, and by a copy of one bond and one coupon, in the first case, of bonds numbered from 1 to 26 inclusive, and in the second case of bonds numbered 31 to 100 inclusive. The amount due in each case is not stated, as by the better practice it ought to be; but, the data for computing the amount being given, the defect is not fatal. *Metcalf v. City of Watertown*, 34 U. S. App. 107, 16 C. C. A. 37, and 68 Fed. 859. It is also stated that the several acts of the legislature of Illinois mentioned in the recitals of the bonds were offered and admitted in evidence, and "that the following were the orders made,

and are all the proceedings taken by the county court of Saline county, with reference to the issuance of said bonds, as shown on the county court records." And a copy of the proceedings and orders is set out, from which it appears, but by recital only, that on the 5th day of October, 1867, the electors of Saline county, "by a legal majority, voted in favor of the proposition that Saline county subscribe one hundred thousand dollars to the capital stock of the Cairo & Vincennes Railroad, to be paid in bonds of said county"; that afterwards, on November 28, 1867, a contract was made between the county and the railroad company whereby it was agreed that the county would sell to the company, for \$5,000, to be paid in an equal amount of the bonds, the \$100,000 of stock to be issued in payment of the \$100,000 of bonds; and that afterwards, on October 8, 1872, after a recital of this agreement, it was ordered that bonds to the amount of \$95,000 be issued. Pursuant to the order bonds were issued, including those in suit.

Upon these facts the court held that the bonds were a donation to the company, and were illegal, because the statutes under which they were voted and issued authorized only a subscription to the stock of the railroad company, and not a donation. That view is in accord with the ruling of the supreme court of Illinois in *Choisser v. People*, 140 Ill. 21, 29 N. E. 546, followed by this court in *Post v. Pulaski Co.*, 1 C. C. A. 405, 49 Fed. 628, and 9 U. S. App. 1. See *Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433. But the proposition, enunciated in *Post v. Pulaski Co.*, that "the recital in the bonds, that they were issued pursuant to an order of the county court, put whoever should come into possession of those bonds, even if purchased for value upon the open market, upon inquiry as to the terms of that order," is inconsistent with, and must be regarded as overruled by, the recent ruling of the supreme court in the case of *City of Evansville v. Dennett*, *supra*, where it was held that a recital that a subscription to the stock of a railroad company was "made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof" "imported not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute." That is necessarily so, if the recitals in municipal bonds are not to be denied significance. The only reason for saying that a reference to an ordinance puts a party upon inquiry into the contents thereof is because the reference conveys knowledge of the existence of the ordinance. But common councils, boards of commissioners, and like municipal bodies can act only by order, ordinance, or resolution, as every one is bound to know; and, when a municipal bond is offered upon the market, it needs no mention in a recital to give a proposed purchaser notice that the bond was issued in pursuance of an order, or resolution, or ordinance. The existence of the bond implies that much, and when there is a recital to the effect that the bond was issued in pursuance of a statute, the necessary import is that there was an ordinance, and a proper one, whether express mention is made of it or not. To say "in pursuance of a statute and an ordinance" is equivalent to an express statement that the ordinance is in conformity with the statute, and the pur-

chaser of a bond containing that recital is not bound in that particular to look for further information.

The bonds here in question were put upon the market before the case of *Town of Eagle v. Kohn*, 84 Ill. 292, was decided, and under the decisions of the supreme court of the United States the rights of a good-faith purchaser are not left in doubt. The recitals are indisputable proof of the facts essential to the validity of the bonds. *Town of Coloma v. Eaves*, 92 U. S. 484; *Insurance Co. v. Bruce*, 105 U. S. 328; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704; *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159; *Citizens' Savings & Loan Ass'n v. Perry Co.*, 156 U. S. 692, 15 Sup. Ct. 547. If the facts were as the recitals show they were, there was complete authority of law for the execution of the bonds, and, as against an innocent purchaser, evidence that the facts were different must be rejected or disregarded. The judgment in each case is therefore reversed, and the cause remanded, with instructions to enter judgment upon the special finding for the plaintiff, with interest computed according to the rule laid down in *Metcalf v. City of Watertown*, supra.

Mr. Justice HARLAN sat at the hearing, but has not participated in the decision.

GRAVES et al. v. SALINE COUNTY.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 173.

MUNICIPAL REFUNDING BONDS—VALIDITY—INSTRUCTIONS FROM SUPREME COURT.

The supreme court, having decided, in answer to questions certified by this court, that the county refunding bonds involved in this controversy were valid and binding obligations in the hands of innocent holders (16 Sup. Ct. 526), thereby disposing of all the questions involved in the case, this court accordingly reverses the decree below, enjoining the levy and collection of a tax to pay the bonds, and directs the dismissal of the bill.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Geo. A. Sanders, T. C. Mather, and J. C. Mathis, for appellants.
Samuel P. Wheeler, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

PER CURIAM. This suit was in equity, brought in the circuit court of Saline county, Ill., by the county of Saline, against the treasurer and auditor of public accounts of the state of Illinois and the collector of taxes and clerk of the court of Saline county, to restrain the levy and collection of the tax required to be levied by such auditor of the public accounts for the state of Illinois, to pay the interest on 100 registered refunding bonds of that county. The appellant Luther L. Graves, as one of the holders of such refunding

bonds, intervened in that suit, and procured the removal of the cause to the circuit court of the United States for the Southern district of Illinois. Upon such removal the appellants the Society for Savings, D. B. Wesson, and William Burgoyne, other holders of such bonds, also intervened therein for their interest. The court below decreed in favor of the county, issuing the writ of injunction demanded, and the cause was then appealed to this court, and, upon the argument, the court desiring to be advised upon certain questions arising in the cause, certified three questions to the supreme court of the United States, the second of which questions was as follows:

"Second. Are the funding bonds so issued by the county of Saline legal, valid, and binding obligations upon said county, in the hands of a bona fide holder for value before maturity?"

The supreme court has returned its affirmative answer to that question, and stated that such answer renders a formal answer to the other questions submitted unnecessary.

The statement of facts and the questions embodied in the certificate are as follows, and are also in substance included in the opinion rendered by the supreme court upon the certificate presented by this court, and reported in 16 Sup. Ct. 526:

Statement of Facts.

The appellants were, prior to the year 1883, bona fide holders, for value, and before maturity, of certain bonds issued by the county of Saline to the Belleville & Eldorado Railroad Company and to the St. Louis & Southeastern Railway Company, respectively. These bonds (\$75,000 in amount to the former, and \$25,000 in amount to the latter, company, and bearing interest at the rate of 8 per centum per annum, payable semiannually) were issued under authority of acts of the general assembly of the state of Illinois, passed in the years 1861 (Priv. Laws Ill. 1861, p. 485) and 1869 (3 Priv. Laws Ill. 1869, p. 238) and pursuant to an election duly ordered and held according to law on the 9th day of October, 1869, and in payment of subscriptions to stock in said companies respectively, dated January 15, 1870, duly authorized by said election, upon certain conditions, one of which was that said railroad should be commenced within one year and completed within three years from the date of subscription, and another of the conditions was, that the St. Louis & Southeastern Railway should pass, and a depot be established, within one-half mile of the old courthouse in Raleigh and within one-half mile of the church in Galatia. These bonds to the St. Louis & Southeastern Railway Company were dated January 1, 1872, payable 20 years after date, with option of paying 5 years after date, and were issued and delivered to that company February 1, 1872, and were purchased in open market by the appellants, and for value, and without notice, prior to the year 1876. The railroad was never constructed within one-half mile of the old courthouse in Raleigh, or within one-half mile of the church in Galatia, but was constructed in a different direction, and the said condition was in no sense complied with, but was waived by the board of commissioners of said county after July 2, 1870. The time for the completion of the Belleville & Eldorado Railroad was by the board of commissioners of the county of Saline after July 2, 1870, extended from time to time, and until October 20, 1877, and the bonds were issued and delivered on the 19th day of April, 1877, being dated March 9, 1877, and payable 20 years after the 1st day of January, 1873, with option of paying 5 years after date.

The amendment to the constitution of the state of Illinois, which went into effect July 2, 1870, provided:

"No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donations to or loan its credit in aid of such corporation: Provided, however,

that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

The bonds issued to the St. Louis & Southeastern Railway Company were valid obligations of the county in the hands of the appellants, under the decisions of the supreme court in the cases of *Insurance Co. v. Bruce*, 105 U. S. 328, and *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124. The bonds issued to the Belleville & Eldorado Railroad Company were void, even in the hands of bona fide purchasers for value, within the decision of *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159. The bonds to the St. Louis & Southeastern Railway Company were issued before, and those to the Belleville & Eldorado Railway Company were issued after, the decision of the supreme court of Illinois, in the case of *Town of Eagle v. Kohn*, 84 Ill. 292, decided in 1876. The validity of none of these bonds was at any time questioned by the county of Saline until December 30, 1889, and the county had annually paid the interest on all of these bonds from the time of their issue until they were exchanged for funding bonds of the county as hereinafter stated. The county of Saline has always retained and now has the stock in said railway companies obtained by it for the bonds so issued to said railway companies, respectively; but such stock is now, and always has been, wholly worthless, and of no value.

The general assembly of the state of Illinois, by act approved February 13, 1865, and by acts amendatory thereto approved April 27, 1877, and June 4, 1879, enacted as follows (Rev. St. Ill. 1881 [Cotbran's Ann. Ed.] p. 1119; 2 Starr & C. St. p. 1877, c. 113:

"Section 1. That in all cases where any county, city, town, township, school district, or other municipal corporation, has issued bonds or other evidences of indebtedness for money, or has contracted debts, which are the binding, subsisting legal obligations of such county, city, town, township, school district or other municipal corporation, and the same, or any portion thereof, remain outstanding and unpaid, it shall be lawful for the proper corporate authorities of any such county, city, town, township, school district or other municipal corporation, upon the surrender of any such bonds or other evidences of indebtedness, or any number or portion thereof, to issue, in lieu or place thereof, to the owners or holders of the same, new bonds prepared as hereinafter directed, and for such amounts, upon such time not exceeding twenty years, payable at such place, and bearing such rate of interest, not exceeding seven per centum per annum, as may be agreed upon with the owners or holders of such outstanding bonds or other evidences of indebtedness: Provided, that bonds issued under this act, to mature within five years from their date, may bear interest not to exceed eight per cent. per annum. And it shall also be lawful for the proper corporate authorities of any such county, city, town, township, school district, or other municipal corporation, to cause to be thus issued such new bonds, and sell the same, to raise money to purchase or retire any or all of such outstanding bonds or other evidences of indebtedness; the proceeds of the sales of such new bonds to be expended, under the direction of the corporate authorities aforesaid, in the purchase or retiring of the outstanding bonds or other evidences of indebtedness of such county, city, town, township, school district or other municipal corporation, and for no other purpose whatever. All bonds, or other evidences of indebtedness, issued under the provisions of this act, shall show upon their face that they are issued under this act, and the purpose for which they are issued, and shall be of uniform design and style throughout the state, to be prescribed by the state auditor, whose imperative duty it shall be to devise and prepare such uniform style and draft adapted to the classes of bonds herein provided for, namely: the first class to consist of bonds of which only the interest is payable annually; the second class to consist of those of which the interest and five per centum of the principal are to be paid annually, and the third class to consist of a graduated series; the first grade made payable, principal and interest, at the end of one year from the date of issue; the second at the end of two years, and thus to the end of the series, the class to be issued being at the option of the legal voters expressed as herein pro-

vided. In any case, the new bonds, or other evidences of indebtedness, authorized to be issued by this act, shall not be for a greater sum in the aggregate, than the principal and accrued or earned interest unpaid, of such outstanding bonds or other evidences of indebtedness. And when such new bonds, or other evidences of indebtedness, shall have been issued, in order to be placed on the market and sold to obtain proceeds with which to retire outstanding bonds, or other evidences of indebtedness, it shall be the duty of the state auditor, on the request of the corporate authorities issuing them, and at the expense of the corporation in whose behalf the issue is thus made, to negotiate the same, at not less than par value, and on the best terms which can be obtained: Provided, always, that any such county, city, town, township, school district or other municipal corporation issuing bonds under the provisions of this act, may through its corporate authorities duly authorized, negotiate, sell or dispose of said bonds, or any part thereof, at not less than their par value, without the intervention of the auditor of state: And, provided, further, that no new bonds or other evidences of indebtedness shall be issued under this act, unless the same shall be first authorized, as hereinafter provided by a vote of a majority of the legal voters of such county, city, town, township, school district, or other municipal corporation voting at some general election, or special election held for that purpose."

Under and by virtue of this provision of law, the board of commissioners of the county of Saline duly ordered an election to determine the question of issuing the bonds of the county for the purpose of paying and redeeming the bonds above stated, issued to the St. Louis & Southeastern Railway Company, and to the Belleville & Eldorado Railroad Company, and to another railway company, respectively, and at such election, duly held, according to law, on the 6th day of November, 1883, a majority of the legal voters of the county of Saline voting at such election voted in favor of such proposition. On the 15th day of November, 1883, the board of commissioners of the county, by order duly made and entered, ordered, in compliance with such vote, that 195 bonds of said county, of \$1,000 each, be issued to take up and pay off the said bonds so issued to the St. Louis & Southeastern Railway Company, the Belleville & Eldorado Railroad Company, and said other company; and the duly constituted officers of said county thereafter, on the 1st day of July, 1885, issued the bonds of said county in strict conformity with said act, to the amount, in the aggregate, of \$100,000, to take up and pay off the said bonds so issued to the St. Louis & Southeastern Railway Company and to the Belleville & Eldorado Railroad Company, each of said bonds being of the tenor and effect following:

"United States of America.

\$1,000.

"State of Illinois, County of Saline, Funding Bond, Issued under the Act of 1865, as Amended April 27th, 1877, and June 4th, 1879.

"Twenty years after date, for value received, the county of Saline promises to pay to the bearer hereof, the sum of \$1,000 in lawful money of the United States, at the office of the treasurer of the state of Illinois, in the city of New York, with interest at the rate of six per cent. per annum, payable annually, as shown by and upon the surrender of the annexed coupons as they severally become due, reserving, however, the right to redeem this bond at any time after five years from date. This bond is one of a series of 195 of like tenor, issued for the purpose of funding and retiring certain binding, subsisting, legal obligations of said county, which remain outstanding and unpaid, under the provisions of an act of the general assembly of the state of Illinois, entitled 'An act to enable counties, cities, towns, townships, school districts and other municipal corporations to fund, retire and purchase their outstanding bonds, and other evidences of indebtedness, and provide for the registration of new bonds, or other evidences of indebtedness, in the office of the auditor of public accounts,' approved February 13th, 1865, and acts amendatory thereto, approved April 27th, 1877, and June 4th, 1879, and in pursuance of a vote of the majority of the legal voters of said county, voting at an election legally called, under said act, the 6th of November, 1883. We hereby certify that all requirements of said acts have been fully complied with in the issue hereof.

"In testimony whereof, we, the undersigned officers of said county, being duly authorized to execute this obligation on its behalf, have hereunto set our signatures this 1st day of July, A. D. 1885.

"W. G. Frith, Chairman of the County Board.

"[Seal.] W. E. Burnett, County Clerk."

Each of said bonds was duly registered according to law with the auditor of the state of Illinois, who indorsed upon each of said bonds the following:

"State of Illinois.

\$1,000.

"Saline County Bond.

"Date of bond, July 1st, 1885. Payable twenty years after date. Redeemable five years after date. Interest payable July 1st, annually. Principal and interest payable at the office of the state treasurer of the state of Illinois, in the city of New York, and state of New York.

"Auditor's Office, Illinois, Springfield, Nov. 23rd, 1885.

"I, Charles P. Swigert, auditor of public accounts of the state of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled 'An act to enable counties, cities, towns, townships, school districts and other municipal corporations to fund, retire and purchase their outstanding bonds and other evidences of indebtedness, and to provide for the registration of new bonds, or other evidences of indebtedness, in the office of the auditor of public accounts,' approved February 13th, 1865, and acts amendatory thereto, approved April 27th, 1877, and June 4th, 1879. I further certify that the aggregate equalized valuation of property assessed for taxation in said county for the year 1885 was certified to this office as follows: Real estate, \$1,362,931.00. Personal property, \$477,340.00.

"In testimony whereof, I have hereunto subscribed my name, and affixed the seal of my office, the day and year aforesaid.

"[Seal.]

Charles P. Swigert, Auditor Public Accounts."

The county of Saline appointed an agent to solicit the exchange of bonds and obtained from the appellants and canceled the old bonds respectively held by them, and issued to them the funding bonds in lieu thereof. The county of Saline thereafter, until the year 1890, paid the annual interest on such new issue of bonds.

Questions.

First. Is the county of Saline estopped by the recital in the funding bonds to assert that the bonds issued to the St. Louis & Southeastern Railway Company and to the Belleville and Eldorado Railroad Companies, respectively, and for which the funding bonds were exchanged were not binding, subsisting, legal obligations of said county?

Second. Are the funding bonds so issued by the county of Saline legal, valid, and binding obligations upon said county, in the hands of a bona fide holder for value before maturity?

Third. If the court should be of opinion that the funding bonds are invalid, would it be competent for the court in this cause, which is a suit in equity instituted by the county of Saline to restrain officers of the law from levying and collecting a tax as required by law to pay the interest upon the funding bonds, to grant the relief asked only upon condition that the county of Saline pay to the holders the amount of the valid bonds issued to the St. Louis & Southeastern Railway Company which were exchanged for the funding bonds?

The affirmative answer of the supreme court to the second question sustains the validity of the issue of the refunding bonds. The relief by injunction granted by the court below to the county of Saline was predicated upon its holding that the refunding bonds were invalid. This conclusion, as is determined by the supreme court, was erroneous. The opinion of the supreme court reviews and disposes of every question at issue necessary to be determined, and

no further discussion of the matter is needed at the hands of this court. The judgment will be reversed, and the cause remanded, with directions to the court below to dismiss the bill filed by the county of Saline for want of equity.

SNEED v. SABINAL MINING & MILLING CO.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 259.

1. ALTERATION OF NOTE—MATERIALITY.

When a note is given by a corporation, payable to the manager's wife, for money due him for salary, and for expenditures made in behalf of the company out of funds represented by him to have belonged in part to his wife, an alteration of the note so as to make it payable to the manager himself is a material one. 18 C. C. A. 213, 71 Fed. 493, affirmed on rehearing.

2. SAME—BURDEN OF PROOF.

In an action on a note, the burden of showing its invalidity rests on the defendant; but, if it be shown that the name of the payee has been changed without the consent of the maker, the defense is established, and the burden is then on the plaintiff to show that the alteration was ratified, or for other reasons was not available as a defense.

3. SAME—LIMITATION OF ACTIONS.

If it be shown that a note has been altered in a material respect after the making and delivery thereof, it is void, and the fact that the statute of limitation has run against the original cause of action is irrelevant.

4. TRIAL TO THE COURT—SPECIAL FINDINGS.

Specific statements in a special finding are not to be controlled or modified by inferences suggested by uncertain or equivocal expressions. When such finding is rendered, it behooves the party having the burden of proof to see that every fact essential to the relief sought is directly and unequivocally stated. *Wesson v. Saline Co.*, 73 Fed. 917, followed.

On Petition for Rehearing.

This was an action of assumpsit by John R. Sneed against the Sabinal Mining & Milling Company to recover upon a promissory note in the sum of \$7,000, which he held as indorsee. The case was tried to the court without a jury, and a special finding of facts was made, and judgment given for defendant. The plaintiff sued out a writ of error to this court, which, on January 6, 1896, rendered an opinion affirming the judgment below. See 18 C. C. A. 213, 71 Fed. 493, where the special findings are set out in the statement of the case. The case is now heard on a petition for rehearing, filed by the plaintiff.

Adolph Moses, for plaintiff in error.

Milton I. Beck, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This petition proceeds upon a misapprehension in respect to the burden of proof. It is true, as stated, that the burden to show the invalidity of the note rested upon the defendant; but, once it was shown that the name of the payee

had been changed without the consent or authority of the maker of the note, the defense was established, and the burden was upon the plaintiff to show, if possible, that the alteration had been ratified, or for other reason was not available as a defense. It is found that some of the directors were present in the room where the note was altered, but that is not a finding that they knew of or consented to the change. It is also found that, after the change was made, one of the directors, Mr. James, was opposed to the execution of the note, and was not satisfied therewith, until an indorsement was made waiving all claims against him and another as stockholders; but that falls short of a finding that James then knew that the alteration had been made. The finding shows that at the first James "objected to giving Provard a note," and the importance of the waiver which he obtained was not affected by the alteration. Besides, the consent of one of the directors to the alteration was not sufficient, if given, and that it was not given the finding is explicit when it says, "Neither the directors as a body nor any of the officers of the company consented to the alteration at any time." The directors were officers of the company. There may be ground for supposing that the court did not intend by the word "officers," as here used, to include directors; but specific statements in a special finding are not to be controlled or modified by inferences suggested by uncertain or equivocal expressions. When a special verdict or finding is rendered, it behooves the party on whom is the burden of proof to see to it that every fact essential to the relief he seeks is directly and unequivocally stated. *Wesson v. Saline Co.* (just decided) 73 Fed. 917. Care should be taken to distinguish between the finding of a fact and a mere statement of evidence which tends to establish, or, it may be, establishes, the fact. Circumstances are stated in this finding which tend to show the consent of one or more directors to the alteration which was made; but, instead of the circumstances, the fact of such consent, if material, should have been directly stated. It is found as a conclusion of law "that the alteration was not fraudulently made"; but, if material, that should have been found as a fact, and not as a legal conclusion. The finding of facts in a special finding, as in a special verdict, should be in itself complete, and should be followed by a separate statement of the conclusion or conclusions of law, unmixed with matter of fact. To illustrate further: The finding shows that, in order to procure the execution of the note in suit, Provard made certain statements; but that establishes only that the statements were made, and not that they were true. He said, for instance, that a part of the money expended by him belonged to his wife, and therefore requested that the note be drawn in her favor. While this does not show that a part of the consideration of the note belonged to the wife, it discloses an important reason for the note being made payable to her, and indicates that in fact, as well as in law, the alteration was a material one. The burden of proving the fact to have been otherwise, to say the least, was upon the plaintiff in error.

It is urged that the statute of limitations has run against any action upon the original consideration of the note, relieving the defendant in error from all risk of suit by Mrs. Provard if she, in fact, had any interest in the note, and depriving the plaintiff in error of any remedy upon the original demand of Provard for which the note was given. These suggestions are irrelevant to the present issue. The alteration in question was material or immaterial, authorized or unauthorized, when it was made; and if material and unauthorized, as the finding shows it was, the note was thereby invalidated, and no mere lapse of time could impart to it new validity. The petition is denied.

ASHMAN v. PULASKI COUNTY.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 141.

MUNICIPAL BONDS—INNOCENT PURCHASERS—RECITALS.

Recitals in county bonds, that they are "issued pursuant to an order of the county court of said county, authorized by a majority of the legal votes cast at an election held in said county, pursuant to law," and under the provisions of certain statutes, and that they are in part payment of a "subscription to the capital stock," of a named railroad company, estop the county as against an innocent purchaser, from showing that the bonds are void because in fact issued as a donation to the railroad company, whereas the statute only authorized a subscription to its stock. *Wesson v. Saline Co.*, 73 Fed. 917, followed.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

G. A. Sanders, for plaintiff in error.

L. M. Bradley, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

PER CURIAM. The action in this case is in assumpsit upon twelve bonds, for \$500 each, and interest coupons attached, issued by the county of Pulaski, Ill., bearing date October 17, 1872, and payable to the Cairo & Vincennes Railroad Company, or bearer, in the city of New York, twenty years after date, with interest thereon after November 1, 1872, at the rate of eight per cent. per annum, evidenced by semiannual coupons. See *Post v. Pulaski Co.*, 1 C. C. A. 405, 49 Fed. 628, and 9 U. S. App. 1. Each bond is signed and attested by the county judge and by the clerk of the county court of Pulaski county, bears a certificate of registration by the auditor of public accounts for the state, and contains the following recitals:

"This bond is one of two hundred of like tenor and amount of the same issue, and issued pursuant to an order of the county court of said county, authorized by a majority of the legal votes cast at an election held in said county pursuant to law on the 5th day of November, A. D. 1867. This bond is also issued under the provisions of 'An act to incorporate the Cairo & Vincennes Railroad Company,' approved March 6, 1867, and under the provisions

of an act to amend said act, approved February 9, 1869, also under the provisions of an act entitled 'An act to fund and provide for the payment of the railroad debts of counties, townships, cities and towns,' approved April 16, 1869, and is in part payment of a subscription to the capital stock of the Cairo & Vincennes Railroad Company, in the total sum of one hundred thousand dollars."

Issue was joined by a plea of nonassumpsit, with an agreement that all matters of defense might be proved under that plea; and, upon written waiver of a jury, the case was tried by the court, which made both a general and a special finding, and gave judgment for the defendant. The finding is to the effect that the plaintiff was a good-faith purchaser of the bonds and coupons sued on (*Bank v. Holm*, 19 C. C. A. 94, 71 Fed. 489), and that, from the records of Pulaski county, it appeared that no subscription to the capital stock of the Cairo & Vincennes Railroad Company was ever made by Pulaski county, but that bonds to the amount of \$95,000, of which these in suit are a part, were issued as a donation to that company; and for that reason the court below held them void. In short, the same objections are made to these bonds, on a like state of facts, as were made in *Wesson v. Saline Co.*, and in *Society for Savings v. Same* (just decided by this court) 73 Fed. 917; and for the reasons there explained, and upon the authorities there cited, it must be held that in the hands of an innocent purchaser these bonds are valid.

The judgment of the circuit court is therefore reversed, and the case remanded, with instruction to enter judgment upon the special finding for the plaintiff for the amount due on bonds and coupons, with interest computed as directed in *Metcalf v. City of Watertown*, 16 C. C. A. 37, 68 Fed. 859, and 34 U. S. App. 107.

ROBERTSON et al. v. LION INS. CO. et al.

(Circuit Court, W. D. Virginia. April 24, 1896.)

AWARD—SETTING ASIDE.

Plaintiff and an insurance company, being unable to agree as to the amount of a loss under a policy of fire insurance, resorted to the arbitration clause of such policy. Plaintiff and the insurance company each proposed an arbitrator. The arbitrator proposed by the insurance company was objected to by plaintiff, and another was proposed and accepted in his stead. The arbitrators then proceeded to select an umpire, and, two names being proposed, plaintiff, after inquiry, accepted one of them. The arbitrators having disagreed, the umpire made an award, which differed from the estimate of plaintiff's arbitrator. Plaintiff then brought suit to set aside the award, alleging that the umpire and the insurance company's arbitrator had acted fraudulently and unfairly. No evidence, however, was presented which showed any undue partiality, though the award differed from the estimate of some persons familiar with goods similar to those injured in the fire. *Held*, that the award should not be set aside.

In Equity.

Kirkpatrick & Kirkpatrick, Blackford, Horsely & Blackford, and A. W. Nowlin, for complainants.

Peatross & Harris, for defendants.

Before SIMONTON, Circuit Judge, and PAUL, District Judge.

SIMONTON, Circuit Judge. This is a bill to set aside an award made after a loss by fire, pursuant to the terms of a policy of insurance. The complainant is a merchant of Lynchburg, Va., engaged in the ready-made clothing business. He sustained the loss, and is dissatisfied with the award.

The law on the subject is not disputed. It is clearly stated in 4 Minor, Inst. 152. Awards can be set aside only for:

"(1) Improper conduct of the arbitrators; (2) improper conduct of the parties, or one of them; (3) illegality or injustice apparent on the face of the award itself."

It is stated clearly and fully by Mr. Justice Grier in *Burchell v. Marsh*, 17 How. 350:

"Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. 'In order,' says Lord Thurlow (*Knox v. Symmonds*, 1 Ves. Jr. 369), 'to induce the court to interfere, there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award or to be made out by evidence; but, in case of mistake, it must be made out to the satisfaction of the arbitrator, and that, if it had not happened, he should have made a different award. Courts should be careful to avoid a wrong use of the word 'mistake,' and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality, merely because their award is not such a one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.'"

The question, then, resolves itself into a question of fact. The insured and the insurer not being able to agree upon the amount of the loss, a resort was had to the arbitration clause in the policy. The insured proposed as his arbitrator R. B. Schenck, of Lynchburg. The insurer proposed a name of its arbitrator. The person named was promptly objected to by the assured. The name was withdrawn, and A. C. Westbrook, of Atlanta, was named and was accepted in his stead. The bill is filled with grave charges against the character and judgment of this arbitrator. But the record fails to disclose any evidence whatever reflecting upon his character, either as an experienced or as an honest man. The two arbitrators, having been sworn according to law, proceeded to select an umpire, to decide between them in case they should differ. This umpire was selected, before they had begun possibly, certainly before they had compiled their own appraisal; and very properly. Then, before the possibility of a heated discussion over differences of opinion, they could more easily agree upon an umpire. A gentleman from Richmond was selected. His business engagements compelled him to decline. Thereupon two names were submitted, of persons resi-

dent in Baltimore. Robertson, the insured, then communicated with Oppenheimer & Co., his friends and creditors in that city, giving them the names and addresses of these two persons, stating his purpose in asking about them, and requesting advice with regard to them. In reply, he was advised to select I. George Baetjer, one of the persons named. He was then selected as umpire. After his selection, Westbrook, who, according to the evidence, had no personal acquaintance with him, wrote to know if he would serve. He replied assenting to act; and, having business, attending court as a witness in a county of Virginia, and other business at Roanoke, he called at Lynchburg on his way home, and found the arbitrators about concluding their work. He thereupon took his oath as umpire, and, the arbitrators having differed, he concluded the award. The bill contains grave charges against him also. But the great preponderance of the evidence, including the concurrent opinion of witnesses of the highest respectability and business character in Baltimore, who knew him, and had full opportunity of knowing him for years, establishes his character as a man of high integrity, great business capacity, and large experience. In the estimate of losses by fire, he had been frequently employed both by insurers and insured, and his opinions were valued and respected. In his pleadings and in the argument, the complainant charged that these two men, Westbrook and Baetjer, were professional arbitrators, hirelings of insurance companies, and obedient to their behests, who had been foisted upon the complainant fraudulently, to his wrong.

The record shows no justification for charges of this kind. The arbitrators were sworn in on 14th April, 1894. They made their finding on the 21st. The umpire made his award on 24th of that month. Every fact concerning the residence, business character, employment, and relation of Westbrook and of Baetjer were either known to, or were within easy reach of, the complainant. But he, having made no objection to Westbrook, and having intervened actively to secure Baetjer, made no sign of disapproval during the period of the arbitration and award. Clearly, he waited on the event. The true test of the award is this: Is this of so extravagant a character as to warrant the conclusion that it was found and concluded from a partisan bias towards one of the parties? If so, under the law, it cannot stand. We have gone over the testimony with great care, and cannot see anything which can lead to such a conclusion. As has been seen, the umpire is a man of character, experience, and ability. He went carefully over the stock, which had been arranged in parcels, examining specially each parcel, and putting his valuation upon it. He differed, it is true, with some merchants in that line of business in Lynchburg. But they observed and estimated the stock as a whole, lying as it was left after the fire. He went into it in detail. He differed also with the arbitrator of the complainant. But the estimate of this arbitrator is clearly extravagant, not justified by the experience of persons who purchased the damaged stock. But, above all, he was chosen to make the award by both parties under the terms of their contract,—the judge of their own selection in this domestic tribunal. His er-

rors, if errors there were, were errors of judgment, over which we have no control. They do not betray fraud, fraudulent dealing, gross irregularity, gross partiality, or partisanship. The award cannot be disturbed. Let the bill be dismissed.

PAUL, District Judge, concurred.

TITLE GUARANTEE & TRUST CO. v. NORTHERN COUNTIES INVESTMENT TRUST, Limited, et al.

(Circuit Court, D. Oregon. April 28, 1896.)

TRUSTS—CREATION—LEGAL TITLE.

One M. entered into an agreement with the T. G. & Trust Company, whereby he sold and conveyed to the trust company two parcels of land, on one of which was a theater. The parcel on which the theater stood was subject, with other land, to a mortgage to a third party, which had been negotiated by the trust company. By an agreement of trust, simultaneously made, a trust was created in the trust company in the theater, and the land on which it stood, in favor of the trust company, to manage the theater, collect the rents and profits, pay the expenses of management, and for the services of the trustee, and to repay advances to M. and certain claims against him. After such payments and the payment of the mortgage, the property was to be reconveyed to M. M. retained his box and an office in the theater, and also the management of the other parcel of land, the latter for the purposes of the trust. *Held*, that these agreements did not create a mere mortgage, but vested the legal title to both parcels of land in the trust company, and that M.'s equitable interest was not subject to levy and sale on execution, though the box and office reserved by him might be so sold.

W. D. Fenton, for plaintiff.
Zera Snow, for defendants.

BELLINGER, District Judge. This is a suit by the Title Guarantee & Trust Company to enjoin the Northern Counties Investment Trust, Limited, and H. C. Grady, marshal, from selling certain property under execution issued on a judgment against P. A. Marquam and wife. On November 13, 1894, Marquam and wife entered into an agreement with the Title Guarantee & Trust Company, whereby the former sold and conveyed to the latter all of block 178, upon which is situated the Marquam Theater, known in the case as the first tract, and lots 1, 2, 3, and 4, in block 120, known as the second tract. The conveyance was subject to a mortgage in favor of the United States Mortgage Company upon the first tract, and 80 acres of outside land, for \$300,000, which mortgage was to secure a debt negotiated for Marquam by the Title Guarantee & Trust Company. An agreement of trust was entered into on the same date, to which there was subsequently added a supplemental agreement, by which a trust was created in the guarantee company in the theater property and land, and the four lots in block 120, in favor of that company, to manage the theater property, collect the rents and profits therefrom, pay the expenses of such management and operation, and for the services of the trustee, in connection with the trust, to

repay advances that might be made to Marquam, with interest, to pay, pro rata, certain claims against Marquam. After these payments have been made, and the \$300,000 and interest paid, it is provided that the property covered by the deed of trust shall be reconveyed to Marquam. Marquam retained his box in the theater and an office in the building, and he retained the management of lots 1, 2, 3, and 4, for the purposes, however, of the trust. The defendants claim that these conveyances and agreements constitute a mortgage in favor of the guarantee company, and that the legal title remaining in Marquam is subject to levy and sale under an execution levied by it. The suit is brought to enjoin such sale. It is further claimed that if the legal title to the property has passed, there remains in Marquam an equitable interest or estate, and that this is subject to sale on execution.

It is my opinion that these facts vest the legal title to all the property in question in the Title Guarantee Company, and that the right or interest remaining in Marquam is not the subject of levy and sale under an execution issued upon a judgment in an action at law. The agreement of the parties constituted the company the trustee of the parties, charged with the management of a part of it, and with duties and responsibilities to all of it. Moreover, the trustee acquired an interest in the property to the extent of certain commissions for services in procuring the loan of \$300,000, and for such proper charges and expenses as are incurred by the trust.

The extent of Marquam's interest, for the purposes of sale on the execution levied, cannot be determined. It cannot on such sale be defined, nor its marketable value estimated. It is a matter of the merest speculation, so that a sale would probably result in its sacrifice. Moreover, the proposed sale is of all this property, as the only means of disposing of Marquam's interest in it, whatever that interest may be, and the effect of such a sale will be to obstruct the trust, and embarrass the title of the property in the hands of the trustee, to the injury of creditors whose debts are secured by it.

The defendant company has the right to subject Marquam's interest in this property to the payment of its debt, but not by a reckless and destructive procedure. Every consideration of equity requires that the interest to be sold shall be first ascertained by a proper proceeding in a court of chancery. This is necessary to any sale of it with the reasonable expectation of realizing its market value. And the case, as to the second parcel of property, is in no wise altered by the fact that Marquam is allowed to manage it. There is but one trust, and it includes this property, as well as the other. The management of the property does not enlarge Marquam's interest in it, nor aid in determining the extent of such interest, nor in any way overcome the difficulties in the way of its proposed sale on execution.

It is argued that the theater box and office reserved to Marquam's use in the trust agreement is property subject to be sold on this execution. I see no objection to such a sale, and, if the plaintiff in the execution wishes to sell the right so reserved, it may do so, by a precise description of the right sold, leaving open the question

as to whether its standing in equity to reach and subject Marquam's other interest in the property to the payment of its debt will be affected by such a sale.

The demurrer to the bill is overruled, and the motion to discharge the rule to show cause is denied.

PEARSALL v. GREAT NORTHERN RY. CO.¹

(Circuit Court, D. Minnesota. September 14, 1895.)

1. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — ACTS IMPAIRING CORPORATE FRANCHISES.

An accepted act of incorporation of a private corporation is a contract between the state and the corporation, and any law of a state which destroys or impairs any valuable franchise granted by such an act violates section 10, art. 1, of the constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and is ineffective, unless the right so to destroy or impair the franchise is reserved by the state before or at the time the charter is granted.

2. RAILROAD COMPANIES—GRANT AND ACCEPTANCE OF FRANCHISE.

The territory and state of Minnesota, by chapter 160 of the Laws of the Territory for 1856, and chapter 4 of the Special Laws of the State for 1865, granted to the Minneapolis & St. Cloud Railroad Company the right to build, operate, and lease railroads, and the right to consolidate its stock, its railroads, or its property with the stock, the railroads, or the property of any other railroad corporation. These grants were accepted by the corporation prior to 1866, and this corporation has, by a change of name, become the defendant, the Great Northern Railway Company.

3. SAME—RIGHT OF CONSOLIDATION.

The right to consolidate with another railroad corporation includes the right to make a fair and lawful agreement with it for the interchange of traffic, and for the joint use of terminal facilities, the right to buy one-half of its stock for the shareholders of the purchaser, and the right to guaranty the payment of its bonds.

4. SAME—VESTED RIGHTS—RESERVED POWER OF STATE.

This right to consolidate was a valuable and a vested right of the corporation after its acceptance of the grants; and section 17 of the act of 1856, which is: "This act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of said corporation,"—did not reserve to the territory or to the state the power to impair or destroy this vested right.

5. SAME—VESTING OF FRANCHISES.

The use of a franchise granted to a corporation is not a condition precedent to the vesting in the corporation of the right to use it.

6. SAME — CONSOLIDATION — CONTROL OF PARALLEL ROADS — MINNESOTA STATUTES.

If chapter 29 of the Laws of Minnesota for 1874, and section 3 of chapter 94 of the Laws of Minnesota for 1881, which prohibit any railroad corporation from consolidating with or purchasing the stock of any corporation which owns or controls a parallel or competing line of railroad, should be construed to be amendments of the acts cited, they are broad enough in their terms to prohibit the defendant corporation from consolidating with any corporation which owns or controls the Northern Pacific System of railroads, and from purchasing one-half the stock of such a corporation for the use of its shareholders.

¹ Reversed by the supreme court, Mr. Justice Field and Mr. Justice Brewer dissenting. 16 Sup. Ct. 70^f

7. SAME—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

If they should be construed to be such amendments, they would impair to that extent the vested right of the defendant corporation to consolidate with any railroad corporation whatever, which was granted to it by its charter; and they would be ineffective, because they would be in violation of the constitutional provision that no state shall pass any law impairing the obligation of contracts, and also of the contract in the act of incorporation that the state would make no amendment destroying or impairing the vested rights of this corporation. Reversed in 16 Sup. Ct. 705.

8. SAME.

If these acts should not be construed to be amendments of the charter, they leave this right of the defendant to consolidate unaffected.

9. SAME—CONTROL OF COMPETING LINE—AGREEMENT TO PURCHASE STOCK—INJUNCTION.

In either case the agreement made by the Great Northern Railway Company to purchase one-half the stock of a new corporation which is to own or to control and operate the Northern Pacific System of railroads, many of which are lines either parallel to or competing with the lines owned or controlled and operated by the Great Northern Railway Company, to make a just and fair traffic agreement with this corporation, and to guaranty the payment of its bonds, is not rendered illegal by these acts, and its performance cannot lawfully be enjoined on account of them. Reversed in 16 Sup. Ct. 705.

This case came before the court upon a motion for a preliminary injunction, upon a bill and answer that disclose the following facts:

In 1856 the legislature of the territory of Minnesota passed "An act to incorporate the Minneapolis & St. Cloud Railroad Company" (Laws Minn. 1856, c. 160). By that act, the territory granted to that corporation the right to be a corporation, the right to acquire by purchase, gift, grant, devise, or otherwise, to hold and to convey, all such estate and property, real and personal, as should be necessary or convenient to carry into effect the object and purpose of the corporation (section 1); the right to construct and operate certain railroads (sections 2 and 6); the right to be part owner or lessee of any railroad in the territory (section 6); the right to exercise the power of eminent domain (section 7); and the right to connect with and to use any railroad running in the same general direction as any of its proposed railroads (section 12). The last section of the act is: "Sec. 17. This act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly, in any manner not destroying or impairing the vested rights of said corporation." In 1865 the legislature of the state of Minnesota passed an act to amend the act of 1856, *supra* (Sp. Laws Minn. 1865, c. 4). By that act, the state granted to the Minneapolis & St. Cloud Railroad Company the right to connect with or adopt as its own any other railroad running in the same general direction with either of its main or branch lines (section 3); the right to consolidate the whole or any portion of its capital stock with the capital of any other railroad corporation having the same general direction or location (section 8); the right to consolidate any portion of its road and property with the franchises of any other railroad company, or any portion thereof (section 9); and the right to consolidate the whole or any portion of its lines of railroad, and the property pertaining thereto, with the rights, powers, franchises, grants, and effects of any other railroad (section 12).

It is alleged by the bill, and admitted by the answer, that the Minneapolis & St. Cloud Railroad Company was duly incorporated under and complied with the act of 1856 and its amendments, and that it duly accepted the provisions of the act of 1865 immediately after its passage. Subsequent to the year 1879, it constructed and put in operation a railroad from St. Cloud to Hinckley, in the state of Minnesota. After this railroad was constructed, it changed its name, by permission of the legislature of Minnesota, to the Great Northern Railway Company, and it is the defendant in this suit. It now owns some, leases some, and operates and controls all, of the lines of railroad of the Great Northern Railway System. This system comprises lines of railroad which extend from St. Paul and Duluth, in the state of Minnesota,

and from Superior, in the state of Wisconsin, across the states of Minnesota, North Dakota, Montana, Idaho, and to the towns of Everett and Seattle, in the state of Washington, with many branch and connecting lines; but none of these lines reach Tacoma, in the state of Washington, or Portland, in the state of Oregon, or Winnipeg, in Canada.

The Northern Pacific Railroad Company is a corporation organized under acts of congress, and it owns some, and, through its receivers, controls and operates all, of the lines of railroad of the Northern Pacific Railway System. This system comprises lines of railway extending from St. Paul, in Minnesota, and from Ashland, in Wisconsin, across the states of Minnesota, North Dakota, Montana, and Idaho, to Tacoma, in the state of Washington, and Portland, in the state of Oregon, with many branch and connecting lines, one of which extends to Winnipeg, in Canada. The aggregate mileage of each of these systems of railroad is about 4,500 miles, and some of the lines of each of these systems are parallel to and some of them compete with, lines of the other system. The Northern Pacific Railroad Company is insolvent, and its roads and property are in the hands of receivers, who were appointed by the courts at the instance of the holders of bonds which are secured by the second, third, and consolidated mortgages upon its property. The trustee for these bondholders has commenced suits to foreclose these mortgages, and the receivers are in possession under appointments in these foreclosure suits. The holders of a majority of the several classes of bonds secured by these three mortgages have agreed with the Great Northern Railway Company to procure a foreclosure sale of the property covered by these mortgages to a committee of these bondholders, for the benefit of all the holders of bonds secured by said mortgages; to organize a new corporation, in which they will cause the title to all of said mortgaged property to be vested, subject to the lien of the first and divisional mortgages of the Northern Pacific Railroad Company; to cause the new corporation to make a fair and reasonable traffic agreement with the defendant for an interchange of traffic between the two systems, and for the joint use of the terminal facilities of each whenever such use is convenient and economical for both; to cause the new corporation to issue its bonds to the amount of \$100,000,000 or more, secured by a lien upon its property, to issue its full-paid capital stock to the amount of \$100,000,000, and to cause its stockholders to transfer to the stockholders of the Great Northern Railway Company, or to some one for their use, one-half of this stock. In consideration of this agreement, the defendant corporation has promised to enter into the traffic agreement with the new corporation, and to guaranty the payment of the principal of its bonds and \$6,200,000 interest thereon annually; and it is about to perform this promise, against the demand and protest of the complainant.

The complainant is the owner of 500 shares of the capital stock of the defendant corporation, which is now worth more than \$62,500; and he avers that, if this agreement is performed, his stock will be depreciated more than \$5,000. He brings this suit on behalf of himself and all other stockholders similarly situated who may join with him, and alleges that this agreement is unlawful, because it is beyond the powers of the corporation to make or perform it, because it is in violation of chapter 29 of the Laws of Minnesota for 1874, which is: "No railroad corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues,"—and because it is in violation of section 3, c. 94, of the Laws of Minnesota for 1881, which is: "No railroad corporation shall consolidate with, lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchises, rights of property thereof, which owns or controls a parallel or competing line." And he prays that the defendant may be enjoined from taking any steps towards its performance. The defendant answers that it has ample power to make and perform this agreement under

its charter; that the true construction of the provisions of the acts of 1874 and 1881, cited, is that they do not amend or affect its charter; and that, if the opposite construction is adopted, they are void in so far as they prohibit or affect its right to make and perform this agreement, because they are in violation of section 10, art. 1, of the constitution of the United States. The complainant replies that the right to so amend the charter of this defendant as to prohibit the performance of this agreement was reserved to the state by section 17 of the act of 1856, under which the defendant was incorporated, and that the laws of 1874 and 1881 were a constitutional exercise of this reserved right.

A. H. Young and H. J. Horn, for complainant.

M. D. Grover, Davis, Kellogg & Severance, and E. P. Sanborn, for defendant.

SANBORN, Circuit Judge. If there is any principle of jurisprudence that is beyond dispute and discussion in this nation, it is this: An accepted act of incorporation of a private corporation is a contract between the state and the corporation. Any law of a state which impairs or destroys a valuable franchise granted by such an act impairs the obligation of the contract, and is without effect, unless, before or at the time of the passage of the act, the state reserved the right to enact such a law. Const. U. S. art. 1, § 10; Dartmouth College Case, 4 Wheat. 518, 684, 693, 695, 703; Bank v. Knoop, 16 How. 369, 380; Binghamton Bridge Case, 3 Wall. 51; Sala v. New Orleans, 2 Woods, 188, Fed. Cas. No. 12,246; Railroad Co. v. Reid, 13 Wall. 264; Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273; New Jersey v. Yard, 95 U. S. 104; New Orleans Gaslight Co. v. Louisiana, etc., Co., 115 U. S. 650, 6 Sup. Ct. 252; Monongahela Nav. Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. 622; Mayor, etc., of City of Houston v. Houston City St. Ry. Co. (Tex. Sup.) 19 S. W. 127; Smith v. Railroad Co., 64 Fed. 272, 275; Boston & L. R. Corp. v. Salem & L. R. Co., 2 Gray, 1; Zimmer v. State, 30 Ark. 677; McRoberts v. Washburne, 10 Minn. 23 (Gil. 8); Washington Bridge Co. v. State, 18 Conn. 53; Citizens' St. R. Co., v. City Ry. Co., 56 Fed. 746; Citizens' St. R. Co. v. City of Memphis, 53 Fed. 715.

This contract is threefold. It is a contract between the state and the corporation, between the state and the stockholders of the corporation, and between the corporation and its stockholders. If the corporation threatens to do an act beyond the powers granted to it, in violation of law, and in violation of this contract, the stockholders are entitled to the mandate of the court to prevent it; and if, as the complainant alleges, the performance of the agreement which the defendant has made with the bondholders of the Northern Pacific Railroad Company is illegal, the complainant may successfully maintain this action for an injunction against it. *Du Pont v. Railroad Co.*, 18 Fed. 467, 470; *Beach, Priv. Corp.* § 429, and cases cited.

It goes without saying that the right to make and execute the agreement assailed in this suit was a valuable privilege, and, if it is included in one of the franchises granted to the defendant, that was a valuable franchise. The principal questions presented in this case, therefore, are: Was the right to perform this agreement granted to the defendant by its act of incorporation and the subsequent

amendment thereof in 1865? If chapter 29 of the Laws of Minnesota for 1874 and section 3 of chapter 94 of the Laws of Minnesota for 1881 were amendments of this charter, does either of them prohibit the exercise of this right? Was the right to make such an amendment of the charter reserved to the state in the charter? Are the acts of 1874 and 1881 to be construed as amendments to this charter? These questions will be considered in the order in which they have been stated so far as it shall be necessary in order to determine whether or not an injunction ought now to issue as prayed.

An agreement between railroad corporations for an interchange of traffic at connecting points, and for the joint use of terminal grounds and facilities on reasonable terms, is a lawful contract. It is in accord with the public policy of the nation, and is a just and rational method of fulfilling the requirements of the "Act to Regulate Commerce," approved February 4, 1887 (24 Stat. 379; Supp. Rev. St. 529). *U. S. v. Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 78, 79, 58 Fed. 58. This is the character of the traffic contract contemplated by the agreement here assailed. Ample power to make such a contract, and to pay for it by a guaranty of the bonds of the new corporation, was granted to this defendant in the general authority to acquire such property as was necessary or convenient to carry into effect the object and purposes of the corporation, to operate a railroad, to become part owner or lessee of any railroad, and to connect with and use any railroad running in the same general direction as any of its roads, which is found in sections 1, 2, 6, and 12 of the act of 1856. *Laws Minn. 1856, c. 160*; *Zabriskie v. Railroad Co.*, 23 How. 381, 390, 399; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. 221; *Railroad Co. v. Howard*, 7 Wall. 392, 411; *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770; *Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 299, 301, 14 Sup. Ct. 339; *Harrison v. Railroad Co.*, 13 Fed. 522, 524; *Tod v. Land Co.*, 57 Fed. 47, 60; *Marbury v. Land Co.*, 10 C. C. A. 393, 62 Fed. 335; *Smead v. Railroad Co.*, 11 Ind. 104, 112; *Ellerman v. Stock-Yards Co.*, 49 N. J. Eq. 217, 248, 250, 23 Atl. 287; *Rogers L. & M. Works v. Southern R. Ass'n*, 34 Fed. 278; *Low v. Railroad Co.*, 52 Cal. 53, 58; *Opdyke v. Railroad Co.*, 3 Dill. 55, 70, 72, Fed. Cas. No. 10,546.

But this agreement is more than a traffic contract. It is an agreement that the defendant shall have the traffic contract for itself, and one-half of the stock of the new corporation for its shareholders, in consideration of its guaranty of the payment of the bonds of that corporation. Does the charter give it power to buy this stock in this way? The amendment of its charter made and accepted by it in 1865 grants to it the unrestricted right to consolidate with any other railroad corporation in every way in which the legislature could conceive that such a consolidation might be made. *Sp. Laws Minn. 1865, c. 4, §§ 8, 9, 12*. Section 8 gives it the power to consolidate the whole or any portion of its capital stock with the whole or any portion of the capital stock of any other railroad having the same general location or direction, or to become merged therein by way of substitution. Section 9 gives it the power to consolidate

any portion of its road and property with the franchises of any other railroad company, or any portion thereof; and section 12 gives it the power to consolidate the whole or any portion of its main lines or branch railroad and all the rights, powers, franchises, grants, and effects pertaining to such roads, with the rights, powers, franchises, grants, and effects of any other railroad either within or without the state. This unrestricted right to consolidate with any other railroad corporation includes the power to buy and destroy the stock of that corporation, and to pay for it by the issue to its shareholders of stock of the defendant. It includes this power because a consolidation may be legally effected in this way. *Mor. Priv. Corp.* § 942. If the defendant may buy all of the stock of the corporation, it may buy half of it. If it may pay for such stock by the issue of its own stock, it may do so by the payment of money, or by an absolute or conditional promise to pay money for it. The agreement in question contemplates the purchase of half of the stock of the new corporation, and payment for it by a conditional promise to pay a certain amount of the debts of that corporation if the latter fails to do so. The whole is greater than and includes all its parts; and, in like manner, the right to consolidate with a corporation includes a right to purchase a part or all of its stock for the use of shareholders of the purchasing company, and the right to pay for it by a guaranty of the payment of its bonds. There is no escape from the effect of this proposition on the ground that the defendant does not intend to completely consolidate with the new corporation, and hence that it has no authority to exercise the powers which it might exercise if it had that intention, nor on the ground that the new corporation, a part of the stock of which is to be purchased, is yet to be incorporated. The right granted to this defendant was to consolidate with any railroad corporation, and it was not limited by the time when, or the parties by whom, the latter was or should be organized. One who has authority to sell and convey another's land is not deprived of his authority to make a valid agreement of sale because he does not intend to convey, nor of his authority to convey because he first makes an agreement to sell in order that he may exercise his power to convey. The steps the defendant has agreed to take in this case tend towards the accomplishment of the purposes and objects of a consolidation, and they might all be lawfully taken in perfecting an actual consolidation. Upon the principle that the whole includes all its parts, the power to take them must be held to be included in the general right to consolidate granted by this charter. If there could ever have been any doubt of this proposition, it is now supported by judicial authority so eminent that this court ought not to depart from it. *Branch v. Jesup*, 106 U. S. 468, 478, 1 Sup. Ct. 495; *Marbury v. Land Co.*, 10 C. C. A. 393, 404, 407, 62 Fed. 335; *Tod v. Land Co.*, 57 Fed. 47, 56, 57; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 100, 2 Sup. Ct. 221; *Hill v. Nisbet*, 100 Ind. 341; *Smead v. Railroad Co.*, 11 Ind. 104. An exhaustive and instructive opinion upon this question by the circuit court of appeals of the Sixth circuit will be found in *Marbury v. Land Co.*, *supra*

Does chapter 29 of the act of 1874 or section 3 of chapter 94 of the act of 1881, in terms, prohibit the performance of this agreement, if either of them is to be construed to be an amendment of this charter? Section 3 of the act of 1881 provides that no railroad corporation shall consolidate with, lease, or purchase, or in any way become the owner of, or control, any other railroad corporation, or any stock thereof, which owns or controls a parallel or competing line. The new corporation which this agreement contemplates will own or control many lines of railroad that are competing and some that are parallel with lines of the defendant. The defendant proposes to purchase one-half of the stock of this corporation, and a traffic agreement with it, and to pay therefor by a guaranty of its bonds. It matters not that it proposes that the stock purchased shall be issued to its shareholders. The defendant railroad company buys it, and, if it does not propose to own and control it, it does propose that its owners shall own and control it, and that is not an essential difference in the practical operation and effect of the scheme. The conclusion is that, if section 3 of the act of 1881 is an amendment of the defendant's charter, the performance of this agreement falls within its prohibition.

Was the right to impair or destroy the franchise to consolidate with another corporation reserved by the state at or before the granting of the charter? There was no such reservation unless it is contained in section 17 of the act of 1856, which reads: "This act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of said corporation." The contention of counsel for the complainant that this section reserves to the state the power to take from the corporation all of its rights under the charter, except those rights of property which it has acquired, by purchase or otherwise, from parties other than the state, cannot be successfully maintained. Such a construction strikes from the section the words "not destroying or impairing the vested rights of said corporation," and gives it the effect of a reservation of the right to amend in any manner. The rights of property acquired from parties other than the state could not be taken from its stockholders without consideration under the reservation of the unlimited power to alter, amend, or repeal the charter. *Greenwood v. Freight Co.*, 105 U. S. 13, 19; *Kent v. Mining Co.*, 78 N. Y. 159, 182; *Close v. Noye* (Super. Buff.) 26 N. Y. Supp. 93; *Hawthorne v. Calef*, 2 Wall. 10. But the court is forbidden to strike from this provision of the act the limiting clause "not destroying or impairing the vested rights of said corporation," by the familiar rule that all the words of a law should have effect rather than that part should perish by construction. *Knox Co. v. Morton*, 15 C. C. A. 671, 68 Fed. 790; *City of St. Louis v. Lane*, 110 Mo. 254, 258, 19 S. W. 533. Again, a corporation has vested rights in all the valuable franchises granted to it by the state. The state excepted none of these rights from the provision of section 17. That provision was that it might amend the charter in any manner that did not, and that it would not amend it in any manner that did, affect any of the vested rights of the cor-

poration. The conclusive presumption from the fact that the legislature excepted none of these rights from this provision is that they intended to except none, and it is not in the power of the court to do so. *Madden v. Lancaster Co.*, 12 C. C. A. 566, 573, 65 Fed. 188; *Morgan v. City of Des Moines*, 8 C. C. A. 569, 60 Fed. 208; *McIver v. Ragan*, 2 Wheat. 25, 29; *Bank v. Dalton*, 9 How. 522, 528; *Vance v. Vance*, 108 U. S. 514, 521, 2 Sup. Ct. 854. Moreover, if this task was undertaken, the unanswerable question would immediately present itself, what rights shall be excepted, and what shall not be?

It is difficult to perceive, after a patient examination of all the authorities cited on both sides of this case, and a careful consideration of the question, how this provision of the contract can be held to reserve to the state the right to pass any law which, in the absence of this provision, would have been in violation of section 10, art. 1, of the constitution. The plain effect of the provision is that the state will not amend this charter in any way that will impair or destroy the vested rights of the corporation, and that it may amend it in any other way. The provision of the constitution is that no state shall pass any law impairing the obligation of contracts. Any amendment that does not impair a vested right of the corporation under this contract does not impair its obligation, and any amendment that does impair its obligation necessarily impairs a vested right. *Smith v. Railroad Co.*, 64 Fed. 272, 275. An application to section 17 of the ordinary rules of interpretation demonstrates that this is the true construction of the section. One of these rules is that the court may place itself in the place of the contracting parties for the purpose of discovering their intention, and that, when that intention is manifest, it will control, regardless of technical rules of construction. *Binghamton Bridge Case*, 3 Wall. 78, 80; *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray, 1; *Prentice v. Forwarding Co.*, 7 C. C. A. 293, 58 Fed. 437, 443; *Gunn v. Black*, 8 C. C. A. 541, 60 Fed. 158; *Witt v. Railway Co.*, 38 Minn. 122, 127, 35 N. W. 862; *Driscoll v. Green*, 59 N. H. 101; *Johnson v. Simpson*, 36 N. H. 91; *Walsh v. Hill*, 38 Cal. 481, 486, 487. Let us apply this rule.

In 1819, in the *Dartmouth College Case*, the supreme court had declared that the franchise granted to the trustees of Dartmouth College to elect their own successors was a valuable franchise, which the state of New Hampshire was prohibited by the constitution from destroying or impairing. In his opinion in that case, Mr. Justice Story had conclusively answered the argument now made by complainant's counsel in this case, that the only rights secured by this section are rights of property acquired from parties other than the state. He said:

"A grant of franchise is not, in point of principle, distinguishable from a grant of any other property." 4 Wheat. 684.

At page 697 he said:

"Another objection growing out of and connected with that which we have been considering is that no grants are within the constitutional prohibition, except such as respect property in the strict sense of the term,—that is to say, beneficial interests in lands, tenements, and hereditaments,

etc., which may be sold by the grantees for their own benefit; and that grants of franchises, immunities, and authorities not valuable to the parties, as property, are excluded from its purview. No authority has been cited to sustain this distinction, and no reason is perceived to justify its adoption."

At page 699 he said:

"In respect to corporate franchises, they are, properly speaking, legal estates, vested in the corporation itself, as soon as it is in esse. They are not mere naked powers, granted to the corporation, but powers coupled with an interest. The property of the corporation rests upon the possession of its franchises; and, whatever may be thought as to the corporators, it cannot be denied that the corporation itself has a legal interest in them."

And at page 701 he said:

"Could the legislature of New Hampshire have seized the land given by the state of Vermont to the corporation, and appropriated it to uses distinct from those intended by the charity, against the will of the trustees? This question cannot be answered in the affirmative until it is established that the legislature may lawfully take the property of A., and give it to B.; and, if it could not take away or restrain the corporate funds, upon what pretense can it take away or restrain the corporate franchises? Without the franchises, the funds could not be used for corporate purposes; but, without the funds, the possession of the franchises might still be of inestimable value to the college, and to the cause of religion and learning."

In 1845 the legislature of the state of Ohio had passed a general banking law, which required banks to pay to the state 6 per cent. of their semiannual dividends in lieu of all other taxes. In 1847 the State Bank of Ohio had been incorporated under this law. In 1851 the legislature of Ohio had passed a general law which required banks in that state to pay a larger amount of taxes than was required by the law of 1845. In 1853 the supreme court had held that this provision of the law of 1851, which increased the tax, was unconstitutional, and that the bank was not required to pay the increased amount. Mr. Justice McLean, in delivering the opinion of the supreme court, had said:

"Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature, where the power to do so is not reserved in the charter." *Bank v. Knoop*, 16 How. 369, 380.

In 1856 the legislature of the territory of Minnesota convened at St. Paul, more than 200 miles from the nearest railroad, with an area of fertile, but unoccupied, lands, stretching to the north and west of them, so vast and so distant from the commercial centers that there was no hope of its occupation or cultivation, until its products could be moved and the needs of its occupants could be supplied through railroad transportation. In this state of the law and of the territory they represented, this legislature sat bidding for the construction and operation of railroads through their territory. They offered to this railroad company the right to build and operate a railroad in a northerly direction from Minneapolis, and in a southerly direction, by way of West St. Paul, to Iowa, and the right to connect with and use any railroad running in the same general direction as either of these lines. Nine years passed, but no railroad had been built. The legislature amended their offer, and increased their bid. In addition to all the franchises granted in 1856,

they offered to this corporation, in various forms, the right to consolidate with any other railroad corporation whatever. These offers were accepted, and became the contract between the state and the company. The original contract of 1856 contained, and the amended contract of 1865 carried with it, the agreement that it might be amended by the state in any manner not destroying or impairing the vested rights of the corporation. The legislatures of some of the states had attempted to revoke or impair franchises that had been granted to corporations, and had been prevented from so doing by the decisions of the supreme court. That court had declared that every valuable privilege given by the charter which conduced to an acceptance of it or an organization under it was a contract which could not be changed by the legislature where the power to do so was not reserved in the charter. Mr. Justice Story had declared that corporate franchises were legal estates vested in the corporation itself as soon as it was in esse. The legislature of Minnesota were offering every inducement in their power to secure the operation of railroads. What did they mean when they agreed with this corporation that they would not so amend its charter as to destroy or impair its vested rights? The question carries its answer. The conclusion is irresistible that they meant that they would never so amend that charter as to impair or destroy any franchises or rights of the corporation which the supreme court had declared vested as soon as it was accepted and rested under the protection of the constitution.

Another canon of interpretation is that, where the language of a contract or statute is unambiguous, it must be held to mean what it clearly expresses, and no strained or refined rule of construction can be applied to any part of it, to defeat it. *Knox Co. v. Morton*, 15 C. C. A. 671, 68 Fed. 789; *U. S. v. Fisher*, 2 Cranch, 358, 399; *Railway Co. v. Phelps*, 137 U. S. 528, 536, 11 Sup. Ct. 168; *Bedsworth v. Bowman*, 104 Mo. 44, 49, 15 S. W. 990; *Warren v. Paving Co.*, 115 Mo. 572, 576, 22 S. W. 490. The natural and obvious meaning of the language contained in section 17 is that the legislature reserved the right to amend this charter in matters of form, procedure, and in other respects that would not affect the substantial rights of the corporation, and that they made no further reservation. Counsel for plaintiff urged as an objection to this construction that it leaves the rights of the state and of the corporation just where they would have been if section 17 had not been enacted. This is true, but this is where section 17 leaves these rights when every word it contains is given its natural and obvious meaning. This construction makes the section declaratory of the law as the supreme court had interpreted it, and it is not unusual for legislatures to pass acts declaratory of the general law. The circumstances under which the act was passed point with almost compelling force to the conclusion that this section was added to define and limit the extent of the power of amendment, and to assure the corporation that its substantial rights would not be assailed by the territory or the state; and, in any event, there is nothing in the act itself, or in the circumstances surrounding its enactment, to warrant this court in repealing or

ignoring both the general law and the statute which plainly declared it.

Another contention of counsel for the complainant is that section 17 should be construed to read: "This act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly in any manner not destroying or impairing any rights of said corporation which have been exercised at the time of the amendment." And they maintain that, because the right to consolidate with another corporation had not been exercised by the defendant, when the acts of 1874 and 1881 were passed, the right was excepted from the saving clause of section 17, and was lawfully restricted. In support of this proposition, they cite *Tomlinson v. Jessup*, 15 Wall. 454; *Miller v. State*, Id. 478; *Hamilton Gaslight & Coke Co. v. City of Hamilton*, 13 Sup. Ct. 90; *Shields v. Ohio*, 95 U. S. 319, 324; *Railroad Co. v. Maine*, 96 U. S. 499, 510; *Greenwood v. Freight Co.*, 105 U. S. 13; *Newport & C. Bridge Co. v. U. S.*, Id. 470; *Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48; *Crease v. Babcock*, 23 Pick. 334; *In re Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Union Imp. Co. v. Com.*, 69 Pa. St. 140; *Railroad Co. v. Smith*, 47 Me. 34; *City of Roxbury v. Boston & P. R. Co.*, 6 Cush. 424, 431; *Railroad Co. v. Stamps (Ga.)* 11 S. E. 442; *Central Railroad & Banking Co. v. State*, 54 Ga. 401. These authorities, however, do not make this distinction or support this proposition. A careful, patient examination of them discloses the fact that in every case except that of *Newport & C. Bridge Co. v. U. S.*, 105 U. S. 470, the state had, prior to or at the time of the grant of the charter under consideration, expressly reserved to itself the unlimited power to alter or repeal it; and in the *Bridge Company Case* congress had reserved the right to withdraw its assent to the construction of the bridge, or to direct necessary modifications or alterations thereof, and by subsequent action, which was sustained, simply required some changes to be made in the construction of the bridge. These cases rest upon the acknowledged principle that when the state, before or at the time of the grant of a charter to a corporation, expressly reserves the right to alter or repeal it, that reservation becomes a part of the contract between the state and the corporation; and the franchises are then, by the express terms of the contract, revocable at the will of the state. This case is not ruled by these authorities, because, as we have seen, the territory and state did not reserve the power to alter or repeal this charter, but limited its reservation to the power to amend it "in any manner not destroying or impairing the vested rights of said corporation."

Every valuable franchise granted to this corporation vested in it when the act making the grant was accepted. The three great franchises granted were the franchise to build a railroad, to operate a railroad, and to consolidate with another railroad corporation. The chief value of every franchise is in its present or future use. It derives little value from the past. Section 17 was in effect a covenant against any amendment that would impair any vested right of this corporation. Can it be successfully maintained that the right to a franchise is never a vested right until the franchise is used?

Has a railroad corporation, after acceptance of its charter and organization, no vested right to condemn land for its road until it has condemned some, no vested right to build its road until it has built some, no vested right to run its engines and cars until it has run some, no vested right to collect tolls until it has collected some, and no vested right to consolidate with another corporation (where that franchise is granted in the charter) until it has consolidated with one? These questions carry their answers. There is no distinction, in reason or in the authorities, between the right to a franchise that has been and the right to one that has not been used, before the latter is forfeited for nonuser. The legal presumption is that each of the valuable franchises granted in a charter formed a part of the consideration for its acceptance, and the investment of capital in the stock of the corporation; and, as it is impossible to determine which of them formed the chief inducement, the right to those exercised first and the right used last vest alike in the corporation as soon as the grant which gives them is accepted, and they are all equally protected by the constitutional inhibition to impair the obligation of the contract both before and after they are used.

Sala v. New Orleans, 2 Woods, 188, Fed. Cas. No. 12,246, and *Zimmer v. State*, 30 Ark. 677, are cases in which rights to franchises that had never been exercised at all were held to be vested rights, and state legislation which attempted to impair these franchises before they were exercised was held to be in violation of the constitutional prohibition. And all cases of this class, from the Dartmouth College Case down, were necessarily cases in which state legislation attempted to impair the value of those portions of the franchises that had not been used,—the value of their use in the future, and not in the past. In *Sala v. New Orleans*, supra, the franchise to the city to issue bonds to pay for the waterworks, which was contained in the charter of the waterworks company, was impaired by onerous restrictions before it was exercised, and the act which restricted it was held ineffective. In *Zimmer v. State* the state of Arkansas attempted to impair, by a subsequent constitution, the franchise of a railroad corporation to consolidate with another before that franchise had been exercised; but the supreme court of that state held that this franchise could neither be withdrawn nor impaired by either a law or a constitution of the state. A franchise to consolidate with another corporation is incorporeal and intangible, but it is property, and often valuable property. Such a franchise cannot be taken for public use without condemnation and the payment of just compensation. *Railroad Co. v. Reid*, 13 Wall. 264; *Montgomery Co. v. Bridge Co.*, 110 Pa. St. 54, 58, 20 Atl. 407; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 341, 13 Sup. Ct. 622.

In the case last cited, Mr. Justice Brewer, delivering the opinion of the supreme court, and speaking of the franchise of the navigation company to take tolls, said:

"The franchise is a vested right. The state has power to grant it. It may retake it, as it may take other private property for public uses, upon the payment of just compensation. A like, though a superior, power exists

in the national government. It may take it for public purposes, and take it even against the will of the state; but it can no more take the franchise which the state has given than it can any private property belonging to an individual."

This is the last expression of the supreme court on this question, and it must conclude this discussion. The supreme court is the final arbiter upon all the questions that have been considered in this case. Its decisions are binding upon this court, and, whenever that court has decided a question that is afterwards presented here, it is the primary duty of this court to conform to that decision. Unless the opinions of the supreme court that have been cited have been misread, and their purport has been misconceived, they have decided every question that has been considered here, and left this court no power or duty but to follow those decisions. Unless the decisions of the supreme court from the Dartmouth College Case, in 1819, to the Case of the Navigation Company, in 1892, are to be disregarded, the franchise to consolidate with another railroad corporation was a vested right of this defendant from the time of its acceptance of its grant; and any law of the state which impaired that right was ineffectual, unless the power so to do was reserved by the legislature before or at the time of the grant. The legislature of Minnesota not only failed to reserve any such right, but, in effect, it contracted that the state would not impair any of the vested rights of the corporation by any amendment of the charter. If chapter 29 of the Laws of 1874 and section 3 of chapter 94 of the Laws of 1881 are to be construed to be amendments of this charter, they restrict and impair the right of this defendant to consolidate with any other railroad company, and to that extent they are ineffective.

A single question remains. It is whether or not chapter 29 of the Laws of 1874 and section 3 of chapter 94 of the Laws of 1881 should be construed to be amendments of the charter of the defendant. But it is unnecessary to determine that question in order to decide this preliminary motion. If they should be considered to be amendments of that charter, they are ineffective, for the reasons that have been stated; and, if they should not be deemed to be amendments of that charter, they leave it unaffected, and the right to consolidate unrestricted. In either event the agreement assailed in this case is not illegal on account of these statutes. For this reason this question will not now be considered, and the motion for the preliminary injunction will be denied.

BUTLER et al. v. COCKRILL.

OLD NAT. BANK OF GRAND RAPIDS et al. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. April 13, 1896.)

Nos. 682, 683.

1. DEED BY TRUSTEES—PRESUMPTION OF AUTHORITY.

The fact that trustees holding lands in trust for a national bank formally and regularly execute a deed thereof to a third party itself raises a presumption that the deed was made pursuant to a regular resolution of

the bank's board of directors, and the deed must be *held* sufficient to convey the legal title where there is nothing to rebut the presumption.

2. **VENDOR'S LIEN—PRETENDED SALE.**

There can be no vendor's lien in favor of a bank which causes lands held in trust for it to be conveyed to a corporation, for the purpose of giving such corporation the appearance of ownership, and the power and opportunity to deal with strangers as the owner, when in reality it takes the lands in trust for the bank. There can be no vendor's lien when there is no actual sale.

3. **CORPORATIONS—ULTRA VIRES—ESTOPPEL.**

A bank which causes property owned by it to be conveyed by a deed regular in form to a worthless corporation, organized by its own directors, and then loans such corporation money, takes its notes, and discounts them with strangers, by representing them as prime paper and on the strength of such corporation's apparent ownership of such property, is thereafter estopped, as against the holders of the notes, to assert that the conveyance was *ultra vires*.

4. **SAME—INSOLVENCY—CREDITORS AND STOCKHOLDERS.**

A bank for which certain mill property was held in trust caused the same to be conveyed to a corporation, organized among its own officers and directors, with a view to loaning to such corporation money wherewith to repair and operate the mills and make them salable. The bank directors who subscribed for stock in the mill corporation had a secret agreement with the bank that, after a sale of the property was effected, the proceeds should be first applied to repay the amount of their subscriptions. The money was loaned accordingly, the bank taking the mill company's notes, and discounting them with innocent third parties. No sale was effected, and the bank and mill company failed, and all their property went into the hands of the bank's receiver. Thereafter the mill company gave to such subscribers its own notes, secured by mortgage, for the amounts paid on the stock, and the notes were then transferred to alleged innocent purchasers. *Held*, that these notes were without consideration, that this was a futile attempt to divert the property of an insolvent corporation from its creditors to its stockholders, and that the proceeds of the receiver's sale of the mill property must be equally distributed among the holders of the notes given by it to the bank for the borrowed money, the receiver taking, for the bank's creditors, the proportion applicable to such of the notes as were retained by the bank.

Appeals from the Circuit Court of the United States for the Eastern District of Arkansas.

Morris M. Cohn, for appellants E. J. Butler, trustee, and Oscar Davis et al.

W. C. Ratcliffe, John Fletcher, and E. W. Kimball, for appellants Old Nat. Bank of Grand Rapids, Mich., and Southern Nat. Bank of New York.

S. R. Cockrill and Ashley Cockrill, for appellee Sterling R. Cockrill, receiver of First Nat. Bank of Little Rock, Ark.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. These controversies arise over the distribution of the proceeds of some cotton mills in the city of Little Rock and the lands on which they stood, which were sold under an agreement by all the parties to the original suit that the money derived from the sale should be paid into the court below and should stand in the place of the real estate. In a suit brought in that court, before the sale of the property, by Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Ark., the appellee,

against the appellants in these cases, and against all parties interested in this property, a decree was rendered that the receiver was entitled to recover all the proceeds of this sale, for the benefit of all the creditors of the First National Bank. The Old National Bank of Grand Rapids, Mich., and the Southern National Bank of New York, joined in one appeal from this decree, and E. J. Butler, as trustee in a certain trust deed of the property, and those who held the notes described in that deed, joined in the other appeal. The question is, to which of these parties do the proceeds of the sale of this real estate belong?

On February 3, 1893, the First National Bank of Little Rock, Ark., was insolvent, and the comptroller of the currency appointed a receiver of its property, who took possession of and has since been administering it. The legal title to the real estate, the proceeds of which are here in question, was then in the Little Rock Cotton Mills, a corporation which was organized on May 19, 1891. That corporation had taken possession of this property in the summer of 1891, had borrowed \$23,000 of the First National Bank, which it had used to buy new machinery for, to make repairs upon, and to operate the mills, and had given its promissory notes to that bank for this money. These notes were unpaid. The First National Bank held two of them, which amount to \$8,000. It had negotiated two of them, which amount to \$11,000, for value and before maturity, to the Southern National Bank of New York; and it had negotiated one of them, which was for \$4,000, for value and before maturity, to the Old National Bank of Grand Rapids, Michigan. The Little Rock Cotton Mills was insolvent. It had no property but the real estate, the proceeds of which are here in question, and it owed no debts but the \$23,000, evidenced by these notes. The receiver of the First National Bank, soon after his appointment, took possession of these mills and this property of the cotton mills, and held it as such receiver until it was sold by the order of the court.

The property of an insolvent corporation constitutes a trust fund, pledged to the payment of all its debts, equally and ratably. *Graham v. Railroad Co.*, 102 U. S. 148, 161; *Railway Co. v. Ham*, 114 U. S. 587, 594, 5 Sup. Ct. 1081; *Richardson v. Green*, 133 U. S. 30, 44, 10 Sup. Ct. 280. In view of this principle, there can be no doubt, under the state of facts which we have recited, that the proceeds of the property of the cotton mills ought to be distributed pro rata among the three banks, which hold these notes and are its only creditors. The receiver of the First National Bank, however, seeks to escape from the effect of this principle, and to recover the entire proceeds of this property, by virtue of these additional facts:

Prior to June 29, 1889, this property belonged to another insolvent corporation, which conveyed it to P. K. Roots and Oscar Davis, in trust, for the First National Bank and the German National Bank, in satisfaction of debts owed to them. This property was silent and unproductive. The president, the cashier, and the directors of the First National Bank decided to organize the Little Rock Cotton Mills, to have this property conveyed to that corporation, to have that corporation operate the mills, and then to sell them for the highest

price it could obtain. The purpose of this plan was to make the mill property more salable by putting it into operation, and thus to enable the bank to realize a larger amount for it; and the reason for putting the title to it in the Little Rock Cotton Mills was evidently to have a corporation that could make bills receivable that could be discounted on the credit of this property, and to have a corporation to carry on a business which, under its charter, the bank might not be able lawfully to conduct. The bank had eleven directors. Six of them joined with one Greer and incorporated the Little Rock Cotton Mills on May 19, 1891. They made four of their number members of its board of directors, which consisted of seven. They chose one of their number president of that corporation, and these officers remained such, and conducted the affairs of the cotton mills, until this suit was commenced. They filed a certificate in the office of the secretary of the state of Arkansas, that each of them held 20 shares of \$25 each of the capital stock of that corporation, that \$5,000 of its capital stock had been actually paid in by the subscribers, and that one Robert Greer had subscribed for 200 shares. When this had been done, H. G. Allis was president of the First National Bank, and H. G. Allis, N. Kupferle, Gus Blass, M. G. Hall, William Farrell, Mark M. Cohn, Logan H. Roots, W. H. Haliburton, George H. Sanders, and C. M. Taylor were its directors, and George H. Sanders was its counsel. N. Kupferle was president of the Little Rock Cotton Mills, and H. G. Allis, N. Kupferle, M. G. Hall, Mark M. Cohn, Robert Greer, E. J. Butler, and George R. Brown were its directors. Before these directors of the First National Bank subscribed for their shares of the capital stock of the cotton mills, they, as president and directors of the bank, agreed with themselves as individuals that those of the directors and stockholders of that bank who subscribed and paid for stock in the cotton mills should be first repaid the amounts they paid for the stock, out of the proceeds of the sale of the mills when made; but they did not make this agreement with Robert Greer, who subscribed for 200 shares. Pursuant to this contract, H. G. Allis, N. Kupferle, Gus Blass, M. G. Hall, William Farrell, Mark M. Cohn, George R. Brown, and E. J. Butler each subscribed for 20 shares of the stock of the cotton mills, and each paid or promised to pay \$500 therefor. About May 25, 1891, the First National Bank bought the interest of the German National Bank in the property in question, and the latter bank authorized its president and Oscar Davis, its cashier, to convey it. Thereupon, on the request of the president of the First National Bank, and with the knowledge and consent of all its directors and officers, Oscar Davis and P. K. Roots conveyed the real estate in question to the Little Rock Cotton Mills, by deed dated May 25, 1891, which recited that they held the property in trust for the two banks, and that the conveyance was "executed by their directors, and at their request, and for their benefit." The several notes of the Little Rock Cotton Mills, which evidence its indebtedness for the \$23,000, were made more than a year after this deed had been recorded, and in the months of June and October, 1892. No record of the passage of any resolution by the board of directors of the

bank, authorizing their trustees, Davis and Roots, to make the deed to the cotton mills, was produced at the trial, but several of the directors testified that such a resolution was passed. The Little Rock Cotton Mills paid nothing for the conveyance made by Davis and Roots to it; but, soon after that conveyance was made, it proceeded to borrow money of the First National Bank, upon its notes, and to repair, improve, and operate the mills with this money. For this purpose it borrowed and used \$23,000, and when its property was sold it brought but \$15,000. When the First National Bank discounted the notes of the cotton mills, now held by the Old National Bank and the Southern National Bank, it represented that these notes were prime paper; and those banks had no notice, other than the record of the deeds, that the cotton mills did not own the property conveyed to it by Davis and Roots. On March 3, 1893, after the bank and the cotton mills had both become insolvent, when all their property was in possession of the receiver of the bank, and about two years after the stockholders of the cotton mills had taken their stock, that corporation made and delivered to each of the subscribers to its stock, who were either directors or stockholders of the bank, its promissory note for \$500, and made a trust deed of all its property to secure the payment of these notes. A few days after this deed was made and recorded, the cotton mills made another trust deed, to secure the payment of its notes for \$23,000, held by the three banks. The subscribers to the stock of the cotton mills, who received notes for \$500, immediately transferred them to other parties, who claimed to be bona fide purchasers thereof for value. The holders of all these notes, the Little Rock Cotton Mills, and the trustee named in these trust deeds were parties to the suit brought by the receiver of the First National Bank, and a part of the relief sought in that suit was that these mortgages should be set aside and declared to be void.

Upon this state of facts, counsel for the receiver of the bank insists that he is entitled to all the proceeds of the property of the Little Rock Cotton Mills, to be distributed pro rata among the general creditors of the bank; counsel for the Old National Bank and the Southern National Bank contend that these banks have a prior claim in equity to these proceeds; and counsel for the holders of the \$500 notes maintain that they have a right to these proceeds superior to that of the First National Bank. It is conceded on all hands that Davis and Roots had no beneficial interest in the mill property, but held the title to it in trust for the First National Bank after the latter purchased the interest of the German National Bank therein. Resting upon this concession, counsel for the receiver base their contention on three propositions: They say—First, that there never was any resolution or other action of the board of directors which authorized Davis and Roots to convey the property to the Little Rock Cotton Mills, and hence the bank always owned it; second, that if the board ever passed such a resolution, the conveyance to the cotton mills was void, because it was made at the instance of the directors of the bank to a corporation of their own, to enable the bank to conduct a business beyond its powers; and, third, if

the conveyance was valid, the cotton mills paid nothing for it, and the bank had a vendor's lien upon the property for more than the amount realized from its sale.

The first and third propositions cannot be maintained upon the evidence. The testimony is clear and convincing that the board of directors of the First National Bank did pass a resolution which authorized and requested Davis and Roots to convey this property to the cotton mills, although no record of it was produced, and perhaps none was ever made. It was, however, the passage of the resolution, not the record of it, that gave the authority to make the conveyance. Moreover, Davis and Roots recited in their deed that it was executed by the directors of this bank, at their request, and for their benefit. The First National Bank had undoubtedly lawful right and ample power to direct this conveyance to be made by its trustees, and, at its request, these trustees had the right and the power to make it. On the face of the deed their power appears to have been lawfully exercised. The fact that this deed was formally and regularly executed by these trustees at once raises the presumption that it was made pursuant to a regular resolution of the board of directors of the bank, and by its direction, and there is nothing in this record to overcome that presumption. A conveyance by trustees, formally executed, and not necessarily beyond the scope of their powers, will, in the absence of proof to the contrary, be presumed to have been made by lawful authority. Acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter. *City of Lincoln v. Sun Vapor Street-Light Co.*, 19 U. S. App. 431, 438, 8 C. C. A. 253, 257, and 59 Fed. 756, 760; *Barber Asphalt Paving Co. v. City of Denver*, 72 Fed. 336; *Lincoln v. Iron Co.*, 103 U. S. 412, 416; *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 70; *Omaha Bridge Cases*, 10 U. S. App. 98, 189, 2 C. C. A. 174, 240, and 51 Fed. 309, 326, 327; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620, 629. The deed to the Little Rock Cotton Mills, therefore, must be held, upon this record, to be sufficient to convey the legal title to the property it describes to that corporation.

As to the vendor's lien, there is no evidence whatever of its existence. No one came to testify that the bank sold this property to the cotton mills, or that the cotton mills bought it of the bank, or agreed to pay for it. The evidence was uncontradicted that the bank and its directors caused this property to be conveyed to that corporation for the purpose of giving the latter the appearance of ownership of it, and the power and opportunity to deal with strangers as its owner, when, in reality, it held it all the time in trust for the bank. There can be no vendor's lien where there is neither vendor nor vendee. But it is argued that the deed to the cotton mills was void, and the title to the property it described remained in Davis and Roots, in trust for the bank, because it was made in fulfillment of a void contract between the bank and its directors to convey this property of the bank to a corporation which these directors controlled, and to cause that corporation to carry on a business with this property which the bank could not lawfully conduct. It would

not be a difficult task to show that a national bank, which has taken a mill property for a debt, has the power to lease it to a third person to operate, and has the power to convey it to him, under an agreement that he shall operate and sell it, and account to the bank for its proceeds; that when it has made such a lease or contract, the bank may discount his notes to enable him to conduct his business. Nor are we prepared to concede that all contracts made by directors and officers with their bank, for its benefit, and without profit or the hope of it for themselves, are either against public policy or void. *Smith v. Lansing*, 22 N. Y. 520-522, 527, 528, 533, 534; *Oil Co. v. Marbury*, 91 U. S. 587, 589, 591; *Hotel Co. v. Wade*, 97 U. S. 13, 21, 23.

But we dismiss these questions. We rest the decision of this case on broader ground. A corporation is bound to a careful adherence to truth in its dealings, as much as an individual. It cannot take advantage of its own wrong to benefit itself, and to defeat the just calculations of innocent third parties who have acted in reliance upon its representations and conduct. It is governed by the well-settled rule that "one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial." *Paxon v. Brown*, 27 U. S. App. 49, 60, 10 C. C. A. 135, 143, and 61 Fed. 874, 881, 882; *National Life Ins. Co. v. Board of Education of City of Huron*, 27 U. S. App. 244, 10 C. C. A. 637, and 62 Fed. 778; *Omaha Bridge Cases*, 10 U. S. App. 98, 188, 190, 2 C. C. A. 174, 239, 240, and 51 Fed. 309, 326, 327; *Zabriskie v. Railroad Co.*, 23 How. 381, 397; *Cairncross v. Lorimer*, 3 Macq. 828; *Dickerson v. Colgrove*, 100 U. S. 578, 582; *Kirk v. Hamilton*, 102 U. S. 68, 75; *Evans v. Snyder*, 64 Mo. 516; *Pence v. Arbuckle*, 22 Minn. 417; *Crook v. Corporation of Seaford*, L. R. 10 Eq. 678; *Faxton v. Faxon*, 28 Mich. 159. The First National Bank procured the conveyance of this property to the Little Rock Cotton Mills for the express purpose of giving that corporation the semblance of title to it, and of enabling it thereby to operate the mills, and finally to sell the property. We say it gave that corporation the semblance of title, for, as we have seen, the deed was valid on its face, and vested the legal title in the cotton mills. The bank then loaned money to that corporation to enable it to repair, improve, and operate these mills, took the promissory notes of that corporation for this money, and discounted three of them, aggregating \$15,000, with the Southern National Bank and the Old National Bank, under the representation that they were prime paper. It goes without saying that this course of action was as much a representation by this bank that the title to this property was in the cotton mills, and that its notes were collectible from this real estate, as if it had expressly so stated. The cotton mills had no other property, and, if its notes charged any property, they charged this. If these notes were prime paper, it was because the cotton mills held the title to this property, and the notes were collectible

from its proceeds. Now, could the First National Bank, under the principles and authorities we have cited, cause some of its property to be fairly conveyed to a worthless corporation, and thus clothe that entity with the appearance of vigor and prosperity, then take its notes, discount them with innocent third parties on the strength of this appearance, and when the notes fell due, retake the property to itself, on the ground that it had exceeded its powers, and violated public policy, when its directors caused this property to be conveyed to the corporation, and thus obtain for itself both the proceeds of the notes it discounted and the property on the strength of which it obtained the discount, and leave the purchasers of the notes to pursue the grinning skeleton of the corporation for their money? The question needs no answer. Concede that the contract between the First National Bank and its directors, and the conveyance of the property to the Little Rock Cotton Mills in pursuance thereof, were void, as between them, because they effected a conveyance of the property of the bank to a corporation controlled by its directors. Concede that, at the suit of any of the parties to it, a court of equity would have avoided this entire transaction. The bank gave no notice that it was void. It caused and permitted the fair appearance of title to remain in the Little Rock Cotton Mills unchallenged, until it had discounted the notes of that corporation on the strength of that appearance; and it does not lie in its mouth now to say to the purchasers of these notes that the appearance was false, because of the secret and unlawful agreement between it and its directors. In *Zabriskie v. Railroad Co.*, 23 How. 381, 400, 401, a case in which the guaranty of a corporation upon certain bonds was originally void, because the corporation had failed to accept the act of the legislature, which authorized the guaranty, the supreme court held that the corporation and its stockholders were estopped to question the validity of the guaranty by their acts in permitting, and their acquiescence in, the circulation of the bonds. Mr. Justice Campbell said, after discussing the invalidity of the guaranty, as between the stockholders and the corporation:

"But we are to regard the conduct of the corporation from an external position. The community at large must form their judgment of it from the acts and resolutions adopted by the authorities of the corporation, and the meeting of the stockholders, and their acquiescence in them. These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts. Men have invested their money on the assurance they have afforded. A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

Concede that the First National Bank had no power under its charter to repair, improve, and operate these mills, either in its own name or in the name of another. It was nevertheless within its power to cause Davis and Roots to convey this property to a bona fide purchaser, or to another trustee; and the presumption from the record of the deed was that it was lawfully made. The bank cannot

now rebut that presumption, for the purpose of defeating the right or remedy which an innocent stranger has acquired in reliance upon it. The doctrine of *ultra vires* cannot be successfully invoked to defeat the ends of justice or to work a legal wrong. *Railway Co. v. McCarthy*, 96 U. S. 258, 267; *Fisher v. Adams*, 11 C. C. A. 396, 63 Fed. 674; *Campbell v. Mining Co.*, 51 Fed. 1. Concede that the Little Rock Cotton Mills held the title to this property in trust for the bank. The money expended, and the liabilities incurred by the trustee, at the request of or with the consent of the beneficiary, to repair, improve, and operate the property held in trust, constitute, in equity, a preferential claim upon the trust property, which must be paid out of its proceeds before the beneficiary or any of its creditors can share them. *Mechem*, Ag. § 684; 2 *Jones, Liens*, §§ 1175, 1177; 2 *Lewin, Trusts*, 639. The entire indebtedness of this trustee was incurred with the consent of the bank, to repair and operate the trust property, and the holders of that indebtedness are entitled to payment out of the proceeds of the property before the bank or its creditors are entitled to a dollar. In short, there is no just view of this case that can be taken which would entitle the receiver of the First National Bank to the entire proceeds of the property of the cotton mills, or to any preference in their distribution over the two other banks which hold notes of that corporation. The proceeds should be distributed pro rata between the holders of the notes of that corporation for the \$23,000, under the well-settled principles of equity jurisprudence to which we have adverted. In this view the question of the validity of the mortgage made by the Little Rock Cotton Mills to secure the payment of these notes becomes immaterial, and it will not be considered.

The second question in this case is: Are the holders of the promissory notes which were made by the Little Rock Cotton Mills on March 3, 1893, to some of the directors and stockholders of the First National Bank, to repay to them the amounts which they had subscribed or paid for the capital stock of the cotton mills in 1891, and to secure which that corporation made its trust deed to the appellant E. J. Butler, entitled to a preference in payment out of the proceeds of the property of that corporation over the receiver of the First National Bank? Conceding that the agreement which these directors made with the bank, before they subscribed for their stock in the cotton mills, to the effect that they should be first repaid the amounts which they subscribed from the proceeds of the sale of the mills which should be made, was not void or against public policy, this was a contract between these directors and the bank only. It was not an agreement between them and the cotton mills. After this agreement had been made, these directors and stockholders made a contract with the Little Rock Cotton Mills that they would take from it the stock, and pay to it the par value of the stock for which they subscribed; and in their articles of incorporation, which they published to the world, they certified that they had done so. The Little Rock Cotton Mills, therefore, never owed them anything. They were not creditors, but stockholders and officers, of that corporation. They imposed upon themselves the duty of managing its af-

fairs with care and prudence, and they subjected all their claims against it and rights in it to the payment of its just debts. Standing in this relation to the cotton mills, and holding their secret agreement with the bank to be repaid from the proceeds of this property, they procured its conveyance to the Little Rock Cotton Mills as a trustee for the bank. What was their relation to this trustee and to this property when this had been done? They had this secret agreement with the cestui que trust that they should be first paid out of the proceeds of the trust estate; but they had made a solemn public contract with the trustee and its creditors that they would see that it wisely and prudently administered its trust, and that it paid all the debts it incurred in so doing, before the cestui que trust should receive any of the proceeds of its property. This contract the law of corporations imposed upon them. Under it, they caused this trustee to incur an indebtedness of \$23,000 in administering its trust, and three months after their management had made it insolvent they caused it to make notes to themselves and a trust deed upon all its property to secure the repayment to them of their subscriptions to its stock, in preference to its creditors, and then immediately transferred these notes to innocent purchasers, for value, who appealed from the decree below, and insist upon a preference over the First National Bank in the distribution of the proceeds of this property.

These appellants concede that the Old National Bank and the Southern National Bank, as creditors of this trustee, are entitled to a preference over them in the distribution of this fund; but they insist that the First National Bank is not. If the latter bank could realize a fund from the proceeds of this property, as the beneficiary of the trust, after the payment of the debts of the trustee, the question whether these appellants would not be entitled to a preference in the distribution of that fund might be worthy of serious consideration; but the share of this fund which the First National Bank will receive, under the view we take of this case, it will obtain, not as the beneficiary of the trust, but as a creditor of the trustee. It will obtain it because, subsequent to its promise to its directors and shareholders on which these appellants relied, it loaned to that trustee, with their consent, funds to enable it to administer its trust. If the trustee had borrowed this money from, and promised to pay it to, a stranger, it is conceded that these appellants could claim no share in it. If the trustee had fulfilled its promise to pay the notes it gave to the First National Bank for this money, the appellants certainly could not have claimed any part of the moneys so repaid. This is the true test of their rights. The subscribers to the stock of the cotton mills had no contract with this bank that they should receive any of the money which it should subsequently loan to the trustee, and which that trustee should repay to it; nor have the appellants, who hold the notes given to these subscribers, any lien or claim upon that fund. The facts that the trustee has not repaid this loan, and that it became necessary to sell the trust estate to raise the money to repay it, does not change the character of the fund. It is none the less money loaned to and repaid by the trustee, and it is not money realized by the beneficiary, as such, from the sale of this trust estate. It was not

pledged by the contract of the bank with the directors, and it would violate the fundamental principles of the law of trusts and of the law of corporations to give these appellants a preference in its distribution. It would violate the principle that the property of an insolvent corporation is a trust estate pledged—First, to the payment of its creditors; and, second, to distribution among its stockholders. It would violate the rule that the just debts and expenses incurred by a trustee in the administration of the trust estate must be paid before any portion of the fund realized from it can be distributed to the beneficiary or applied to the payment of his debts.

The result is that on March 3, 1893, the Little Rock Cotton Mills was insolvent, and it owed the subscribers to its stock nothing. The promissory notes it gave them were clearly without consideration. They were not issued to raise money to administer the trust estate, and did not charge it; and the deed of that date which the corporation made to secure them was a futile attempt to divert the property of the corporation from the payment of its creditors to the payment of its stockholders, and to divert the trust estate from the payment of the debts incurred by the trustee in its management to the payment of the obligations of the *cestui que trust*. It was voidable at the suit of the creditors of the cotton mills, and created no lien or charge upon its property enforceable against them. An insolvent corporation cannot lawfully divert its property from the payment of its creditors, to a distribution among its stockholders. *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60, 63, and cases cited. A trustee cannot lawfully divert the property of the trust estate from the payment of just debts he has incurred in its management to the payment of prior obligations of the *cestui que trust*. 2 Jones, Liens, §§ 1175, 1177.

Moreover, there is no equity in the claim of the directors of this bank. As such directors, they were trustees for its general creditors and stockholders. They took the money of these general creditors and stockholders of the bank in 1892, and loaned it to this trustee to carry on its manufacturing business, and for this money they took the promise of the trustee to repay it. They did this at a time when they had certified that they were stockholders and not creditors of the trustee, and when they had spread upon the records the appearance of title to this property in the latter. They ought not now to be permitted to deprive the general creditors of this bank of a right to a repayment of their money out of the property which these directors made this trustee appear to hold, on the ground that their own representations were false, that the appearance they produced was deceitful, and that in fact they were not stockholders but creditors of the trustee, who held the first lien upon all its property. *Paxon v. Brown*, 27 U. S. App. 49, 10 C. C. A. 135, and 61 Fed. 874, and the cases cited under it.

The decree of the court below must be reversed, with costs, and the case must be remanded to the court below, with directions to enter a decree to the effect that, out of the fund raised by the sale of the property of the Little Rock Cotton Mills, there shall first be paid to the receiver of the First National Bank of Little Rock, for taxes

on and expenses paid in the care of the property, the sum of \$1,129.05 and interest at 6 per cent., in accordance with the agreement of the parties to this suit, and that the remainder of said fund be distributed between the receiver, the Southern National Bank of New York, and the Old National Bank of Grand Rapids, Michigan, in proportion to the amounts owing on February 1, 1893, on the five promissory notes of the Little Rock Cotton Mills, aggregating \$23,000 and interest, held by them and described in the agreed statement of facts herein; and it is so ordered.

AMERICAN WATERWORKS CO. OF ILLINOIS et al. v. FARMERS'
LOAN & TRUST CO.

CLARKSON v. SAME.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1896.)

Nos. 715, 716.

1. MORTGAGES—CONVEYANCE SUBJECT TO MORTGAGE—ESTOPPEL.

A corporation which accepted a conveyance of a waterworks plant by a deed describing certain mortgages thereon, and expressly declaring that the conveyance was made subject thereto, *held*, estopped thereby from questioning the validity of the mortgages.

2. SAME—ESTOPPEL AGAINST GRANTOR.

A water company which had mortgaged its plant to secure issues of bonds, and afterwards conveyed the plant expressly subject to the mortgage debt, parting with all its interest in the property, and without binding itself to protect its grantee from foreclosure, or to pay any part of the incumbrance, cannot be heard to allege, as against the bondholders, that it had no authority to execute the mortgages.

3. FOREIGN CORPORATIONS—CHARTER POWERS.

A corporation, organized under the laws of one state, which acquires property and carries on business in another state, carries with it into the latter state all the powers given to it by the laws of the state of its incorporation, including the power to mortgage its property, unless prohibited from so doing by the laws or public policy of the state in which it so carries on the business.

4. MUNICIPAL CORPORATIONS—WATERWORKS CONTRACT—ASSIGNABILITY.

Charter power to contract with and procure individuals or corporations to construct and maintain waterworks, "on such terms and under such regulations as may be agreed on," authorizes the city, in its discretion, to allow parties erecting waterworks under contract to sell, assign, or mortgage the plant.

5. SAME.

Where a municipal corporation has charter power to agree that a waterworks company operating a plant in the city may mortgage the same, and the company does mortgage it, the question whether the contract between the city and the company did in fact authorize the latter to execute the mortgage cannot be raised by the company, as against its mortgagees and bondholders, so long as the city itself does not raise the question.

6. FORECLOSURE SALE—PURCHASE BY BONDHOLDERS—PAYMENT IN BONDS.

On the foreclosure sale of the property of a corporation, bonds should not be received in payment of a bid, except for such proportion of the bid as the purchaser, on a distribution of the purchase money, is entitled to receive out of the purchase price, on account of the bonds by him held and tendered in payment; and the right to answer a bid in bonds should

not be limited to any particular bondholder, but should be extended to all bondholders on the same terms.

7. PLEADING IN FORECLOSURE SUITS—ANSWERS OF RECEIVERS—TIME OF FILING.

An application by an ancillary receiver of a corporation for leave to file an answer to a foreclosure bill, for the purpose of setting up defenses already pleaded by the corporation itself, is properly denied, especially when not made until after all the testimony has been taken, and the cause heard and submitted.

Appeal from the Circuit Court of the United States for the District of Nebraska.

The suit out of which these appeals arise was brought by the Farmers' Loan & Trust Company, the appellee, to foreclose an original and a supplemental mortgage on a certain waterworks plant situated in the city of Omaha, Neb., which were given to secure the payment of an issue of negotiable bonds to the amount of \$4,000,000, that were executed by the American Waterworks Company, a corporation of the state of Illinois.

The action was brought originally against the appellant the American Waterworks Company of Illinois, and against a corporation of the same name, to wit, the American Waterworks Company, a corporation organized under the laws of the state of New Jersey. E. Hyde Rust, as suspended receiver of the American Waterworks Company of New Jersey, and Alonzo B. Hunt, as temporary receiver of the same company, were also named as parties defendant to the original bill. The defendant companies filed a joint answer to the bill of complaint, and subsequently an amended answer, wherein they set up various defenses to the suit. After the taking of considerable testimony by both parties, a trial was had which resulted in a decree of foreclosure directing a sale of the mortgaged property for the satisfaction and payment of the mortgage debt. From that decree the two defendant companies, to wit, the American Waterworks Company of Illinois, and the American Waterworks Company of New Jersey, have appealed.

During the pendency of the suit at bar, an action was commenced in the circuit court of Cook county, Ill., against the appellant the American Waterworks Company of Illinois, to wind up the affairs of that company on the ground of its insolvency. In that proceeding Francis B. Peabody was appointed receiver of the property and effects of the insolvent corporation, and thereafter, by an order made, on May 2, 1895, by the circuit court of the United States for the district of Nebraska, Thaddeus S. Clarkson, the appellant, was appointed ancillary receiver of said company for the district of Nebraska. After the final hearing of the suit at bar to foreclose the aforesaid mortgages, and on the day that the final decree therein appears to have been entered, said Thaddeus S. Clarkson, in his capacity as ancillary receiver of the American Waterworks Company of Illinois, asked leave to file an answer to the bill of complaint, which application was by the circuit court refused. From the order thus made denying his application to file an answer to the bill of complaint, the receiver has also prosecuted an appeal. Both of said appeals are before this court for consideration upon the same record.

John L. Webster, for appellants.

J. M. Woolworth and David McClure (R. S. Hall was with them on brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The important questions which arise on these appeals will be best explained and understood by a succinct statement of the facts and circumstances that gave rise to the litigation. In the year 1880 the

city of Omaha, being a city of the first class, was authorized by a general law of the state of Nebraska regulating the organization and defining the powers of cities of the first class, "to erect, construct, and maintain waterworks either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of water supplied by such waterworks, and to do all acts necessary for the construction, completion, management, and control of the same, including the appropriation of private property for the public use in the construction and operation of such waterworks; * * * and, * * * to contract with and procure individuals or corporations to construct and maintain waterworks on such terms and under such regulations as may be agreed on." Laws Neb. 1879, pp. 95, 99. The power thus conferred upon the city was exercised by its mayor and council by an ordinance, passed on June 11, 1880, which was subsequently amended, entitled "An ordinance to authorize and procure the construction and maintenance of waterworks in the city of Omaha, state of Nebraska." The first section of this ordinance was as follows:

"Section 1. Any person, company, corporation or association who shall erect, construct and maintain waterworks upon the principle of a combined system of direct pressure and reservoir, of the capacity, magnitude and character hereinafter described, and as more fully and at large appears in the report and appendix tables of J. D. Cook, engineer, filed in the office of the city clerk of the city of Omaha, on the 25th and 31st days of May, A. D. 1880, and as finally approved by the city council of said city on the 8th of June, A. D. 1880, within and adjacent to the city of Omaha, in Douglas county, state of Nebraska, for the purpose of supplying said city and the citizens and inhabitants thereof for domestic, mechanical, public and fire purposes, shall have the right of way along, upon and under the public streets, alleys, public squares, and public places of said city for the purpose of placing and repairing their mains, pipes and other fixtures, including fire hydrants, during the time any such person, company, corporation or association, or their assigns, shall maintain and operate any such waterworks, and while constructing the same, upon the terms and conditions hereinafter mentioned."

The succeeding sections of said ordinance specified the sources from which the water supply for the city should be drawn, the size and location of reservoirs to be erected, the capacity of the pumping machinery to be employed, the size of the water mains and pipes, the general location thereof, the number of fire hydrants to be erected, the tariff of rates to be charged for supplying water both to public and private consumers, and many other details of construction and operation unnecessary to be mentioned. The twelfth section of the ordinance provided, in substance, that proposals should be invited and received by the city for furnishing the city with water for the period of 25 years from the date of the completion of the plant by means of a waterworks plant that was to be constructed and operated in conformity with the provisions of the ordinance. The final section of the ordinance reserved to the municipality the right to purchase the plant that might be thus constructed, at a valuation to be fixed by arbitration, at any time after the expiration of 20 years.

In pursuance of the provisions of the aforesaid ordinance, a contract was entered into between the city of Omaha and one Sidney

E. Locke, on July 20, 1880, whereby the latter person secured the right to construct and maintain waterworks, and to furnish water to the city of Omaha for public and private use for the term of 25 years from the completion of the works. On July 20, 1880, the aforesaid contract was assigned by Locke to the City Waterworks Company of Omaha, a corporation of the state of Nebraska. The latter company completed the works in accordance with the provisions of the contract, and the plant, when completed, was duly accepted by the city. On August 2, 1880, the City Waterworks Company executed a mortgage on the waterworks plant, then in process of construction, to secure an issue of bonds, to the amount of \$400,000, which are still outstanding.

On or about April 1, 1887, the American Waterworks Company of Illinois, one of the appellants, purchased the plant now in controversy from the City Waterworks Company of Omaha, and subsequently, on July 1, 1887, and on January 16, 1889, it executed the two mortgages or deeds of trust to the Farmers' Loan & Trust Company, as trustee, which it seeks to have foreclosed. These mortgages, respectively, contained, in substance, the following recitals, to wit: That the mortgagor company (the American Waterworks Company of Illinois) was duly authorized to build, equip, and operate waterworks for the purpose of supplying water to cities, towns, and villages, and other municipal corporations; that it had purchased from the City Waterworks Company of Omaha the waterworks plant and real estate connected therewith, by means of which the city of Omaha and its inhabitants were supplied with water for fire and other purposes, including the contract with the city under which the City Waterworks Company was engaged in furnishing water to said city, and including, also, all contracts with private consumers; that, by the terms of its purchase of said waterworks plant, it had agreed to assume the bonded debt of said City Waterworks Company, and, in addition to said bonded debt, to assume and pay all other indebtedness of said City Waterworks Company; that the mortgagor company deemed it essential and necessary to the successful maintenance and operation of said works to make extensive improvements upon and additions to said waterworks plant, for the purpose of enabling it to comply with the increased demand made upon it for water, arising from the rapid growth of the city of Omaha; that it was vested with the power, under its charter, of contracting debts and borrowing money; and that it had been authorized, by a resolution duly passed by its board of directors on June 30, 1887, to issue bonds to the amount of \$4,000,000, and to secure the same by a mortgage on its Omaha property, and by pledging its income and resources for the payment thereof. Said mortgages contained a further recital to the effect that, by virtue of the aforesaid resolution of the board of directors of the American Waterworks Company of Illinois, the proceeds of the bonds authorized to be issued were to be appropriated and used as follows: \$800,000 for the purpose of extending, enlarging, and improving the waterworks plant of the city of Omaha that had been purchased; \$1,700,000 for the purpose of paying the purchase price for said works, and to extinguish the bonded and

other indebtedness of the City Waterworks Company that had been assumed by the purchasing company; and the residue, \$1,500,000, for the purpose of enlarging and improving the works in future, as occasion might require.

Contemporaneously with the execution and delivery of the aforesaid mortgage or deed of trust, dated July 1, 1887, and prior to the execution of the supplemental mortgage dated January 16, 1889, the American Waterworks Company of Illinois executed and deposited with the appellee, the Farmers' Loan & Trust Company, 4,000 negotiable bonds amounting in the aggregate to \$4,000,000. By the terms of the mortgage given to secure the same, bonds to the amount of \$1,600,000 were to be delivered forthwith by the Farmers' Loan & Trust Company to any person or persons who presented to it written orders for the delivery of bonds signed by the president and secretary of the mortgagor company. Bonds to the amount of \$400,000 were to be retained by said trust company for the purpose of retiring the outstanding bonds to the same amount that had been executed by the City Waterworks Company of Omaha. The residue of the bonds were to be held in trust, and delivered from time to time by said trust company, under certain terms and conditions specified in said mortgage, which for present purposes need not be stated. It will suffice to say that the circuit court found and decreed that the Farmers' Loan & Trust Company had duly certified and put in circulation, in accordance with the provisions of the mortgage, bonds to the amount of \$3,600,000, and it was stipulated by the parties in the progress of the trial that "a large part of the bonds in controversy had been negotiated and sold by C. H. Venner," who was a director of the American Waterworks Company, and was the chief manager of its financial affairs. This stipulation must be held to imply that the bulk of the entire issue of bonds—all of them, perhaps, except bonds, to the amount of \$400,000, that are still held by the trust company to retire the outstanding bonds of the City Waterworks Company of Omaha—were sold for value in the open market, to purchasers who had no notice of any of the facts attending the issuance of the bonds except such as were disclosed by the recitals contained in the mortgages securing the same.

The American Waterworks Company of Illinois took possession of the waterworks now in controversy shortly after it acquired the same by purchase from the City Waterworks Company of Omaha, to wit, in April, 1887, and continued to operate the works with the full knowledge and consent of the city of Omaha until about the 24th day of April, 1891. In the meantime the city of Omaha made payments to the vendee company for water supplied to the city for fire and hydrant purposes, and made such payments at the time and at the rate agreed upon in the original contract between itself and the said Sidney E. Locke; and in all other respects it appears to have recognized the American Waterworks Company of Illinois as the legitimate owner and assignee of the waterworks, and of all rights, privileges, and franchises incident thereto, that were originally acquired by said Locke by virtue of his contract with the city of Omaha. In the meantime, also, the American Waterworks Com-

pany of Illinois paid the interest on such of its bonds, dated July 1, 1887, as had been certified and put in circulation by the Farmers' Loan & Trust Company pursuant to the provisions of the aforesaid mortgage or deed of trust. On April 24, 1891, the American Waterworks Company sold and conveyed its entire waterworks plant, situated in the city of Omaha, and all the real estate, rights, and privileges connected therewith, to its namesake, the American Waterworks Company of New Jersey, which last-named company thereafter operated the works and supplied water to the city of Omaha at the rate agreed upon in the contract between the city and said Sidney E. Locke. It also paid the interest on the bonds now in controversy as they matured until January 1, 1892. The deed by which the property was thus conveyed by the Illinois Company to the New Jersey Company, described the outstanding incumbrances existing thereon, to wit, the aforesaid incumbrances for \$400,000 and \$4,000,000 respectively, and expressly declared that the property was conveyed to the grantee company "subject to said incumbrances."

In view of the foregoing facts, the American Waterworks Company of Illinois and the American Waterworks Company of New Jersey, which for convenience will be hereafter termed, respectively, the "Illinois Company" and the "New Jersey Company," now contend that the mortgages sought to be foreclosed are invalid for want of authority on the part of the Illinois Company to execute the same. This was the principal, if not the sole, defense pleaded in the several answers to the bill of complaint. In other words, while it was recited, in substance, in the mortgages now sought to be foreclosed, as heretofore shown, that they were executed by the Illinois Company for the express purpose, among others, of enabling it to obtain money by the sale of its bonds to pay for the mortgaged property, and to alter, extend, and improve the same, and render it more valuable and serviceable, it is now claimed by the mortgagor company, and by its successor in interest, the New Jersey Company, that the mortgages were and are void, that the New Jersey Company is entitled to hold the mortgaged property discharged from the lien thereof, and that the defense of ultra vires may be successfully pleaded both by it and by the Illinois Company, in a suit to foreclose the mortgages, without paying or offering to pay the whole or any part of the outstanding bonds thereby secured. The defense thus interposed does not commend itself to the favorable consideration of a court of equity, and, unless it is clearly sustained by authority which this court is bound to recognize and follow, it should be overruled. A number of authorities have been invoked by counsel for the appellants in support of the defense which is thus interposed, but, in our judgment, none of them, when fairly applied to the case in hand, are sufficient to justify a decision that the mortgages are void, and for that reason are not enforceable against the defendant companies. The New Jersey Company, we think, is estopped from asserting the invalidity of the mortgages executed by its predecessor, the Illinois Company, by virtue of the well-established rule that a purchaser of property who accepts a conveyance thereof which describes incumbrances existing thereon, and expressly declares that the conveyance is made

subject thereto, will not be allowed to question the validity of such incumbrances. One who thus buys property has no right to challenge the validity of a mortgage lien existing thereon at the date of his purchase, which his grantor by the terms of his conveyance did not see fit to challenge, but recognized in the most formal manner by declaring that he conveyed the property subject to the existing lien. Whether such mortgage is valid or otherwise is no concern of the purchaser, for in contemplation of law he only acquires an equity of redemption in the property conveyed to him,—that is to say, a right to discharge the mortgage debt,—and it would be a breach of good faith, having purchased this right and nothing more, to deny the validity of the incumbrance, and seek to avoid the payment thereof on that ground. As between the grantor and grantee in a conveyance made subject to an existing mortgage, the amount of the incumbrance should be regarded as a part of the purchase price left unpaid at the date of the conveyance which the grantee undertakes to pay. At all events, he impliedly agrees not to challenge the validity of the incumbrance. The authorities to this point are amply sufficient, in our opinion, to preclude the New Jersey Company from defending against the foreclosure on the ground that the mortgages are invalid. *Freeman v. Auld*, 44 N. Y. 50; *Johnson v. Thompson*, 129 Mass. 398; *Ritter v. Phillips*, 53 N. Y. 586; *D'Wolf v. Johnson*, 10 Wheat. 367; *Calkins v. Copley*, 29 Minn. 471, 13 N. W. 904; *Shufelt v. Shufelt*, 9 Paige, 137, 145; *Jones. Mortg.* (4th Ed.) §§ 744, 1491, and cases there cited.

It is also apparent, we think, that the Illinois Company has no such present interest in the mortgaged property as should entitle it to resist a foreclosure sale of the property for the purpose of paying its outstanding bonds. Long before this suit was brought, the Illinois Company had sold its plant situated in the city of Omaha, and had made a conveyance thereof to its grantee, subject to the mortgages thereon which are now in controversy. So far as the present record shows, it entered into no engagement with its grantee to pay any portion of the mortgage debt, but by the form of its deed devolved that duty upon the grantee, and expressly declined to assume any such obligation. It would seem, therefore, that a sale of the mortgaged property for the payment of the mortgage debt will inure to the advantage of the mortgagor company, rather than to its disadvantage; for, whether the mortgages by it executed did or did not create a valid lien on the property therein described and conveyed, it certainly cannot be denied that the mortgagor is liable on the outstanding bonds, by the sale of which it has realized a large sum of money, which it has appropriated to its own use and benefit. It is clearly liable on its bonds to the purchasers thereof, even though it had no power to execute the mortgages, and it will be relieved of this liability to the extent that such bonds are extinguished and paid by the proceeds of the sale of the mortgaged property. For this reason—that is to say, because it had parted with all interest in the mortgaged property, and is not bound by the terms of any contract or covenant to protect its grantee from a foreclosure sale, and in contemplation of law will be benefited by such

sale—it should not be heard to allege, as against the bondholders, that it executed the mortgages without authority.

On the argument of the case it was suggested that the Illinois Company was without power, under its charter, to execute mortgages on any real property that it might own or acquire; and with much force it was contended that the property covered by the mortgages now in question was of such a character, being a waterworks plant designed for public use and convenience, that it was not susceptible of being sold, assigned, or mortgaged without express authority derived under the laws of the state of Nebraska where the property is located. The first of these contentions is clearly untenable. The American Waterworks Company of Illinois was organized under a general incorporation law of the state of Illinois, the first section of which provides "that corporations may be formed in the manner provided by this act for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money." The fifth section of the same act, which enumerates the powers that corporations formed thereunder may exercise, provides, among other things, that "they may borrow money at legal rates of interest and pledge their property, both real and personal, to secure the payment thereof, and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed." Rev. St. Ill. (Cothran's Ann. Ed.) c. 32, §§ 1, 5. The powers thus conferred on the Illinois Company by the laws of Illinois it carried with it into the state of Nebraska, and was privileged to there exercise, unless it was prohibited from so doing by the provisions of some local law or the public policy of that state. *Cowell v. Springs Co.*, 100 U. S. 55, 59; *Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183. And no law of the state of Nebraska has been cited which, in our judgment, deprived the Illinois Company of its right to exercise within the state of Nebraska its charter power to mortgage real estate by it owned and there situated.

With respect to the second contention of counsel above stated, it is sufficient to say that the charter power of the city of Omaha heretofore quoted authorized it "to contract with and procure individuals or corporations to construct and maintain waterworks, on such terms and under such regulations as may be agreed on." Acting under that power, it seems evident that the city was authorized to agree with anyone who undertook to construct and maintain waterworks for its benefit that he should have the right to assign his contract, or to sell or mortgage the plant, and that the assignee or purchaser should succeed to all the rights and privileges of the original contractor. The legislature saw fit to invest the city with full power and discretion to determine whether the person or corporation with whom it might enter into an agreement for the construction and maintenance of waterworks should be permitted to mortgage the plant and franchises incident thereto, or whether he should be denied that privilege. It was probably thought that the person or company who might undertake to construct an extensive system of waterworks for a growing city like the city of Omaha

would find it necessary to borrow money to complete the works, and to secure the loan by a mortgage on the plant and franchises, and that the city might deem it advisable to confer that privilege. It accordingly left the city at full liberty to enter into such an agreement with the contractor, and to grant such rights and privileges as it deemed advisable. Inasmuch, then, as the municipality was authorized by the general laws of the state to permit or to ratify the execution of an incumbrance covering the waterworks property and franchises, if the city of Omaha does not see fit to challenge the right of the Illinois Company to execute the mortgages now in controversy, it is not apparent that the mortgagor company has the right to raise that question. The city of Omaha has not hitherto questioned the validity of the incumbrances, and it is not a party to the suit, nor in anywise concerned in the present controversy. Moreover, it has hitherto for a long period of time recognized the assignability of the contract under and by virtue of which the waterworks plant was constructed, by paying hydrant rentals to the successive assignees according to the provisions of the contract, and by permitting them, as assignees, to exercise the franchises thereby granted to the original contractor. For this reason we do not deem it necessary or material, on the present occasion, to decide whether by the terms of the contract between the city of Omaha and Sidney E. Locke, or whether by the provisions of the ordinance on which that contract was based, the city did in fact expressly authorize the execution of an incumbrance covering the waterworks plant that was to be constructed. That is a question, we think, which, on the present record, the mortgagor company is not privileged to raise, and should not be permitted to raise.

Besides the points already discussed, the appellants indulge in some criticism of various provisions of the decree. It is claimed, in substance, that the decree of foreclosure and sale, as heretofore entered, permits the appellee, the Farmers' Loan & Trust Company, in case it becomes a purchaser at the foreclosure sale, to pay the amount of its bid in bonds at their par value, without reference to the price bid for the property, and that the decree also denies the right of other purchasers to answer their bids in bonds. If such is the proper construction of the provisions of the decree, and some paragraphs thereof doubtless give color to that construction, it should be corrected before a sale takes place. Bonds should not be received from any purchaser in payment of his bid, except for such proportion of the sum bid as the purchaser, on a distribution of the purchase money, shall be entitled to receive, out of the purchase price, on account of the bonds by him held and tendered in payment of his bid. In other words, bonds should not be received at par in payment of a bid unless the purchase price is adequate to pay the par value of all outstanding bonds. Moreover, the right to answer a bid in bonds should not be limited to a particular bondholder, but should be extended to all bondholders on the same terms. Counsel for the appellee have conceded that the provision in the decree requiring so much of the purchase price as is not paid in bonds to be paid "in gold coin of the United States of the present standard of fineness" may

result in some inconvenience and hardship to bidders, and that it is an unnecessary provision. As we understand, they consent that this clause may be expunged from the decree, so as to permit payment to be made in whatever kind of money is recognized as a legal tender by the laws of the United States. We also observe, although the point was not made in the argument, that the provisions in the existing decree relative to the place of sale and mode of advertisement are not such as will satisfy the requirements of the act of congress in that behalf, enacted on March 3, 1893. 27 Stat. 751, c. 225. In view of the aforesaid defects and uncertainties in the existing decree, it will be modified by this court, without remanding the case, by adding thereto the following provisions, to wit:

"All sums of money required to be paid under the provisions of this decree shall be paid in legal tender money of the United States; but the plaintiff or any other bidder at the sale herein provided for may answer his bid with the bonds or coupons heretofore mentioned which shall be received in payment of such bid for an amount equal to the sum of money which the holder of said bonds or coupons so tendered would be entitled to receive on account thereof on the distribution of the purchase price bid at such sale. Said sale shall be made at the courthouse of the county of Douglas, in the state of Nebraska, that being the county in which the property to be sold is situated. Notice of such sale shall be published once a week for four successive weeks in the 'Omaha Daily World-Herald,' and the 'Omaha Daily Bee,' said newspapers being printed, regularly issued, and published, and having a general circulation, in said county of Douglas, state of Nebraska, and also in some newspaper printed, published, and regularly issued, and having a general circulation, in the city of New York. All provisions of the original decree, to which this paragraph is amendatory, which are in conflict with any of the provisions of this paragraph, are hereby canceled and annulled; but in all other respects said decree, as entered by said circuit court of the United States for the district of Nebraska on June 24, 1895, shall be and remain firm and effectual."

Touching the appeal taken by Thaddeus S. Clarkson, as ancillary receiver of the Illinois Company, it is only necessary to say that his application to file an answer to the bill of complaint was made too late, and was properly denied by the circuit court for that reason, as well as for the reason that an answer setting up all the defenses which he proposed to make had already been filed by the company which he represented. The circuit court was justified in denying an application to file an answer which was not made until all the testimony had been taken, and the cause had been heard and submitted.

The decree of the circuit court for the district of Nebraska as herein modified by the aforesaid provision ordered to be inserted therein, is hereby affirmed, each party to pay its own costs in this court, except the costs incurred on the appeal taken by Thaddeus S. Clarkson, receiver, all of which costs will be taxed against said last-named appellant.

CITY OF EVANSVILLE v. DENNETT.

(Circuit Court of Appeals, Seventh Circuit.)

No. 38.

1. MUNICIPAL BONDS—EFFECT OF RECITALS.

Held, pursuant to the decision of the supreme court, that a recital, in a series of municipal bonds, that they were issued in pursuance of an act of the legislature and ordinances of the city council, passed in pursuance thereof, does not put a purchaser upon inquiry as to the terms of the ordinance under which the bonds were issued.

2. SAME.

Held, further, pursuant to the decision of the supreme court, that a recital, in such bonds, that they were issued by virtue of a resolution of the city council, passed on a given date, does not put a purchaser upon inquiry as to the terms of the resolution.

3. SAME.

Held, further, pursuant to the decision of the supreme court, that recitals in municipal bonds, of acts of the legislature, authorizing their issue upon certain conditions, and of the taking of steps to comply with such conditions, the acts so recited being invalid, and the conditions actually required being different, estop the municipality issuing the bonds, as against a bona fide purchaser for value, from asserting that the bonds were not issued under the proper conditions.

4. SAME.

Held, further, pursuant to the decision of the supreme court, that, under such recitals as to the conditions of the issue of the bonds, a bona fide purchaser is not put upon inquiry as to the performance of the conditions actually requisite for the issue of the bonds.

5. SAME.

Held, further, pursuant to the decision of the supreme court, that such recitals, as to the legislative authority for the issue of the bonds and the conditions under which they were issued, do not charge a bona fide purchaser for value with notice that the bonds were issued in pursuance of an invalid act, and of the conditions required thereby, but such purchaser has a right to assume from the recital that the conditions both of the invalid and valid acts had been complied with before the issue of the bonds.

In Error to the Circuit Court of the United States for the District of Indiana.

George A. Cunningham, for plaintiff in error.

A. W. Hatch, for defendant in error.

Before JENKINS, Circuit Judge, and BAKER and SEAMAN, District Judges.

PER CURIAM. This was a suit brought by William S. Dennett, the defendant in error, against the city of Evansville, to recover upon certain coupons taken from negotiable bonds purporting to be obligations of the city of Evansville. Judgment below was rendered in favor of the plaintiff, and a writ of error sued out by the city of Evansville to review that judgment. Upon the argument of the cause here, the court, desiring to be advised upon certain questions and propositions of law arising in the cause, certified the facts and certain questions to the supreme court for its opinion and instruction, as follows:

Statement of Facts.

The city of Evansville, on May 1, 1868, issued its bonds, bearing date on that day, to the amount, in the aggregate, of the sum of \$300,000, in payment of its subscription to the stock of the Evansville, Henderson & Nashville Railroad Company. Each bond was for the sum of \$1,000, payable to the bearer 30 years after date, with interest on presentation of the coupons attached, and each bond was of the tenor and effect following:

"\$1,000.00

No. —

"United States of America.

"City of Evansville, State of Indiana.

"On account of stock subscription in the Evansville, Henderson and Nashville Railroad Company. The city of Evansville, in the state of Indiana, promises to pay to the bearer, thirty (30) years after date, the sum of one thousand dollars, at the office of the Farmers' Loan and Trust Company, of New York, with interest thereon at the rate of seven per centum per annum, payable semiannually at the office of the Farmers' Loan and Trust Company in the city of New York, on the first day of November and on the first day of May of each year, on presentation and delivery of the interest coupons hereto attached. This being one of a series of three hundred bonds of like tenor and date issued by the city of Evansville in payment of a subscription to the Evansville, Henderson and Nashville Railroad Company, made in pursuance of an act of the legislature of the state of Indiana and ordinances of the city council of said city passed in pursuance thereof. The city of Evansville hereby waives all benefit from valuation or appraisal laws. In testimony whereof the said city of Evansville has hereunto caused to be set its corporate seal, and these presents to be signed by the mayor of said city, and countersigned by the clerk thereof. Dated the 1st day of May, 1868.

"[Signed]

William H. Walker, Mayor.

"A. M. McGriff, City Clerk."

The city of Evansville, on December 1, 1870, also issued its further series of bonds, amounting in the aggregate to the sum of \$300,000, in payment of its subscription to the stock of the Evansville, Carmi & Paducah Railroad Company, each bond being dated December 1, 1870, for the sum of \$1,000, payable to the Evansville, Carmi & Paducah Railroad Company, or bearer, December 1, 1895, with interest, etc., on presentation of coupons attached, and each bond was of the tenor and effect following:

"Total Amount Authorized, Three Hundred Thousand Dollars.

"No. —.

\$1,000.00.

"City of Evansville, State of Indiana.

"Evansville, Carmi and Paducah Railroad Company.

"By virtue of an act of the general assembly of the state of Indiana entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburgh, a city charter,' approved January 27th, A. D. 1847, and by virtue of an act of the general assembly of the state of Indiana amendatory of said act, approved March 11th, 1867, conferring upon the city council of said city power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4th, 1869, ordering an election of the qualified voters of said city upon the question of subscribing three hundred thousand dollars to the capital stock of the Evansville, Carmi and Paducah Railroad Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription; and by virtue of a resolution of said city council, passed May 23rd, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part) to an

amount not to exceed three hundred thousand dollars, bearing interest at the rate of 7 per cent. per annum, for the purpose of paying the subscription as authorized above: The said city of Evansville hereby acknowledges to owe and promises to pay to the Evansville, Carmi and Paducah Railroad Company, or bearer, one thousand dollars, without relief from valuation or appraisal laws, payable on the 1st day of December, A. D. 1895, at the Farmers' Loan and Trust Company, in the city of New York, with interest from the date thereof at the rate of 7 per cent. per annum, said interest payable semi-annually on the 1st day of June and the 1st day of December, on presentation of the proper coupons for the same at said bank. The faith and credit and real estate revenues and all other resources of the said city of Evansville are hereby solemnly and irrevocably pledged for the payment of the principal and interest of this bond. In testimony whereof the mayor of the city of Evansville has hereunto set his hand and affixed the corporate seal of the said city, and the city clerk of said city has countersigned these presents, this 1st day of December, 1870.

Wm. Baker, Mayor.

"Wm. Helder, City Clerk."

The city of Evansville, by its charter, approved January 27, 1847, has power, conferred upon it by the fortieth clause of section 30 thereof, as follows:

"To take stock in any chartered company for making roads to said city, or for watering said city, and in any company authorized or empowered by the commissioners of Vanderburgh county, to build a bridge on any road leading to said city, and to establish, maintain and regulate ferries across the Ohio river from the public wharves of said city; provided that no stock shall be subscribed, or taken, by the common council in such company, unless it be on petition of two-thirds of the residents of said city who are freeholders of the city, distinctly setting forth the company in which stock is to be taken and the number and amount of shares to be subscribed; and provided, also, that in all cases where such stock is taken, the common council shall have power to borrow money and levy and collect the taxes on all real estate (either inclusive or exclusive of improvement, at their discretion) for the payment of said stock."

This fortieth clause of section 30 of the original charter of Evansville was, in form, amended by an act of the legislature of the state of Indiana entitled "An act to amend the 40th clause of section 30 of an act entitled 'An act to grant to the citizens of the town of Evansville, in the county of Vanderburgh, a city charter,' approved January 27, 1847, and declaratory of the meaning of the second section of the same." Acts 1865, p. 76. Under the decisions of the supreme court of Indiana this act was repugnant to the constitution, and invalid, in that it did not set out the entire section as amended.

In 1867 the legislature of the state of Indiana attempted to amend the act of 1865, above referred to, by an act entitled "An act to amend the first section of an act entitled 'An act to amend the 40th clause of the 30th section of an act entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburgh, a city charter,' approved January 27, 1847, and declaratory of the meaning of the 2nd section of the same, approved December 21, 1865, so as to authorize the common council of the city of Evansville to subscribe for and take stock in the Evansville, Henderson & Nashville Railroad Company, or any other company, or corporation, organized for the purpose of constructing a railroad leading from Nashville, in the state of Tennessee, to a point on the Ohio river at, or near, Evansville, Indiana." Acts 1867, p. 121.

This is an act authorizing subscriptions for stock in the Evansville, Henderson & Nashville Railroad Company, or other railroad companies, by the city of Evansville, when a majority of the qualified voters of the city, who were also taxpayers, should vote therefor. Under the decision of the supreme court of the state of Indiana, this latter act is invalid, because amendatory of a prior invalid act.

The bonds in question, of both series, were in fact issued in attempted compliance with the act of March 11, 1867, above, and in the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, referred to. The ordinances of the city council of the city of Evansville, authorizing the issue of both series of bonds, disclose that they were issued pursuant to an election by the legal voters of the city of Evansville, and do not recite that any petition of resident freeholders of the city was presented to the common council, as required by the charter; and no such petition was, in fact, in either case, made or presented to the common council of the city of Evansville. The defendant in error, William S. Dennett, purchased bonds of both issues, before maturity, and for value, and is a bona fide holder thereof. This suit is brought upon matured coupons of both series of bonds.

Questions.

(1) Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson & Nashville Railroad Company, that they were issued "in pursuance of an act of the legislature of the state of Indiana, and ordinances of the city council of said city, passed in pursuance thereof," put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued?

(2) Does the recital in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company, that they were issued "by virtue of a resolution of said city council, passed May 23, 1870," put a purchaser upon inquiry as to the terms of that resolution, and charge him with knowledge of its terms?

(3) Do the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, as against a bona fide purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued for stock subscribed, upon a petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken and the number and amount of shares to be subscribed?

(4) Under the recitals in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company, is a bona fide purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of the city of Evansville who are freeholders of the city had been presented to the common council before that body had subscribed for stock in said railroad company?

(5) Is a bona fide purchaser for value of the bonds issued to the Evansville, Carmi & Paducah Railroad Company charged by the recital in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election thereunder; or

had such a purchaser a right to assume from the recital that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?

The supreme court, in response to the request, has returned to us its answers to the several questions propounded, answering the first, second, and fourth questions in the negative, the third question in the affirmative, the first paragraph of the fifth question in the negative, and the last paragraph of the fifth question in the affirmative. The opinion of the supreme court will be found reported in 16 Sup. Ct. 613.

The answers of the supreme court to the questions propounded to it affirm the validity and binding obligation of the bonds in question, and the case requires no further consideration at our hands. The judgment appealed from will be affirmed.

CLEVELAND, C., C. & ST. L. RY. CO. v. BROWN.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 72.

1. MASTER AND SERVANT—FELLOW SERVANTS—PERSONAL INJURIES.

A foreman of a railroad bridge gang, who is a subordinate of the superintendent of bridges, but has authority to hire and discharge the men under him, and sole power to direct and control them in their work, is their fellow servant, with respect to injuries caused to one of them by his negligence in adopting and pursuing a dangerous method of doing a given piece of work, such as throwing down a railway transfer shed, and the company is not liable therefor. 6 C. C. A. 142, 56 Fed. 804, reversed. Railroad Co. v. Keegan, 16 Sup. Ct. 269, 160 U. S. 259; Railroad Co. v. Peterson, 16 Sup. Ct. 843; Railroad Co. v. Charless, Id. 848,—applied.

2. SAME—UNSAFE TOOLS—MANNER OF USE.

If necessary and safe tools and appliances are furnished by a railroad company for the use of a foreman and a gang of laborers under his control, in doing a given piece of work, but they are not employed, or are unskillfully employed, through the negligence or want of skill of the foreman, the company is not liable for a resulting injury to one of the laborers; but if the tools and appliances used are insufficient, and are employed because better were not furnished, the company is liable. Railroad Co. v. Keegan, 16 Sup. Ct. 269, 160 U. S. 259; Railroad Co. v. Peterson, 16 Sup. Ct. 843; Railroad Co. v. Charless, Id. 848,—applied.

Error to the Circuit Court of the United States for the Southern District of Illinois.

This is an action for personal injuries suffered by the defendant in error while in the service of the plaintiff in error as one of a crew of men called the "bridge gang," and employed generally in building and repairing bridges, depots, platforms, and other structures, and, at the time of the injury complained of, engaged in taking down a transfer shed near Cairo, Ill. Upon the first hearing of the case the judgment below was affirmed. 18 U. S. App. 10, 6 C. C. A. 142, 56 Fed. 804. But in view of the opinion of the supreme court in the case of Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, decided soon afterwards, a rehearing was granted. The reargument was had at our May session, 1894, Justice Harlan presiding, and on June 9, 1894, a certificate was made of questions upon which the instruction of the supreme court was desired. The certificate contained a copy of the declaration, and

a statement of facts, which is given below. The declaration contains three counts, which, after alleging, among other things, that Patrick C. Scullen was foreman of the bridge gang of which the plaintiff was a member, and had full authority and control over the men, with power to hire and discharge them, and therefore stood to them as the representative of the defendant, makes the following charges of negligence: In the first count, that "said Scullen, as such foreman aforesaid, by his gross negligence in managing and directing the fellow servants of plaintiff in the performance of the work aforesaid, caused a portion of the roof of that part of said building so being torn down as aforesaid to be thrown with great force and violence against and upon plaintiff." In the second count, in substance, that the defendant did not furnish or use, or cause to be used, the necessary tools, implements, or appliances for the safe tearing down of the portion of the building or structure which was to be taken down, but, on the contrary, negligently failed and refused to furnish and use the same; that Scullen, as such foreman, negligently ordered and directed that a certain prop or brace, made of a certain piece of timber, be placed to and against the portion of the structure to be torn down, for the purpose of pushing the same over as soon as a certain post, constituting the principal support of that portion of the structure to be torn down, should be sufficiently cut near its lower end as, in the judgment of the said Scullen, to allow the said portion of the structure to be pushed over or thrown down by the use of the prop aforesaid; that the prop was carelessly placed against the building, and Scullen ordered plaintiff to cut the post until the same should be sufficiently weakened to enable said portion of the building to be pushed over, and in consequence of the neglect of the defendant to furnish and use such necessary and proper tools, implements, and appliances, and in consequence of the carelessness and negligence of the said Scullen, as such foreman, in so ordering said plaintiff to chop and weaken the post aforesaid, and while plaintiff was then and there cutting and weakening the post, the roof of said portion of the building was then and there thrown down upon plaintiff. In the third count, in substance, that Scullen, as such foreman, did not carry on the work in such manner as not to expose plaintiff to unnecessary danger, but negligently and carelessly directed and commanded the plaintiff to go under the said building, the roof of which had not been previously removed, and to cut near the lower end thereof, and thereby to weaken a certain post under the building, then and there constituting the principal support, so that the said building could be pushed over by the use of a certain prop or brace, which he negligently caused to be placed against the building for that purpose; and in consequence of the negligent and careless way and manner of Scullen in carrying on the work, and commanding plaintiff to cut and weaken said post, a part of the roof of the building was thrown upon him, and he was injured.

The statement of facts, in substance, and the questions certified, were as follows:

On the 18th of November, 1889, at Cairo, Ill., Millard F. Brown, the defendant in error, and six or seven other persons, all in the service of the plaintiff in error, were engaged in taking down a part of a large frame structure or shed, sometimes called a "railroad transfer shed," located in the upper part of the city. The shed was about 120 feet long, and stood between two railroad side tracks; the platform part of the same being about 12 feet wide and 3 feet high. The oak planks constituting the floor of the platform, on which goods were transferred from cars on one side to cars on the other side of the shed, were 2 inches thick, laid on heavy timbers, which were themselves supported by and fastened to heavy square posts set in the ground. The shed was not inclosed at sides or ends, but had a tar and gravel roof, about 11 feet above, of the length and width of the platform or floor, and supported by and on a row of 8x10-inch oak posts, 15 feet apart, extending along the center line of the platform. Along and on top of these posts, pine plates or timbers, 4x6 inches in size, extended, constituting the center plate; and near the tops of the posts, and to them, were fastened caps or cross-arm pieces, 12 feet long, and on the ends of these were laid and fastened smaller plates, and on the center and side plates rafters were laid and fastened, 2 feet apart; and on this framework rested the roof, made of 7/8-inch cypress planks, paper,

and a light coating of gravel. The men were in charge of a foreman named Patrick Scullen, and they had, for a week or two prior to November 18th, been constructing a similar, but longer and heavier, shed, in the lower part of the town, for like transfer purposes; and, on the afternoon of the 18th, Scullen took his men from that shed to the one uptown, to obtain out of the latter a quantity of light planks, or strips of planks, to send up the road to be used to stay and tie together temporarily trestle or bridge work or frame bents, when being put in place. Scullen, who was employed under the general authority of one Hanson, superintendent of bridges on the Cairo division of appellant's road, extending from Cairo to Danville, Ill., and to Vincennes, Ind., had authority, when necessary, to employ, and to discharge at pleasure, the men of his gang. He had sole control of the men when at work, the superintendent directing only what work should be done; Scullen determining, in this instance at least, the method and means by which it should be done. His plan was to take down at once the four north panels, or 60 feet of the shed; and he directed Brown and Charles Mahon to go upon the roof and saw the same in two transversely. Other men were set to work chopping the four center posts on their west sides, about 2 or 2½ feet above the floor or platform; and, desiring to throw the shed over to the west, he put two braces or shores against the shed,—one at the north end, and the other at or near the fourth center post, and about 15 feet north of the place where the roof was severed. These shores were oak timbers, one 3x10 and one 2x12, and were braced against the west rail of the east railroad track, and against the roof of the shed. With these braces or shores he expected to push over the four panels of the shed, by breaking off the four posts at the places where they were chopped. After the roof had been sawed, and the posts all chopped about half off, or through, on their west sides, Scullen had his men take hold of the braces and make an effort to push the shed over to the west, expecting the posts to break at the chopped places. A strong, high wind from the west was blowing, making the work at once more difficult and dangerous; and, finding that they could not push the shed over, the posts not being sufficiently weakened, Scullen directed Mahon to take an ax and chop a little on the east side of the post between the fourth and fifth panels. The roof had been sawed off just north of, and close to, the fifth post; and the fourth post was therefore supporting all of the roof between the fourth and fifth posts, as well as its share of the roof between the third and fourth posts. Mahon, in reply to Scullen, said he was not a good hand with an ax; and thereupon, as Mahon testifies, Scullen said to Brown, "You chop it, Brown, on this side, a little, and probably we can throw her over." Brown, who, according to his own testimony, had just come down from the roof, and did not know to what extent the posts and braces under the roof had been cut, took the ax, and begun chopping the post on the east side, as directed, and, while he was chopping, the lower end of the post, being either chopped off, or twisted off by force of the wind upon the shed, dropped down upon and through the platform, breaking the planks; and that part of the roof, which had been supported by the post, came down upon Brown, and injured him.

(1) "Assuming that Brown's injury was caused by the negligence of Scullen in one or more of the particulars charged by the declaration, and within the statement of facts, was Scullen the fellow servant of Brown, in such sense as to exempt the plaintiff in error from liability?" (2) "Assuming that the method adopted by Scullen for taking down the shed was dangerous, that the tools and appliances provided for accomplishing the work were insufficient or defective, and that the injury suffered by Brown was caused by the employment of that method, or of insufficient appliances, or both, is the plaintiff in error responsible for the injury, notwithstanding the fact, if it be a fact, that Brown and Scullen were fellow servants?" (3) "If the place where Brown received injury was not a safe place in which to work, but by the use of the proper appliances, which were not used, and were not furnished for such use by the plaintiff in error, could have been made safe, is the plaintiff in error liable, or may it be liable, for the injury as one caused by its failure to furnish Brown a safe place in which to work?" (4) "When a master employs a number of servants to work together and in concert, under circumstances which require supervision in order reasonably to guard the

men against danger, the work being such that the safety of one is dependent upon the acts, conduct, or movements of others beyond his observation or control, is it, or not, a duty of the master to furnish the requisite supervision; and if, in a given case, that supervision is committed to the foreman of a gang or band of men employed upon a work of the character stated, will the master be liable, or not, for an injury to one of the men caused by negligent or unskillful supervision?"

The supreme court on January 20, 1896, made the following order: "It is ordered by the court that the submission of this cause be, and the same is hereby, set aside, and the cause remanded to the United States circuit court of appeals for the Seventh circuit, with leave to file a more explicit certificate, or otherwise to proceed in the cause according to law."

John M. Lansden, for plaintiff in error.

Samuel P. Wheeler and W. N. Butler, for defendant in error.

Before WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The questions certified to the supreme court—though perhaps not identical, unless it be the first, with questions presented by the record—were deemed to be closely pertinent; and the aim was to obtain, in answer to the fourth, a declaration of principle, and in answer to the others, if the principle suggested were affirmed, guidance for its application. The particulars in which the questions were found to be inexplicit not having been pointed out, we are unable to put them in a form better calculated to elicit the information which we sought. Indeed, the necessity for so doing has been removed in large measure by later decisions. We refer especially to *Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269; *Railroad Co. v. Peterson*, 16 Sup. Ct. 843; and *Railroad Co. v. Charless*, Id. 848. These cases, together with the opinion in the *Baugh Case*, have put it beyond question that the circuit court erred in this case when, in substance, it instructed the jury, and refused a contrary charge asked by the plaintiff in error, that if Scullen was a foreman, with authority to employ and discharge men, and to oversee and direct them in the performance of the duties assigned them, and, with that authority, had employed Brown and others, and had assigned them to the work of throwing down the company's transfer shed, he was not, in respect to that work, a fellow servant, but stood to the men in the relation of a vice principal or representative of the company. Scullen was not in charge of a department, but, on the contrary, was subordinate to another, who had the general charge of the construction and repair of bridges and other structures, on a division of the road; and the company is therefore not responsible for injuries suffered by any of his subordinates by reason of his misconduct, unless it was a neglect of some duty which the master owed, as master, to the one injured. For the neglects of a foreman, as such, the master is not responsible. It was laid down in the *Baugh Case*, and reaffirmed in *Railroad Co. v. Keegan*, *supra*, "that the rightful test to determine whether the negligence complained of was an ordinary risk of the employment was whether the negligent act constituted a breach of positive duty owing by the master, such as that of taking

fair and reasonable precautions to surround his employés with fit and careful co-workers, and the furnishing to such employés of a reasonably safe place to work, and reasonably safe tools or machinery with which to do the work,—thus making the question of liability of an employer for an injury to his employé turn rather on the character of the alleged negligent act, than on the relations of the employés to each other, so that, if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor." By this test, once it is conceded—as, under these decisions, it must be—that Scullen and Brown were fellow servants, it is clear that for the acts of negligence alleged in the first and third counts of the declaration the company was not responsible. Those acts were all in the line of a foreman's duty, the risk of which the employé assumed when he entered upon the service.

The second count is subject to the same criticism, except in so far as it alleges a failure and refusal of the company to furnish the necessary tools, implements, or appliances for the safe tearing down of the shed. What tools or appliances were needed, which were not furnished, it is not averred; but it was for the defendant to move that the declaration be made more specific in that respect, if desired, and, that not having been done, proof was admissible under the general averment. If the necessary tools were furnished by the company, but they were not employed in the work, or were unskillfully employed, through the negligence or want of skill of the foreman, the company, for the reason already explained, is not answerable for the result; but if the tools and appliances used were insufficient, and were employed because better were not available, and that was the cause of the injury, the company is liable. There is a duty on the part of a master to provide his servants a safe place in which to work, but manifestly that principle is not applicable to a case like this, where the place becomes dangerous in the progress of the work, either necessarily, or from the manner in which the work is done. The judgment below is reversed, and the cause remanded, with instruction to grant a new trial, and to permit, if desired, an amendment of the declaration.

BALCH et al. v. HAAS.

(Circuit Court of Appeals, Eighth Circuit. April 13, 1896.)

No. 710.

1. APPEAL—DECISION ON FORMER APPEAL—BINDING EFFECT.

On a second writ of error an appellate court is bound by its prior decision only upon points distinctly made and determined, and not upon points which might have been, but were not, raised.

2. SAME—DIFFERENT STATE OF EVIDENCE.

The rule that an appellate court is bound by its decision on a former appeal in the same case is not applicable where the point decided was de-

pendent on the evidence, and on the second trial the evidence is different in a material respect.

3. MASTER AND SERVANT—FELLOW SERVANTS—FOREMAN OF STREET LABORERS.

Where a firm of general contractors had taken a contract to grade a street, and had two gangs of laborers at work thereon, each under the charge of a foreman having no control over the other, but having power to hire and discharge his own men and control their operations, *held*, that the foreman of one gang was a fellow servant of the laborers under him, so that the master was not liable for an injury caused to one of them by his negligence.

4. SAME.

The rule announced in *Railroad Co. v. Baugh*, 13 Sup. Ct. 914, 149 U. S. 368, and in *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. 525, restated, that, *prima facie*, all who enter into the employ of a single master are engaged in a common service, and are fellow servants; and that the master is only liable for the negligent performance of his personal duties, by whomsoever performed, and for the negligent acts of an employé whom he has intrusted with the entire management and supervision of all of his business, or with the entire management and supervision of a distinct and separate department of a large and diversified business.

In Error to the Circuit Court of the United States for the District of Minnesota.

This was an action at law by Julius Haas against Foster L. Balch and Henry E. Wetherbee to recover damages for personal injuries. There was a judgment for plaintiff on the verdict of a jury, and defendants brought error.

Frank B. Kellogg (C. K. Davis, C. A. Severance, Arthur M. Keith, R. G. Evans, Charles T. Thompson, and Edward K. Fairchild were with him on the brief), for plaintiffs in error.

N. M. Thygeson (M. D. Munn, J. M. Gilman, and A. E. Boyesen were with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was before us at a previous term on a writ of error that was sued out by Julius Haas, the present defendant in error, who was the plaintiff in the circuit court. *Haas v. Balch*, 12 U. S. App. 534, 6 C. C. A. 201, and 56 Fed. 984. A full statement of the case will be found in our former opinion. On the second trial in the circuit court, Haas recovered a judgment against the present plaintiffs in error, Foster L. Balch and Henry E. Wetherbee, in the sum of \$7,500, and they in turn have brought the proceedings on the second trial here for review.

The present record presents but two questions which we deem it necessary to consider. The first of these is whether the former decision of this court conclusively established the fact that Louis Clausen, the foreman of the gang under whom Haas worked, was a vice principal of the plaintiffs in error, so as to preclude all further consideration of that point; and, in the event that the proposition last stated, which is maintained by the defendant in error, proves to be untenable, the second inquiry is whether Haas and Clausen were in fact fellow servants. It is a well-established doctrine, in the federal courts at least, that a second writ of error or a second appeal in the same case only brings up for review the proceedings of the

trial court subsequent to the mandate, and that it does not authorize a reconsideration of any questions, either of law or fact, that were considered and determined on the first appeal or writ of error, provided the testimony on each trial was substantially the same. This doctrine results from the fact that a judgment rendered by an appellate court in a given case is conclusive on the parties thereto, and that an appellate court, like a *nisi prius* court, is powerless to review or revise its own judgments after the lapse of the term at which they were rendered, except in cases of fraud. Another form of stating the doctrine is that propositions of law which were considered and decided on a first appeal become the law of that particular case, and, whether right or wrong, must be adhered to on a second appeal. *Thatcher v. Gottlieb*, 19 U. S. App. 469, 8 C. C. A. 334, and 59 Fed. 872, and cases there cited; *Tyler v. Magwire*, 17 Wall. 253, 283; *Supervisors v. Kennicott*, 94 U. S. 498; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568; *Sizer v. Many*, 16 How. 98; *Corning v. Nail Factory*, 15 How. 478, 494; *Sibbald v. U. S.*, 12 Pet. 488, 492; *Martin v. Hunter*, 1 Wheat. 304, 355. Conceding the foregoing doctrine to be sound, it is to be observed, in the first place, that this court was not asked to determine on the first appeal whether Haas and Clausen were fellow servants, and no opinion was in fact expressed on that point. *Haas v. Balch*, 12 U. S. App. 534, 6 C. C. A. 201, and 56 Fed. 984. That question was not discussed by counsel for either party, either by brief or on the oral argument. Besides, on the former hearing, the case came before this court on a record which showed very clearly, as we think, that the fellow-servant question was not debated in the circuit court, and that the judgment below was predicated on other grounds. The former record not only disclosed that the decision of the lower court had not turned on the fellow-servant question, but the printed argument then filed in behalf of the plaintiff in error contained the statement that "at the close of plaintiff's testimony the trial court directed a verdict for defendant on the ground that plaintiff was guilty of contributory negligence"; and the entire argument so filed was devoted to a discussion of the questions whether the view thus entertained by the trial court was correct, and whether the plaintiff had sustained the injury complained of in consequence of one of the known risks of the employment which he had voluntarily assumed. Very naturally, therefore, and very properly, this court confined its former decision to these points. Our rules, particularly rule 24—have been framed for the express purpose—among others, of preventing surprises, as far as possible, by requiring counsel on both sides of a case to specify in their briefs with reasonable certainty the grounds upon which they will rely either for a reversal or an affirmance. When this has been done, we do not consider it our duty to travel outside of the lines as they have been laid, or to decide questions which counsel have not seen fit to discuss, especially if they are mixed questions of law and fact which may be presented on different evidence, and in a new light on a second appeal. It is doubtless true that this court might have been called upon to decide on the former appeal whether, on the state of facts then disclosed, Haas and Clausen occupied the relation of fellow

servants; but counsel on both sides were apparently content to confine the ruling then made to the single question whether there was any evidence of culpable negligence, either on the part of Haas or Clausen, inasmuch as that was the only question that had been determined by the circuit court.

In view of these considerations, we think that our former decision does not preclude us from determining whether, on the state of facts disclosed by the present bill of exceptions, Clausen was a vice principal or a fellow servant. As the rule which counsel for the defendant in error have invoked is sometimes, and, as we think, most accurately, stated, it only precludes consideration on a second appeal of those points which were distinctly made and determined on the first hearing. Thus in two cases the rule was stated by the supreme court of California substantially as follows: A ruling by an appellate court upon a point distinctly made upon a previous appeal is in all subsequent proceedings in the same case a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. *Phelan v. San Francisco*, 20 Cal. 39; *Leese v. Clark*, Id. 387, 416, 417. Moreover, the rule in question does not bar the consideration, on a second appeal, of incidental questions which were considered and decided on a prior appeal. With reference to the latter point the supreme court of Indiana said: "In our opinion, a decision rendered on appeal does not conclusively determine merely incidental or collateral questions, but determines only such questions as are presented for decision, and are decided as essential to a just disposition of the pending appeal." *Union School Tp. v. First Nat. Bank of Crawfordsville*, 102 Ind. 464, 472, 2 N. E. 194. And in the case of *Haynes v. Town of Trenton*, 123 Mo. 326, 335, 27 S. W. 622, it was held that an appellate court is not precluded on a second appeal from reversing a case on account of an erroneous instruction, although the same instruction was given on the first trial, and was incorporated into the first bill of exceptions, it appearing that the instruction was not distinctly called to the court's attention, and made a ground of complaint on the first appeal. The court said, in substance, that it could see no possible basis for holding the defendant estopped to object to the instruction on the second appeal, even conceding that it was not objected to on the first appeal; and that, although the error in the instruction was waived on the first appeal, the aggrieved party did not thereby consent to the same error at a second trial, or estop itself to then object to such error. As might be expected, we are naturally indisposed to hold a litigant bound by a supposed ruling on a point that was not raised on the former appeal, and was neither argued nor considered; and, in our judgment, the authorities, when rightly construed, do not require us to so hold, or to decide that the mere fact that the fellow-servant question might have been argued and decided on the first hearing, now estops the plaintiffs in error from raising that issue.

The conclusion last announced is further fortified by the fact that the testimony produced on the last trial differs in one important respect from the testimony adduced on the first trial. In the first bill of exceptions much of the testimony was reported in a narrative
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form, and it contained general statements to the effect that Clausen "had entire charge of the work" that was being done at the city of Stillwater; that "he hired the men, and gave them their time, and had the whole thing" under his control. Other similar and equivalent expressions were contained in the former record. The present bill of exceptions shows, however, that Clausen did not have the entire charge of the work that was being done by the defendants below in the city of Stillwater, but that the working force at that place was divided into two gangs, only one of which worked under the direction of Clausen, while the other gang worked under the direction of another foreman, whose powers were quite as extensive as those exercised by Clausen. We think that the additional fact disclosed by the last bill of exceptions, showing that Clausen did not have the sole and exclusive charge of the work that was being done at Stillwater, has an important bearing upon the inquiry whether Clausen was a vice principal or merely a fellow servant, and that for this reason, as well as for the reasons heretofore stated, our former decision should not preclude all further consideration of that question. It is well settled that the rule of law now under discussion has no application when the evidence on a second trial differs in a material respect from the evidence adduced at the first trial, and the point adjudicated was dependent upon the testimony. Parties are always at liberty to introduce on a retrial such other evidence bearing upon a particular issue as they may possess, and, if such additional testimony changes the aspect of the case, and necessitates the application of a different rule of law, an appellate court is always privileged to apply it. *Thatcher v. Gottlieb*, 19 U. S. App. 469, 8 C. C. A. 334, and 59 Fed. 872; *Meeks v. Railroad Co.*, 56 Cal. 513; *Mitchell v. Davis*, 23 Cal. 381. This rule is further illustrated by the recent decision of this court in *Railway Co. v. Davidson's Adm'r*, 27 U. S. App. 681, 13 C. C. A. 249, and 65 Fed. 969, wherein we reached a different conclusion from that announced on the first appeal (see *Davidson's Adm'r v. Railway Co.*, 12 U. S. App. 115, 4 C. C. A. 146, and 53 Fed. 997), because the facts on the second appeal were materially different.

We proceed, therefore, to consider the question whether Haas and Clausen were in fact fellow servants, inasmuch as that question, in our opinion, is open for consideration, and was distinctly raised in the circuit court on the last trial. The position which Clausen occupied, and the relation which he bore to his employers and to the plaintiff, Haas, at the time of the accident, have already been stated in part, and but little further need be said on that subject. The defendants, Foster L. Balch and Henry E. Wetherbee, were general contractors, who did business under the firm name of Balch & Wetherbee. The firm had taken a contract to grade a certain street in the city of Stillwater, Minn., which involved making a cut some 20 feet in depth through a hill. This work, as heretofore stated, was being done by two gangs of men, who worked under different foremen, one of whom was Clausen. Each foreman had authority to hire men for his gang, or to discharge them, and to direct the operations of the laborers who were thus employed. The two gangs

worked near together on the same job. Each foreman worked with his own crew, and neither foreman appears to have had or to have exercised any authority over the other. Both of them received general directions as to the mode of doing the work from the defendant Wetherbee, who was present on the ground for some two weeks when the work was commenced, and who subsequently visited the place at intervals and on such occasions gave such general directions as he thought necessary relative to the performance of the work. The foregoing facts are practically undisputed. It furthermore appears that the negligence complained of consisted in the fact that Clausen ordered Haas to work at the base of an overhanging earth bank, and assured him that he could work there in safety, when, as it is claimed, he ought to have known that the place was unsafe, and that the bank was liable to fall at any moment, as it did in fact fall. In view of the position which Clausen appears to have occupied, and the authority with which he was vested, we think it is manifest that he and Clausen were fellow servants within the rule announced in three cases that have been decided by this court, to wit: *Minneapolis v. Lundin*, 19 U. S. App. 245, 7 C. C. A. 344, and 58 Fed. 525; *Coal Co. v. Johnson*, 12 U. S. App. 490, 6 C. C. A. 148, and 56 Fed. 810; *Railway Co. v. Waters*, 16 C. C. A. 609, 70 Fed. 28. Clausen was not charged with the superintendence and control of the entire business of his employers; he was not the manager or head of a department of a diversified business; neither was he engaged at the time of the accident in the performance of a special duty which the law devolved upon his employers. On the contrary, he was simply an ordinary foreman, who had charge of a gang of laborers, and who usually worked with them. He did not even have full control of the particular job on which he was employed, for another foreman was engaged on the same work, who seems to have had equal authority, and both foremen were under the general supervision of the common master. Our decisions above referred to were each predicated on the rulings made in *Railroad Co. v. Baugh*, 149 U. S. 368, 384, 13 Sup. Ct. 914, which set at rest some of the doubts that had been raised, and corrected certain deductions that seemed to be warranted by some expressions found in the earlier case of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184. In the *Baugh Case* it was distinctly ruled that "prima facie all who enter into the employ of a single master are engaged in a common service, and are fellow servants." It was further said in that case, in substance, that the danger to be apprehended by a laborer from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him; that each danger is equally with the other an ordinary risk of the employment; that if the employé is paid for the one risk he is paid for the other, and that if he assumes the one he likewise assumes the other. As a corollary from these propositions, it was declared, in substance, that the master's exemption from liability extends to injuries sustained in consequence of the negligence of "all co-workers to the same end," regardless of their rank. This decision, as a matter of course, admitted the rule which we pointed out in *Minneapolis v. Lundin*, su-

pra, that the master is liable for the negligent performance of all of his personal duties, no matter by whom performed, and that he is also responsible for the negligent acts of an employé whom he has intrusted with the entire management and supervision of all of his business, or with the entire management and supervision of a distinct and separate department of a large and diversified business. The doctrine of the Baugh Case was reiterated and applied in *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, in which case it was held that a section boss of a railroad is a fellow servant with an engineer and conductor in the employ of the same company, and that the company is not liable for an injury to the former occasioned by the negligence of the latter, although they work in different departments of the service, and under the control of different superiors. And in the recent case of *Railroad Co. v. Keegan*, 160 U. S. 259, 264, 16 Sup. Ct. 269, it was pointed out that, while the mastery and control of a distinct department of a diversified business may entitle the person in charge to be considered a vice principal, rather than a fellow servant, yet that this must not be understood to mean or imply "that each separate piece of work was a distinct department, and made the one having control of that piece of work a vice principal or representative of the master." See, also, *O'Brien v. Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324, and *Potter v. Railroad Co.*, 136 N. Y. 77, 32 N. E. 603, which are referred to with approval in the decision last cited. This court has also decided very recently that a section foreman of a railroad is not the head or manager of a distinct department in such sense as to constitute him a vice principal, but that he is a fellow servant of those who work under him and are subject to his orders. *Railway Co. v. Waters*, 16 C. C. A. 609, 70 Fed. 28.

It is obvious, therefore, that on the state of facts disclosed by the present record Clausen cannot be regarded as a vice principal on any of the grounds heretofore indicated. He was a fellow servant of the other members of the gang of laborers who worked under him; and, inasmuch as the act of negligence complained of was not committed by him while in the discharge of a duty that was personal to the master, his employers cannot be held responsible for his neglect. The trial court was asked to so instruct the jury, and for its refusal to do so the judgment must be reversed, and the cause remanded for a new trial.

CHARNLEY v. SIBLEY et al.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 284.

1. SET-OFF—FOLLOWING STATE LAWS.

The right of set-off, except as it is enforced in equity, is a matter of local legislation; and the federal courts, sitting in any state, when dealing with the subject, will follow the rules established by the tribunals of the state.

2. SAME—INSOLVENT OR NONRESIDENT PLAINTIFF.

Where the state statute of set-off, as in Illinois, does not authorize a set-off, in action on contract, of unliquidated damages arising out of con-

tracts or torts, not connected with the subject-matter of the suit, there can be no set-off, in an action at law, of such damages, even as against an insolvent or nonresident plaintiff.

3. SAME—INCONSISTENT DEMANDS.

It is no objection to a set-off, claimed by a defendant, that it is inconsistent with another set-off, previously claimed by him, and rejected as improper.

4. DAMAGES—UNLIQUIDATED.

Where it is alleged that one party has agreed to ship to another, as his broker, all the goods made by him, and to pay the broker a certain rate of commission on the sale thereof, a claim by the broker of a breach of the contract, in failing to ship to him a part of such goods, is a claim for unliquidated damages.

5. SAME—ACCOUNT STATED.

The rule whereby a merchant's account, which has been presented, and not objected to, is treated as an account stated, does not apply to a distinct and independent claim for damages for breach of contract.

In Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

E. A. Otis, for plaintiff in error.

Hamline, Scott & Lord and George W. Weadock, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The defendants in error, Hiram W. Sibley and Isaac Bearenger, co-partners under the firm name of Sibley & Bearenger, sued the plaintiff in error, James Charnley, in an action of assumpsit upon the common counts for the proceeds of a cargo of lumber consigned by the former to the latter in 1877 to be sold on commission. The defendant pleaded the general issue with notice of set-off, to the effect that the defendant, being a broker for the sale of lumber in Chicago, in April, 1888, entered into a contract with the plaintiffs, who were the owners, manufacturers, and shippers of lumber at East Saginaw, Mich., to act as their broker in the city of Chicago for the sale of all lumber manufactured by them for the season of 1888 to the amount of 40,000,000 feet, which they agreed to ship to him to be sold on their account for a commission of one and one-fourth per cent. of the gross amount for which the lumber should be sold; that he was ready and willing to perform and did perform the contract on his part, but that they, though often requested, did not, and would not during the season of 1888 consign or ship to him of the entire quantity stipulated, all of which he was prepared and ready to sell, more than 1,892,982 feet, by reason whereof, having given up other business and employment as a broker for the sale of lumber in Chicago, he sustained loss and damage to the amount of \$5,716.05, which, when set off against the demand of the plaintiffs, left a balance due him of \$1,345.76, for which he prayed judgment. This claim of set-off, it is conceded, did not grow out of or have any connection with the transaction upon which the demand of the plaintiffs was founded. Evidence offered in support thereof was excluded, and thereupon the defendant was permitted to file an additional notice of set-off, accompanied with a

bill of particulars; and the evidence offered in support of items in that bill to the amount of \$98.19 was also excluded. Error is assigned upon each of these rulings.

The right of set-off, except as it is enforced in equity, is a matter of local legislation, and the federal courts, sitting in any state, when dealing with the subject, will follow the rules established by the tribunals of the state. *Partridge v. Insurance Co.*, 15 Wall. 573; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696. Under the Illinois statute (Rev. St. c. 110, § 29) which authorizes a set-off, in any action upon contract, of claims or demands against the plaintiff in the action, the rule has been declared by the supreme court of the state that "unliquidated damages, arising out of covenants, contracts, or torts, not connected with the subject-matter of the suit, do not constitute the subject-matter of a set-off." *De Forrest v. Oder*, 42 Ill. 500; *Robison v. Hibbs*, 48 Ill. 408; *Clause v. Press Co.*, 118 Ill. 612, 9 N. E. 201. See, also, *Winder v. Caldwell*, 14 How. 434, 443. It is earnestly contended in behalf of the plaintiff in error that when it appears that the plaintiff in an action is insolvent or a nonresident of the state where the action is prosecuted, a set-off of damages for breach of a contract, though unliquidated, may be allowed. But the numerous authorities cited are to the effect that in such cases a set-off may be had in equity, and there ordinarily it is allowed because relief could not be had at law. *Quick v. Lemon*, 105 Ill. 578; *Lindsay v. Jackson*, 2 Paige, 581. In *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24, a contrary ruling was made; but, however pertinent and strong the reasoning on which that decision was based, it is manifestly a departure from the commonly recognized practice, and is authoritative only as a construction of the statute of Kentucky. It cannot prevail in Illinois against the rule there established.

It is contended next that the claim set up in the original notice was not unliquidated, because "it amounts substantially to a breach of contract of employment where the damages are fixed, certain, and definite, and the contract and the law furnish the exact measure of damage." But it is evident that, in order to determine the damages in question, proof was necessary—First, to establish the contract; second, to show to what extent it had been performed; and, third, to prove the damages suffered by reason of nonperformance, including the expense of doing the business, incurred, or necessary to be incurred, and kindred matters. *U. S. v. Behan*, 110 U. S. 338, 345, 4 Sup. Ct. 81. A claim is liquidated only when the amount of it has been determined, or the data settled upon which the amount can be calculated. *U. S. v. Buchanan*, 8 How. 104; *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 615, 14 Sup. Ct. 710; *Osborn v. Etheridge*, 13 Wend. 339; *Hall v. Glidden*, 39 Me. 445; *Bell v. Ward*, 10 R. I. 508; *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167. In *Edwards v. Todd*, 1 Scam. 464, cited in *Smith v. Huie*, 14 Ala. 201, unliquidated damages were allowed as a set-off, but because connected with the subject-matter of the suit.

But it is insisted that the amount of the proposed set-off in this instance had become certain, as an account stated, because of the

fact, of which proof was offered, that the plaintiff in error had sent to the defendants in error a statement of account wherein the precise amount of damages claimed was stated, to which no response was made. Waiving all question whether, under the notice of set-off given in this case, evidence of an account stated was admissible, we know of no authority for applying to a distinct and independent claim for damages for breach of contract the rule established in respect to merchants' accounts, whereby "an account which has been presented, and no objection made thereto, after a lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account." 1 Story, Eq. Jur. § 526; *Wiggins v. Burkham*, 10 Wall. 129; *Pyncheon v. Day*, 118 Ill. 9, 7 N. E. 65; *Lockwood v. Thorne*, 18 N. Y. 285.

It remains to consider the items in the second notice of set-off, amounting to \$98.19, and alleged to have been expended at the request of the defendants in error under or in connection with the contract set up in the first notice. The record shows that the evidence to support this claim was excluded because the items were not connected with the subject of the suit, but were advanced under the contract mentioned in the first notice of set-off. That ruling, we think, was erroneous. It was equivalent to saying that there can be no set-off unless it be of a demand, whether liquidated or unliquidated, connected with the principal cause of action. It is no objection to this set-off that it is inconsistent with that set up in the first notice, which alleged a contract under which the plaintiff in error was bound to bear his own expenses. He is not entitled to claim both the stipulated commission and a reimbursement of his expenditures, but, the court having rejected evidence of the former, because, being unliquidated, it was not a proper set-off, we do not perceive that it was incompetent for him to offer proof of the latter. *U. S. v. Behan*, supra. Whether by so doing he renounced all right to the demand set up in the first notice, we need not consider. The further objection is urged that, in connection with the evidence offered to establish these items, under the second notice, the offer to prove the contract mentioned in the first notice was not renewed, and that, excepting as it might be implied from that contract, there is no evidence of a request by the defendants that the outlays charged for should be made. The offer of proof, however, included the fact of an express request. The defendants in error may remit of the judgment recovered the sum of \$98.19 as of the date of entry, and within 10 days file with the clerk of this court certified proof of the fact, and thereupon the judgment so reduced will be affirmed; otherwise the same will be reversed, and the cause remanded for a new trial; the costs of this appeal in either event to be taxed against the defendants in error.

CRANE CO. v. COLUMBUS CONST. CO.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 268.

1. EVIDENCE—ADMISSIBILITY AND WEIGHT—TESTING QUALITY OF GOODS SOLD.
Where gas piping sold was guaranteed to stand a certain pressure when tested in line, *held*, that evidence of tests made in line was admissible, even if they were made without notice to the seller, and not within a reasonable time after delivery, these facts going merely to the value, and not to the competency, of the evidence.

2. SAME—OPINION EVIDENCE.

Upon a controversy over the quality of gas pipe guaranteed to stand a certain pressure in line, where it is claimed by the seller that the pipe was injured in handling and laying, after delivery, witnesses who supervised or participated in the work may testify that, in their opinion, the workmen were skillful; but the general question whether the line of pipe was laid with proper skill and care is not one to be determined upon the opinions of witnesses.

3. SAME—COMPETENCY—ESTIMATES FROM INSUFFICIENT DATA.

In an action to recover damages for failure of gas pipe to stand the guaranteed pressure when laid in line, the purchasing company sought to recover the cost of taking up and relaying the pipe with stronger collars; but it appeared that the work was done by employes who were carrying on other work at the same time, and that no separate account was kept of the labor and expense. *Held*, that it was not competent for a manager of the company to testify to the cost per foot of the work, where his estimates were made without personal knowledge of the facts, from reports not designed for the purpose, and containing no data enabling him to reach a definite conclusion.

4. SAME—BREACH OF WARRANTY—REPAIRS BY PURCHASER.

A construction company, under contract with a natural gas company to furnish and lay a pipe line, made a contract with a supply company, whereby the latter was to furnish piping guaranteed to stand a working line pressure of 1,000 pounds to the square inch. Thereafter an act of legislature was passed prohibiting the transportation of natural gas under more than natural pressure, or an artificial pressure of 300 pounds. Thereupon the contract between the gas company and the construction company was modified so as to require the piping to stand a test in line of only 400 pounds. Prior to the enactment, some of the pipe furnished by the supply company had been laid, but was found incapable of standing the guaranteed pressure of 1,000 pounds. It was claimed, however, by the supply company, that it was sufficient for a working pressure of 300 pounds, and there was evidence tending to support the claim. Nevertheless, the construction company, after the enactment, took up and relaid the pipe with stronger collars, also cutting the threads anew, at great expense, and sought to recover the same from the supply company. *Held*, that the supply company was entitled to an instruction that, if the piping was otherwise in accordance with the specifications of its contract, and, as first laid, was sufficient to stand a working pressure of 300 pounds, as limited by law, and if the construction company unreasonably and unnecessarily expended money in making the change, for the alleged purpose of constructing a line to withstand a pressure of 1,000 pounds, then the supply company was not liable therefor; and that, under such circumstances, the ordinary rule should prevail, and the recovery be on the basis of the difference in value between the article delivered and that contracted for.

5. SAME—REPUTATION OF CONTRACT IN PART—ACTION TO ENFORCE IN PART.

A purchaser of gas pipe to be delivered at times and places to be designated by it, after partial delivery, refused to receive more, alleging that the seller had failed to make deliveries for some time. It appeared, however, that no time or place had been designated by it for such deliveries.

Afterwards the purchaser brought an action for breach of the warranty of quality, in respect to the pipe previously furnished. *Held*, that the seller was entitled to an instruction that, if there was nothing to justify the termination of the contract by the purchaser, it could not maintain its action for a breach thereof by the seller.

C. SAME.

The vendee under a contract of sale which is executory and entire cannot repudiate it in respect to a part of the goods, and at the same time enforce it in respect to the remainder.

In Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

This was an action by the Columbus Construction Company against the Crane Company to recover for alleged breach of a contract of sale. The circuit court sustained demurrers to the declaration, and, plaintiff declining to amend, judgment was rendered for defendant. On appeal to this court, that judgment was reversed, and the cause remanded for further proceedings. 3 C. C. A. 216, 52 Fed. 635. Afterwards a trial was had before a jury, resulting in a verdict and judgment for plaintiff in the sum of \$48,000, and defendant brings the case here on writ of error.

Edwin Walker and Chas. S. Holt, for plaintiff in error.

Geo. Hunt and S. S. Gregory, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. For the entire contract between the parties to this appeal, and for the construction put upon it by this court when the case was first here, reference is made to the opinion in *Columbus Const. Co. v. Crane Co.*, 3 C. C. A. 216, 52 Fed. 635, and 9 U. S. App. 46. After the case had been remanded, further counts, special and common, were added to the declaration; but, while the breaches of warranty relied upon and the damages claimed were stated more specifically and fully, the character of the action was not changed.

The defendant in error, the Columbus Construction Company, a corporation of New Jersey, on the 5th day of June, 1890, entered into a contract with the Indiana Natural Gas & Oil Company (which was incorporated under the laws of Indiana for the purpose of owning and operating a pipe line for the transportation of natural gas from the gas fields of Indiana to Chicago), whereby the Columbus Company undertook to construct the proposed line; and to that end, on June 20, 1890, it made with the Crane Company (the plaintiff in error) the contract in suit, whereby the latter company undertook to purchase, and to cause to be delivered to the former, the various quantities and sizes of pipe necessary for the completion of the line, including 260 miles of 8-inch pipe concerning which this controversy has arisen. The substance of the contract, in so far as it need be stated here, is that the pipe shall be "8-inch wrought-iron standard line pipe, to weigh not less than 27.48 pounds per lineal foot," "made from soft iron, free from blisters and other imperfections, and guaranteed to stand a working line pressure of one thousand pounds to

the square inch when proved and tested in lines"; that each spliced joint shall weigh the weight of the collar in addition to its own required weight; that each joint of pipe shall have eight threads to the inch, and at least two inches of thread on each end, with a full uniform taper to the threads both on the pipe and in the collar; and that the vendor shall pay to the vendee all damages and expenses sustained by reason of defects in the pipe delivered, up to and including the time when the pipe should be tested by the vendee under working pressure, not in excess of one thousand pounds to the square inch, and proved tight in line, which working test should be made with reasonable promptness. Deliveries were to be made at such places as should be designated by the Columbus Company, at the earliest practicable dates, in July, August, and September, and of the 8-inch pipe not less than 37 miles in July, 123 miles in August, and the remainder in September, 1890, "barring strikes and causes beyond control." The Columbus Company, upon the delivery of each invoice at the point by it designated, was to pay "spot cash" therefor, including a commission of $2\frac{1}{2}$ per cent. over the amount of the manufacturer's invoice. Shipments were to be by car loads, not exceeding five spliced joints, the Crane Company paying freight and other charges of transportation from the mills to the points of destination; and it was agreed finally that the pipe should not be construed to be accepted, by reason of any payments made therefor, so as to relieve the Crane Company from liability on account of its defective character, until the same had been laid and tested in line, and proved.

In pursuance of this contract, the Crane Company made contracts with different companies for the manufacture and shipment of the required pipe, and reported the same for approval to the Columbus Company. The first shipment, amounting to about 12 miles, was delivered, by order of the Columbus Company, to the Consumers' Gas Company, at Chicago, but was not used until two years later, when it was shipped to Indiana, and laid in line. In addition, by November 3, 1890, 8-inch pipe had been delivered at different stations along the line, to the amount of 95.14 miles, of which 5.7 miles were laid in or across the Tolleston Marsh, 1 mile was laid at the Kankakee Marsh, and 12.65 miles, in double lines of half that length, were laid at Deep River. Further deliveries were then suspended by agreement or mutual consent, until more adequate appliances for testing the pipe in line could be obtained; the tests made in September, 1890, at Deep River, with an air pump of a capacity of 110 pounds to the square inch, having developed serious leaking at as many as 10 per cent. of the joints, and "more at the mill end than at the field end." Besides conflicting views of the contract liabilities of the parties, which were settled only by the decision of this court referred to, the agents of the parties who were present at the tests differed in respect to the nature and cause of the defects in the joints; it being claimed on behalf of the plaintiff in error that the pipe was all tested at the mills, and, without leaking, stood a pressure of 1,000 pounds to the inch, and that the defects developed

in line were attributable to rough and careless handling and unskillful laying of the pipe. On the contrary, the representatives of the defendant in error asserted a careful and skillful manipulation and laying of the pipe, and, in the first instance, attributed the defects to the light weight of the collars, by reason of which they expanded under pressure, but the subsequent employment of heavier collars did not cure the defects; and the later conclusion seems to have been reached that the threads on the ends of the pipe and in the collars did not have a full and uniform taper, the fault being in the thread of the collar. During the ensuing October, efforts were made, by caulking and otherwise, to tighten the defective joints, and, up to a pressure of 200 pounds, were perhaps substantially successful; but, about the 28th of that month, high pressure pumps were brought into use, which, at a pressure of 400 pounds, reopened some of the old leaks, and disclosed many new ones. Further attempts were then made, by caulking and other means, to remedy the defects, but with unsatisfactory results, until November 15th, when winter set in, and work was stopped.

On the other hand, while there had been delays in the delivery of pipe, the Columbus Company had not paid in full for the pipe delivered; and on September 29th the shortage had risen to \$139,900, but by later payments, the last of which, in the sum of \$15,000, was made November 26th, the deficiency was reduced to \$73,800. These shortages were the subject of correspondence, and of complaint by the Crane Company, in behalf of which it is claimed that, while various excuses were offered, it was never assigned "as the reason for not paying spot cash that the pipe was not satisfactory"; that complaint was once made by Mr. Yerkes, who, in October, had succeeded Mr. Hequembourg as the representative of the Columbus Company in the transaction, that some of the pipe shipped by the Reading Company had been forwarded in a damaged condition, but that, it having been found on investigation that some of the threads had been jammed in transit, the Crane Company offered to have all damaged pipe put in order, and returned to the place of use, at its own expense, and that nothing was said at any time about a deficiency in the weight of the collars, or about any defect other than jammed threads; that on December 31, 1890, Mr. Yerkes offered in writing to accept the proposition for repairing pipe, and to pay therefor when returned and further inspected, but upon condition that the mills should commence delivery of pipe, to fill the balance of their contracts, on February 1, 1891, and that the contract be modified so that, instead of spot cash for all pipe delivered, 50 per cent. of the price should be paid on delivery, and the remainder after a test in line, under a pressure of 1,000 pounds to the square inch; that the Crane Company refused to accede to this change in the terms of payment, and now contends that its proposition to repair the damaged threads was thereby in effect rejected by Yerkes. This difference, it seems, divided the parties until January 30, 1891, when Mr. Yerkes telegraphed the Crane Company:

"We are prepared to receive pipe in accordance with contract, particularly that part which provides for a test of 1,000 pounds when laid. Although

you have not complied with terms of your contract, we will receive pipe if you commence immediate delivery."

—And, receiving no response, on February 12, 1890, wrote as follows:

"On the 30th ult., I telegraphed you from New York as follows: 'We are prepared to receive pipe in accordance with contract, particularly that part which provides for a test of one thousand pounds when laid. Although you have not complied with terms of your contract, we will receive pipe if you commence immediate delivery.' Up to the present time, I understand, you have had no pipe delivered this year. I wish to notify you that we cannot wait longer for the said delivery, and will therefore cancel our contract. In regard to the pipe that has already been delivered, we are prepared to make some arrangement with you respecting the repair of same, and adjusting the accounts now remaining open.

"[Signed] Chas T. Yerkes, Vice Prest., C. C. Co."

To that letter, the Crane Company on the same day responded as follows:

"Your young man brought in yours of even date a few minutes ago, and upon its receipt it struck me that there was no occasion for any reply in view of all that has been said and written, but have since concluded that we had better make answer, in order that we may keep our record straight. Would say that we answered yours of January 30th, from New York, to the effect that we were prepared to go ahead with your pipe line contract on the conditions of said contract, and we are now prepared to do so. But you have persistently requested that we go ahead on the contract upon terms different from the contract, and this we have persistently refused, and now refuse, to do. We have simply demanded that you carry out your part of the contract, and desire now to notify you that, if you cancel this contract, you do so at your peril, and we will hold you responsible for the results. We have not delivered any of the pipe this year, because you have not asked us to deliver it, and because you have not complied with your part of the contract. We have been, as we are now, awaiting your orders to go on with the contract, and will do so when you comply with your part of the contract.

"[Signed]

Crane Company,

"R. T. Crane, Prest."

In the following March, Mr. Hequembourg resumed charge, and reaching the conclusion, after some further tests, that the collars furnished by the Crane Company were too light, procured heavier collars, at an expense for those used upon the Crane Company's pipe of \$104,000, and proceeded to lay the line, using the Crane pipe so far as it went; the total extra expense alleged to have been incurred in making that pipe available being the sum of \$200,000, most of which the plaintiff in error insists was incurred by reason of the false theory, negligently adopted and pursued, that the Crane collars were too light. The line was finished and turned over to the Indiana company late in 1892. The defective taper in the threads of the collars, it is asserted by the plaintiff in error, was not discovered until just before the trial of this case, which was commenced December 3, 1894, and therefore could not have been the ground for the rejection of the pipe. The suit was commenced May 23, 1891, the declaration being framed as "of a plea of trespass on the case upon promises," and charging, in substance, that the pipe was made of imperfect iron, and was incapable, when tested in line, of standing the required pressure, and that the threads upon the pipe and in the collars did not have a uniform taper. The plaintiff in error

tendered the general issue, with notice of special matter. The trial resulted in a verdict and judgment in the sum of \$48,000 for the defendant in error. Numerous errors are assigned, but the questions to be considered are comparatively few.

Evidence of certain tests made of the pipe in line was admissible to show the quality and value of the pipe delivered as compared with that contracted for; and if the tests were made without notice to the plaintiff in error, and not within a reasonable time after delivery of the pipe, the value, but not the competency, of the testimony, was affected by those circumstances.

Upon the question whether the pipe was handled carefully and properly laid, witnesses who supervised or participated in the work were permitted to testify that, in their opinion, the workmen were skillful, and the work well done. It was competent, we think, to show that men of experience and skill were employed upon the work; and doubtless, in such a case, a witness may be required to state what defect, if any, he saw in the work, or what carelessness or lack of skill in the manner of its execution; but the general question whether the line or lines of pipe in question had been laid with proper skill and care was not one, we think, to be determined upon the opinions of witnesses. Among the cases cited touching the point are *Provision Co. v. Baier*, 20 Ill. App. 376; *Railroad Co. v. Clark*, 108 Ill. 113; *Morris v. Town of East Haven*, 41 Conn. 252; *Turnpike Co. v. Coover*, 26 Ohio St. 520.

A more serious question has arisen upon the admission of testimony to show the cost of taking up, repairing, and relaying of pipe at Deep River, Tolleston, and Kankakee. Proof was made that in 1891 and 1892, after the bringing of this suit, the Columbus Company, having determined to make use of the pipe which had been delivered, took up what had been laid, removed the Crane collars, rethreaded such pipe as had been bent or caulked, put on heavier collars, and relaid the pipe where it had been before. The men employed in doing this work were at the same time engaged in other work, and no separate account was kept of the labor and expense incident to the changing of the collars, and rethreading and relaying of the pipe received of the Crane Company. The excuse offered is that it could not be done with economy. On direct examination, Mr. Hequembourg, testifying for his company, stated that the cost per foot of taking up and relaying the pipe was \$1.50 at Tolleston, 75 cents at Deep river, and at Kankakee \$1. The cross-examination showed that these were mere estimates, prepared without personal knowledge of the facts, from reports which were not designed for the purpose, and contained no data to enable him to reach a definite and just conclusion. These estimates were clearly incompetent. They were mere guesses by a witness interested to make the figures large. He testified that it was his "particular business to ascertain what was a fair amount to charge the defendant for changing the collars and reconstructing the line"; and, that being so, he should have kept, or caused to be kept, accurate and distinct accounts of the labor and expense as the work progressed, and should not have been allowed to give to the jury, as the result of a calcula-

tion the basis of which was not shown, the very large sum mentioned, and then to testify, as he did, that that sum was the reasonable cost of the several items included in the estimate. Such evidence does not become competent, under ordinary circumstances, because better evidence may not be at hand.

Error is also assigned upon the exclusion of evidence offered by the plaintiff in error for the purpose of showing that useless and unreasonable expense had been incurred by the defendant in error in its efforts to make the pipe conform to the specifications, fulfill the conditions, and stand the tests required by the contract. The Columbus Company was engaged in laying a pipe line, not directly for its own use, but for the Indiana Company, with which it had made the contract of June 5, 1890. By an act of the Indiana legislature approved March 4, 1891, regulating the mode of procuring, transporting, and using natural gas, the use of more than natural pressure or an artificial pressure exceeding 300 pounds to the square inch was forbidden; and by a decision of the supreme court of that state, handed down June 20, 1891, the act had been declared constitutional. *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76. The defendant in error and the Indiana Company were joint parties to that suit, and, as a result of the decision, they modified their contract so as to require the pipe and collar to be tested at the mill under 1,000 pounds hydraulic pressure, and, when laid, to stand, for 24 consecutive hours, a working pressure of 400 pounds to the square inch, without manifest or material defects, or leakage exceeding 10 per cent. of its total storage capacity; the tests to be made in five-mile sections, as soon as each section should be completed. The plaintiff in error offered to put the contract and the modification in evidence, and asked the court to give to the jury, at the proper time, an instruction which, after referring to the Indiana statute and other relevant and undisputed facts, proceeded as follows:

"If, therefore, the jury find from the evidence that the pipe delivered to the plaintiff by the defendant under its contract, prior to the commencement of this action, was of sufficient structural strength to stand a working line pressure of three hundred pounds to the square inch, and also that the threading and taper conformed to the specifications of the contract, so that the line, when constructed, was sufficient for the transportation of the gas at the pressure of three hundred pounds, as limited by law; and if you further believe that, after the commencement of this action, the plaintiff unreasonably and unnecessarily expended money in the purchase of new couplers, and exchanging such new couplers for the old, for the alleged purpose of constructing a line that would stand a pressure of a thousand pounds to the square inch; and if you further believe from the evidence that such expenditure was unreasonable and unnecessary,—then the court instructs you that you should not find for the plaintiff as damages the amount of money so expended."

We are of the opinion that the evidence should have been admitted and the instruction given. By the general rule governing the measure of damages for a breach of warranty in the sale of chattels, the defendant in error, having paid the entire purchase price, was entitled to reclaim a sum equal to the difference in value between the pipe delivered and pipe of the quality warranted; and if, at the time

of delivery, it remained necessary or desirable, and was practicable, by a reasonable expenditure, to bring the pipe up to the requirements of the contract, it was the privilege of the defendant in error to make the expenditure necessary for that purpose, and to exact reimbursement of the Crane Company, instead of resorting to the proof of comparative values. But if, as the proposed instruction assumes, the pipe met the requirements of the modified contract with the Indiana Company, and, by reason of the Indiana statute, a pipe capable of bearing a pressure of more than 300 pounds was not needed, then, manifestly, it was unreasonable to expend time or money in an effort to impart to the pipe a degree of strength which could be of no practical utility. Under such circumstances, the ordinary rule should prevail, and the recovery should be on the basis of the difference of value between the article delivered and that which ought to have been delivered,—to be determined by the market prices, or, if that should be impracticable, then, probably, by the difference in cost of production at the mills; certainly not by the cost of repair or reconstruction in or along the trenches in which the pipe was to be laid, where necessarily the work would be more difficult and expensive than at the mills. The instruction asked was hypothetical, leaving to the jury to determine whether the facts were as supposed, and whether the expenditures in question were reasonable, and, if the modified contract with the Indiana Company had been admitted in evidence, the instruction would have been pertinent and proper to be given. The statute of Indiana, and the decision of the supreme court of that state whereby it was declared constitutional, were matters of judicial cognizance, in respect to which formal proof was unnecessary. Among the authorities cited touching the measure of damages in such cases, besides the texts of Parsons, Sedgwick, Sutherland, and Addison, are the following: *Marsh v. McPherson*, 105 U. S. 716; *U. S. v. Behan*, 110 U. S. 339, 4 Sup. Ct. 81; *Blacker v. Slown*, 114 Ind. 322, 16 N. E. 621; *Smith v. Dunlap*, 12 Ill. 184; *Miller v. Mariners' Church*, 7 Me. 51; *Le Blanche v. Railroad Co.*, 1 C. P. Div. 286; *Hamilton v. McPherson*, 28 N. Y. 72; *Frick Co. v. Falk* (Kan. Sup.) 32 Pac. 360; *Loomer v. Thomas* (Neb.) 56 N. W. 973; *Lake Co. v. Elkins*, 34 Mich. 439; *Bradley v. Denton*, 3 Wis. 557; *Dillon v. Anderson*, 43 N. Y. 231; *Muller v. Eno*, 14 N. Y. 597; *Passinger v. Thorburn*, 34 N. Y. 634; *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332; *Fisk v. Tank*, 12 Wis. 276; *Brown v. Bigelow*, 10 Allen, 242; *Medbury v. Watson*, 6 Metc. (Mass.) 246.

But the question which is most earnestly disputed is whether, in respect to the pipe delivered and retained, the defendant in error, by reason of its refusal, in the letter of February 12, 1890, to accept further deliveries under the contract, is debarred of the right to sue for a breach of the warranty of quality. It is insisted that the refusal to accept more pipe was justified by the bad quality of that received, the presumption being under the circumstances that further deliveries, coming from the same mills, would be of the same bad quality. That was a question of fact, which, if the evidence was sufficient, should have been left to the jury; but it is to be ob-

served that the refusal was not put upon that ground, but on the ground that no pipe had been delivered recently, though no order or request, with a designation of the place for such delivery, had been made. On the facts as presented in the briefs, beyond which we have not looked, it does not appear that there was an adequate excuse for the refusal to accept further performance of the contract; but, whether there was or not, it was the right of the plaintiff in error to have the case submitted to the jury upon the hypothesis that nothing had been done to justify a termination of the contract by the defendant in error; and on that basis, whether other modes of relief were available or not, we think it clear that the defendant in error can have no remedy in an action upon the contract. It cannot at one and the same time repudiate an executory contract like this in respect to a part of the subject-matter, and in respect to other parts insist upon its enforcement. If the declaration had disclosed such a breach or unexcused repudiation of the contract by the plaintiff, it would have been plainly demurrable. Only upon the theory that the Crane Company had been guilty of a breach or breaches which justified the other party in refusing further performance was the action maintainable as brought; and yet from the damages which the jury was directed to award the plaintiff, on account of the defective quality of the pipe delivered, a deduction was authorized of the amount of commission which that company would have earned if it had been permitted to deliver the remainder of the pipe, and a further deduction on account of a decline in the market price of pipe. If the conduct of the Crane Company was such as to justify a refusal of the other party to receive further deliveries, it was entitled to no profit thereon by way of commission or otherwise (*U. S. v. Behan*, 110 U. S. 339, 4 Sup. Ct. 81); and just as if the contract had been terminated by agreement, or as if the pipe delivered had been the total amount called for by the contract, the Columbus Company was entitled to recover undiminished damages, equal to the difference in value between the pipe delivered and pipe of the stipulated quality.

It is not a case of rescission. That requires the placing of both parties in statu quo, and in this case would have involved a return, or at least a tender back, of the pipe which had been received. Neither is it a case of refusal to receive particular lots of pipe, offered for delivery, because the same was visibly, or, upon immediate inspection, was found to be, defective. The rejection of such pipe, before placing it in line, would not have been an act either of rescission or repudiation, but rather of enforcement of the contract. *Barrie v. Earle*, 143 Mass. 1, 5, 8 N. E. 639; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12; *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. C9. But upon the hypothesis of the proposed instruction, which, together with the evidence offered in support of it, ought, as we think, to have been submitted to the jury, it is simply a case where, under a contract of sale which is executory and entire, the vendee repudiates the contract in respect to a part of the goods, and in respect to the remainder seeks to enforce it,—a proposition which, we believe, is supported neither by reason nor precedent. The earlier cases touch-

ing the general subject, both English and American, are collected in the notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. 17-53; and while, in some respects, there has been a contrariety of ruling, no case has been cited which is perceived to be inconsistent with our present conclusion. The case of *Norrington v. Wright*, supra, was not in fact a case of rescission, though partially so treated. It was a suit by the vendor, seeking damages of the vendees on account of their refusal to accept consignments of old T rails, which, by the contract, were to be shipped 1,000 tons per month, to the total number of 5,000 tons. The vendees accepted and paid for 400 tons, received in one consignment, but afterwards, learning that the quantities shipped during three months did not correspond with the requirement of the contract, refused to accept or pay for any more. The court held the contract to be entire, and the specification of the quantity to be delivered each month to be descriptive of the goods, a departure from which through three months "justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission"; and their retention of the 400 tons received in February, it was said, "was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties." To make that case like this, on the theory of rescission, it is necessary to reverse the parties, and to suppose that the vendees, after receiving and paying for the 400 tons shipped in February, had learned at once that no more had been shipped during that month, and having on that account refused to receive further consignments, even though offered in conformity with the contract, had brought suit for damages for the failure of the vendor to ship 1,000 tons in February, instead of the 400 tons received and retained. If that had been the case, it would hardly have been said that the keeping of the 400 tons was not a waiver of the right of rescission. The case is expressly distinguished from *Lyon v. Bertram*, 20 How. 149; and the proposition is announced, which alone and independently of the doctrine of rescission was sufficient to dispose of the suit, that "the plaintiff, denying the defendant's right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action." The principle of that proposition is applicable here. Having repudiated the contract in part, the defendant in error had no right to ask its enforcement in another part. See *Clark v. Steel Works*, 3 C. C. A. 600, 53 Fed. 494, and 3 U. S. App. 358. In *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, the contract was for the sale of 500 tons of American iron and 300 tons of Scotch iron, which the seller undertook to ship to the buyer. The controversy was concerning the American iron alone, which, after delivery at Milwaukee, the purchaser refused to accept, on the ground that it was not of the grade called for by the contract, and, having

notified the seller that the iron was held subject to his order, brought suit to recover the price which had been paid for the iron and the freight thereon. The point decided was that, the jury having found that the iron was not of the quality which the contract required, "on that ground the defendant in error, at the first opportunity, rejected it, as he had a right to do." The syllabus couples, with the right to reject, the right to "rescind the sale," but that is taken from the court's statement of a general proposition of law in respect to sales by sample. When the entire subject of a contract of sale is rejected, it amounts to a rescission of the contract; but when a part of the subject is accepted, and another part rejected, because not of the quality contracted for, it is not a rescission. In *Pope v. Allis* it does not appear whether or not the Scotch iron included in the contract was received by the purchaser. If not, then the case was, as it seems to have been treated, the same as if the American iron alone had been the subject of the sale, and the rejection of the iron was a rescission; but, if the Scotch iron was received and retained, it was not a rescission, but simply a rejection of the American iron, on the ground stated, that "the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted"; just as the defendant in error here was not bound to receive a shipment of pipe which was visibly below the contract standard, though the test provided for was to be made when the pipe was in line. But, under this contract, the vendor would have had the right, within a reasonable time, to furnish, in lieu of pipe so rejected, other pipe of the required quality; while in the case of *Pope v. Allis* such right of substitution was not contemplated, and probably did not exist. In *German Sav. Inst. v. De La Vergne Refrigerating Mach. Co.*, 17 C. C. A. 34, 70 Fed. 146, the rule that rescission must be total is strongly stated, and numerous authorities are cited. Many cases have been cited which afford little aid to the decision of this one, because they grew out of completed deliveries, and involved no question of partial or imperfect performance by the party who was seeking a remedy upon the contract. In *Cherry Valley Iron Co. v. Florence Iron River Co.*, 12 C. C. A. 306, 64 Fed. 569, the contract, which was for the sale of a quantity of ore to be delivered and paid for monthly, is broadly distinguished from the present contract by the single provision that, if the purchaser failed to pay as agreed, the seller should have the right to cancel the contract in respect to ore not delivered at the time of the default in payment.

The judgment below is reversed, and the cause remanded, with instruction to grant a new trial.

WILSON v. NEW UNITED STATES CATTLE-RANCH CO., Limited.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1896.)

No. 494.

1. ELECTION OF REMEDIES—RESCISSION OF CONTRACT—ACTION FOR FRAUD.

A vendee who has been induced by the fraud of his vendor to make a contract of purchase, which contains warranties made by the vendor,

has a choice of remedies. He may rescind the contract, restore what he has received, and recover back what he has paid, or he may affirm the contract, recover the damages he has sustained for the fraud, and also those resulting from a breach of the warranties of the vendor, but he cannot do both.

2. FRAUD—MEASURE OF DAMAGES.

The measure of damages upon a rescission of a contract of purchase is the consideration paid and the moneys naturally expended on account of the purchase before the fraud was discovered.

3. SAME.

Upon an action for damages for the deceit and fraud, the measure is the difference between that which the vendee had before and that which he had after the contract or purchase was made.

4. BREACH OF WARRANTY—DAMAGES.

Upon an action for the breach of the warranties contained in a contract of purchase, the measure of damages is the difference between the value of the property actually received and its value as it would have been if the warranties had not been broken.

5. JOINDER OF ACTIONS.

The two latter causes of action may be maintained together, but each of them is inconsistent with the action for rescission.

6. CONTRACTS—BREACH AND RESCISSION.

The N. Co. entered into a written contract with W. for the purchase of a cattle ranch and 6,000 head of cattle for about \$300,000 and some stock in the corporation; such contract containing various covenants and warranties as to the number and description of the cattle and other matters, and mortgages being given on the land and cattle to secure the purchase money. W. afterwards entered on the ranch, took possession of the cattle, and sold them under the chattel mortgage. Thereupon the N. Co. brought an action against W., alleging that W., by fraudulent misrepresentations, induced it to make the contract and pay the portion of the purchase price which it had paid; that W. had made covenants and warranties which he had broken; that it did not ascertain, until the time of the sale under the chattel mortgage, the frauds practiced by W., and immediately thereafter, on account of the failure of W. to carry out the contract, and his deceit and fraud, it renounced the contract and demanded repayment of the moneys laid out by it, alleged to amount to \$250,000; that it had always been willing to carry out the contract, but W. had failed to perform, so that the consideration had failed, and loss had been inflicted upon it; and thereupon it demanded judgment for \$250,000. *Held*, that the attempts, made by such pleading, to maintain an action for the affirmance and for the rescission of the contract at the same time were inconsistent with each other.

7. SAME—WRITTEN AND ORAL.

The court also charged that the jury might consider all the facts and circumstances, and the representations made by W. and relied on by plaintiff, in determining what warranties were made by W. *Held* error, as the parties had carefully embodied their contract in writing, and all prior representations and oral contracts were merged in such writing.

8. SAME—WARRANTY—MEASURE OF DAMAGES.

The court also charged that if the jury found that W. had warranted that there were 800 beef cattle in the herd, and there were not such cattle therein, plaintiff would be entitled to a deduction from the contract price of the value of 800 such cattle. *Held* error, since, even if there were such warranty, and a breach thereof, the measure of damages would be only the difference in value between 800 beef cattle and 800 of the best in the herd,—not the full value of the 800 beef cattle.

In Error to the Circuit Court of the United States for the District of Colorado.

At some time in the early part of 1884 the New United States Cattle-Ranch Company, Limited, a corporation, and the defendant in error herein, agreed to purchase of William J. Wilson, the plaintiff in error, the Circle ranch,

which was located on the Republican river and some of its tributaries in the states of Nebraska, Colorado, and Kansas, and 6,000 head of cattle grazing thereon, and to pay therefor about \$300,000 in money and some stock of the corporation. By this contract, and its various modifications, the plaintiff in error covenanted to convey to the vendee a good title to 3,000 acres of land, and to deliver to it 6,000 head of cattle. The vendee paid \$63,850 of the purchase price, took possession of the ranch and of some of the cattle, and gave a bond and mortgages upon the cattle and the land to secure the payment of the balance of the price. The vendor made a bill of sale of the cattle, and a deed of 453.80 acres of the land to the vendee, and also gave to it a bond to convey a good title to the remainder of the 3,000 acres of land. All these papers were deposited with a bank in the city of Denver, to be delivered to the vendee if it paid the balance of the purchase price according to their terms, and to be delivered to the vendor if the vendee failed so to do. It was also agreed that the moneys realized from the sales of the cattle meanwhile should be applied in part payment of the purchase price. On the 22d day of July, 1885, the vendor entered upon this ranch, took possession of the cattle and personal property thereon, and in the month of September sold them under the chattel mortgage given by the vendee for a default in the payment of an overdue installment of the purchase price. Thereupon the cattle company brought an action against the plaintiff in error in the court below for \$250,000. It alleged in its complaint that the plaintiff in error had by false and fraudulent representations as to the number and character of the cattle, and as to his title to the 3,000 acres of land, and as to the quantity of other land to which he had the right of possession, and as to the previous sales of cattle from this ranch, and as to various other matters connected with the transaction, induced it to make the contract of purchase and the various modifications thereof, and to pay that portion of the purchase price which it had paid. It also alleged that the plaintiff in error had made covenants which he had not kept, and warranties which he had broken. After setting forth these various false representations, which the defendant in error averred had induced it to make the contract of purchase, and the various covenants and warranties which it alleged the plaintiff in error had made and broken, it closed the statement of its cause of action with these two allegations: First, it alleged that it did not ascertain until after the 19th day of September, 1885, on which day the personal property was sold under the chattel mortgage, the frauds and tricks practiced upon it by the vendor in counting and delivering the cattle, and that immediately thereafter, on account of shortages and violations of the agreement, on account of the substantial failure of the vendor to carry out his contract, on account of the entire failure of said transaction, and on account of the deceit and fraud of the defendant, and the failure of the consideration which induced it to enter into the contract, it renounced the said contract of purchase, and demanded repayment of the moneys it had laid out and expended, which, it alleged, amounted to \$250,000; second, it alleged that, at all times after the making of the contract and of the modifications thereof, it had been willing and had offered to carry out and perform its part thereof, upon the performance by the plaintiff in error of his promises and undertakings contained therein, but that he had utterly failed and neglected to perform the contract on his part, so that the considerations which induced the plaintiff to enter into it had utterly failed, and the objects and purposes to be attained thereby were completely destroyed, and great loss and damage was inflicted upon it by the fraud and deceit of the defendant, and by his failure to perform his contracts and undertakings, and to make good his representations and statements. These allegations are followed in the complaint by a prayer for \$250,000, and interest from September 19, 1885. Issues were joined upon the averments of this complaint, and upon their trial the jury returned a verdict against the plaintiff in error for \$50,000. It is the judgment upon this verdict that is attacked by this writ of error.

Chas. S. Thomas (W. H. Bryant was with him on the brief), for plaintiff in error.

Chas. J. Hughes, Jr. (Tyson S. Dines was with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The futile attempt of the defendant in error to maintain an action for affirmance, and an action for rescission of its contract of purchase, upon the facts pleaded in its complaint, has resulted in such inextricable confusion of the rules of law applicable to the trial of this case that the judgment below must be reversed. When a vendee ascertains that he has been induced to make a contract of purchase by the fraudulent misrepresentations of his vendor, he has a choice of remedies. He may rescind the contract, restore what he has received, and recover back what he has paid, or he may affirm the contract, and recover the damages he has sustained by the fraud. He cannot, however, do both. It is as difficult a feat to maintain a cause of action for the consideration paid for the purchase on the ground of rescission, and one for damages for the fraud which induced it, and for a breach of the contract of purchase itself, in the same action, as it is to ride at the same time two horses that are traveling in opposite directions. Upon a rescission of a contract of purchase, the measure of damages is the consideration paid and the moneys naturally expended on account of the purchase before the fraud was discovered. Upon an action for damages for the deceit and fraud which induced the purchase, the measure of damages is what the vendee has lost. It is the difference between that which he had before, and that which he had after, the contract of purchase was made. *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39; *Reynolds v. Franklin*, 44 Minn. 30, 46 N. W. 139. Upon an action for a breach of the covenants and warranties contained in the contract of purchase, the measure of damages is the difference in value between the property actually received, and its value as it would have been if the warranties and covenants had not been broken. The two causes of action last mentioned are consistent with each other, and may be maintained together; but each of them is inconsistent with the cause of action for rescission, and neither of them can be maintained at the same time with that cause of action. One who has been induced by fraud to make a disadvantageous contract of purchase may affirm the contract, and sue for its breach by the vendor, and at the same time may recover of him the damages which resulted from the fraud which induced the contract; but he cannot recover for a breach of the contract, and for the fraud which induced it, and at the same time recover the consideration which he paid for it. He cannot have the benefit of the contract which he purchased with the consideration, and also have the consideration itself. The court below perceived this dilemma, and, in opening its charge to the jury, it told them that the defendant in error sought to recover on either of three grounds: First, on the ground of deceit; second, on the ground of a breach of express warranties; and, third, on the ground of a rescission of the contract,—but that they need not consider the latter ground, except to ascertain whether or not the whole consideration to the plaintiff failed on account

of the fraudulent acts and practices of the defendant. The court then attempted to keep these three grounds of recovery distinct, and it charged the jury that, if they found that the contract and its modifications were induced by deceit, the defendant in error might recover the proper measure of damages for that fraud, and that if they found no deceit, but found that there was a breach of express warranties, the defendant in error might recover damages on that ground, and that if there was an entire failure of consideration, as there would be in case of rescission, the defendant in error might recover all its expenditures on account of the contract. This attempt, however, proved futile. The different measures of damages applicable to the three causes of action became inextricably confused before the charge closed; and the court advised the jury, among other things, that if they found that through the failure of the plaintiff in error to fulfill his warranties, and the retaking of the property by the plaintiff in error under his chattel mortgage, there was an entire failure of consideration to the vendee, they might give to the cattle company a verdict for the moneys it had paid to the vendor with interest from September 19, 1885, and for all the expenses it had paid on account of the purchase. In other words, the court charged that the jury might give the same damages for the breach of the warranties in the contract that they might have given in case of the rescission of the contract. If we apply this portion of the charge of the court to a single warranty, its error is apparent. One of the guaranties contained in the contract was that there were 6,000 cattle on the ranch, and that the vendor would gather and deliver to the vendee 5,400 cattle of all ages during the season of 1884. The breach of this guaranty alleged in the complaint was that there were not more than 3,000 cattle in the herd at the time the contract was made, and that the vendor did not deliver during the season of 1884 more than 4,000 cattle of all ages. It is obvious that the measure of damages for this breach was the difference in value between the herd as it was and as it was warranted to be, and not the consideration paid for, nor the expenses paid on account of, the contract. Nor could the fact that the vendor some months later seized the cattle then upon the ranch, under an alleged default in the mortgage given to secure the payment of the balance of the purchase money, change the measure of damages upon the warranties, or substitute for it the measure of recovery allowed upon a rescission of the contract.

The court fell into another error in its treatment of the warranties alleged in the complaint. It charged the jury as follows:

"You may take into consideration all the facts and circumstances, in determining what, if any, warranties defendant made, or caused to be made; statements made by the defendant, or caused to be made, if any, by him, not made as mere matters of opinion or belief, but affirmations of existing facts as facts, for the purpose of assuring the plaintiff or its agents, or both, of the truth of the facts affirmed, and inducing the plaintiff to make the purchase of the ranch and property in question; and such statements, if any, relied on by the plaintiff and its agents, or either, in making said purchase, or entering into said contract, or acting in respect thereto, may authorize you in finding an express warranty, if you think it ought to be found from the evidence and all the circumstances of the case."

Again, it charged the jury with reference to a representation that there were 800 beef cattle in the herd, which was made before any of the written contracts were signed, as follows:

"The court charges the jury that if they find from the evidence that it was represented by the said defendant, or his agent, that there were in said herd eight hundred beef cattle ready for the market, that this was a material representation, for the truth of which the said defendant was responsible, and that, if said cattle were not there as represented, then the said plaintiff had a right to a deduction from the contract price, and from the first payment thereon of the value of the cattle which were not there according to said representation, and the said defendant was under obligation to make reduction therefor; and this although there may be no special mention or reference in the contract itself to the number of the said cattle, for the reason that the said plaintiff had a right to rely upon the statement and declaration and representation made by and for the said defendant as to their existence and presence in said herd."

These portions of the charge were erroneous and misleading in the case now before us. It may be that some portions of them could be sustained in a case in which the parties to the sale had not reduced their contracts to writing, but they were certainly not applicable to the case at bar. The parties to this suit embodied their agreement of sale in a written contract, and signed it. So careful were they that there should be no question what their contracts were and what they were not, that they reduced to writing and signed no less than five agreements of modification of their original contract. In these various agreements the vendor made certain express warranties. He guaranteed that the herd sold should consist of 6,000 cattle which should be well graded American stock, free from Texas or Spanish pedigree, and should include 30 full-blood Durham bulls; that he would deliver all these cattle by the close of the round-up season of 1885; and that he would deliver 5,400 cattle of all ages during the season of 1884. But he nowhere in these contracts guaranteed or agreed that there were 800 beef cattle in this herd, or that he would deliver any such cattle to the purchaser. The defendant in error made no plea of any mistake in the draft of these contracts. It made no demand for any change or reformation of any of them. From these facts the legal inference irresistibly follows that all prior representations, statements, and declarations made in good faith, and all prior oral contracts, were merged in these written agreements, and that they contained all the warranties and guaranties that the parties to these negotiations made. They contained some warranties. The conclusion is irresistible that when they were made the parties selected from their oral representations those declarations, and all those declarations, which they agreed to warrant or guaranty, and embodied them in these written agreements. "*Expressio unius est exclusio alterius.*" In the absence of fraud or mistake in reducing complete contracts of sale, containing warranties, to writing, the presumption is conclusive that they contain all the warranties that the parties intended to make or did make. The supreme court of Minnesota states the rule thus:

"Where the parties have deliberately put their engagements into writing, in such terms as to import a legal obligation, without any uncertainty as

to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the manner and extent of their undertaking, was reduced to writing." *Thompson v. Libby*, 34 Minn. 374, 377, 26 N. W. 1; 1 Greenl. Ev. § 275; *Barnes v. Railway Co.*, 12 U. S. App. 1, 7, 4 C. C. A. 199, and 54 Fed. 87; *McMurphy v. Walker*, 20 Minn. 382, 386 (Gil. 334); *Harmon v. Harmon*, 51 Fed. 113, 115.

The result is that the plaintiff in error was not liable for the breach of any guaranties or warranties not found in his written contracts, and it was error for the court to instruct the jury that they might find that any statements of facts which he made to induce, and which did induce, the contract of sale, were express warranties, for whose breach he was liable. Moreover, if the plaintiff in error had warranted that there were 800 beef cattle in the herd sold, and there were in fact no such cattle there, the measure of damages for the breach of this warranty would not have been the value of 800 beef cattle. It is conceded that there were more than 800 cattle in the herd, and the measure of damages for the breach of a contract that 800 of them were beef cattle could not be more than the difference between the value of 800 beef cattle, and the value of 800 of the best cattle found in the herd. The defendant in error had a written guaranty of the number of the cattle in the herd, for the breach of which it was entitled to recover the difference between the value of the number of cattle actually there, and the value of the 6,000 cattle guaranteed to be there. If, in addition to these damages, it could also recover the value of the 800 beef cattle, the plaintiff in error would, in effect, be required to furnish the equivalent of 6,000 cattle guaranteed in his written contract plus 800 beef cattle, or in all 6,800 cattle, and that was not the contract.

There are many other assignments of error in this case. Those which we have noticed present basic questions that will return for consideration upon the second trial. Many of those raised by the other assignments present minor questions that may not arise again, and it would serve no good purpose to extend this opinion by noticing them.

The fundamental principles which must govern this case are: One who is induced to make a disadvantageous contract of purchase by the fraudulent misrepresentations of his vendor has a choice of remedies. He may, upon the discovery of the fraud, rescind the contract, restore what he has received, and recover what he has paid, or he may enforce the contract, and recover the damages caused by the fraud which induced him to make it, but he cannot do both. If he chooses the latter remedy he may recover, for the fraud which induced the contract, the difference between the value of what he had before he made the contract, and the value of what he would have had after the contract was made, if it had been duly performed by both parties to it. In addition to these damages, if the vendor has unlawfully failed to perform his part of the contract and to keep his warranties, the vendee may recover, as damages for such breaches, the difference between the value of the property actually received, less that portion of the purchase price secured to the vendor by the mortgage back upon it, and the value

which the property would have had, less that portion of the purchase price secured to the vendor by the mortgage back upon it, if the contract had been duly performed. A careful application of these rules will, we think, result in an impartial trial of this case. The judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial, and it is so ordered.

LATIMER v. WOOD et al.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1896.)

No. 684.

BANKS AND BANKING—INSOLVENCY—ACCOMMODATION NOTES.

Complainants, on the request of a national bank needing funds, signed an accommodation note for \$10,000, payable to its order, with the understanding that it would discount the same, and use the proceeds in its business. The bank at the same time agreed to place to the credit of complainants on its books an amount equal to the proceeds of the note, complainants stipulating that they would not check against this credit except to pay the note or to reimburse themselves for paying it. The credit was accordingly made, and the bank, after continuing business for some time, failed, and complainants were compelled to pay the note. They thereafter recovered a judgment at law against the bank's receiver for the amount paid to take up the note, and then sued in equity for the amount placed to their credit according to the agreement. *Held*, that they were not entitled to two judgments for the same debt, and to dividends on both judgments until one of them was satisfied, and that the bill must, therefore, be dismissed.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

The First National Bank of Sedalia, on the 20th day of July, 1893, being in need of funds to use in its banking business, requested of H. W. Wood and E. G. Cassidy, the appellees (and one E. A. Phillips, who, having passed out of the case, will not be further mentioned), the loan of their names and credit to borrow \$10,000, which request was acceded to, and the appellees made a promissory note payable to the order of the bank for the sum of \$10,000, with the understanding that the note should be indorsed and discounted by the bank, and the proceeds thereof used by the bank for its own purposes. The note was discounted with the Commercial Bank of St. Louis, and the proceeds used by the Sedalia National Bank. At the time of the making of the accommodation note by the appellees it was agreed between them and the bank that the bank would place to the credit of the appellees on the books of the bank a credit equal in amount to the proceeds realized from the discount of the note, and this was done, the credit amounting to \$9,802.22. It was stipulated that the appellees were not to check against this credit except to pay the note, or reimburse themselves for paying it. The note was twice renewed under the same agreements, and for the same purposes, and, the bank failing to pay the last renewal thereof at maturity, it was paid by the appellees on the 25th day of May, 1894. The bank failed on the 4th day of May, 1894, and W. A. Latimer, the appellant, was duly appointed receiver thereof by the comptroller of the currency on the 10th day of May, 1894. The appellees recovered a judgment at law against the receiver for the amount paid by them to take up the note, and interest thereon, amounting to the sum of \$10,675.24. In this suit the appellees seek a decree against the receiver for the amount of the credit in their favor standing on the books of the bank, placed there under the agreement. The lower court rendered a decree that: "The complainants have and recover the sum of \$9,802.22 against the respondents as a special

claim against the estate in the hands of the respondent W. A. Latimer, as receiver of the First National Bank of Sedalia, which said sum is to be paid by said receiver out of the assets in his hands to the extent and until the sum realized thereon, in connection with any dividends paid by said receiver on the judgment between the above-named parties in the action at law, this day entered of record in this court, shall be equal to and be in satisfaction of the sum of \$10,675.24 and the interest accrued thereon from the date of said judgment at law; the object, intent, and purport of this decree being that the complainants, the said H. W. Wood and E. G. Cassidy, shall receive in the distribution of said estate by said receiver a pro rata dividend with other creditors of said estate in both the said judgment at law and under this decree to the extent of the sum sufficient to satisfy the amount of said judgment at law, to wit, the said sum of \$10,675.24, and said interest thereon." From this decree the receiver appealed to this court.

William S. Shirk, for appellant.

George P. B. Jackson, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The single question in the case is: Are the appellees entitled to two judgments for the same debt, and to dividends on both judgments until a sufficient sum has been received to discharge one of them? The appellees, as the makers of the accommodation note, were, of course, entitled to a judgment for the amount paid to take up that note, and interest thereon. But we do not perceive upon what ground they can also recover a judgment for the amount of the credit on the books of the bank for that same debt. When the appellees made the note for the accommodation of the bank, the law settled the respective rights and duties of the parties. As between the makers of the note and the bank, the former were sureties for the latter. It was the duty of the bank to pay the note at maturity, and if it failed to do so, and the sureties paid it, the bank thereby became debtor to the sureties in the sum paid. Independently of any special agreement to that effect, when the sureties paid the note it became the duty of the bank to credit them on its books with the sum so paid for its account, and to honor their checks drawn against the same. The only variation from the obligations the law imposed on the bank was that, instead of waiting until the sureties had paid the note before giving them credit therefor, the credit was given at the inception of the transaction, but upon the distinct agreement that it was not to be drawn against until the sureties had paid the note, or any renewal thereof, or "the bank made default in the payment thereof," so that the credit given the sureties on the books of the bank was merely anticipating the credit to which they would be entitled upon the payment of the note. It was to become effective only after the note had actually been paid by the sureties, or the bank had made default in the payment thereof; and it can have no other or greater force or effect for any purpose than if the credit had been placed there after the payment of the note by the sureties. It was suggested in argument that the sureties wanted this credit on the books of the bank to offset their apparent indebtedness to the bank on the accommodation note. This is not improbable, as it would seem that the parties

would scarcely anticipate that the bank would continue to do business and honor checks when it was unable to protect its sureties, and after letting its commercial paper go to protest. But, whatever may have been the motive for giving the credit, it represents nothing different from the cause of action which accrued to the sureties by paying the note. It was made without any consideration. At the time it was made, no money was paid to the bank, and no money had been paid by the sureties on account of the bank. It was not a real, but a fictitious, credit. It was, indeed, a false and fraudulent entry, if not one for which the officers of the bank could be held criminally liable. The parties to the transaction knew the accommodation note was given to raise money for the use of the bank, and the money thus obtained was so used. The money obtained by the bank by negotiating the note was the money of the bank, and not the money of the accommodation makers of the note, and any credit given them therefor, before they paid the note, was premature, and without any consideration. This credit did not represent a trust fund, because there was no such fund. It represented no fund whatever. There can be no trust where there is nothing to bottom the trust upon. It was not a security, collateral or otherwise, for the same reasons, and for the further reason that it was not so intended by the parties; and the rule applicable to the case of a creditor holding two securities for the same debt does not apply. The decree of the circuit court is reversed, and the cause remanded, with instructions to dismiss the bill.

FARMERS' LOAN & TRUST CO. v. OREGON RY. & NAV. CO.

(Circuit Court, D. Oregon. April 28, 1896.)

WAREHOUSEMAN—NEGLIGENCE.

While certain of plaintiff's goods were lying in defendant railway company's freight depot,—their transportation having ended, and the railway company being responsible for them as a warehouseman,—a drayman brought a carboy of sulphuric acid to the depot, for shipment, and unloaded it there. All the defendant's employés who were about the depot were engaged in other parts of it, and, though it was defendant's rule that carboys of acid should not be placed inside the depot, there was no one present to enforce the rule, or see what the drayman did with the carboy. He placed it inside the depot, near a spot where the floor was saturated with oil; and, in consequence of a leak in the carboy, an explosion occurred, which set fire to the depot, and plaintiff's goods were destroyed. *Held*, that defendant was negligent in failing to exercise a reasonable supervision over the storage of articles in its depot, and in the care of the building where its patrons' property was stored, and, accordingly, was liable to plaintiff for the value of his goods destroyed.

This was an intervening petition filed by P. F. Collier, in the suit of the Farmers' Loan & Trust Company against the Oregon Railway & Navigation Company, to recover damages for the loss of certain goods of the intervener.

Wallis Nash and J. F. Boothe, for petitioner.
Cox, Cotton, Teal & Minor, for respondent.

BELLINGER, District Judge. The petition claims damages for the loss of two cases of books destroyed in the fire by which the freight depot and station of the Oregon Railway & Navigation Company at Baker City was destroyed on August 12, 1895. The goods were shipped from Portland by the company's railroad to Baker City, consigned to one T. A. Frischkorn. They arrived at Baker City on August 9th, and were thereupon placed in the warehouse portion of the depot. On the morning of the 10th a postal card was sent to the consignee, stating that the books were at the warehouse, awaiting delivery, and that storage would be charged thereon after the expiration of 48 hours. On the afternoon of August 12th the warehouse in which the books were stored was destroyed by fire. There were employed there at the time a station agent, telegraph operator, and two warehousemen. The following stipulation of facts as to the fire is filed in the case:

"On the afternoon of the 12th of August, 1895, the two warehousemen employed at the said depot were engaged in loading a car of merchandise with freight from said warehouse; said car being situated on that side of the warehouse nearest the main track of the railway, and near the west end of the said depot. That, while said warehousemen were so engaged, a drayman by the name of Breon backed his dray up to the platform of the depot, on the side of the depot away from the main track, and at the east end of said warehouse, and unloaded from said dray one carboy of sulphuric acid, and placed the same inside of the warehouse, and near the door which he had entered. That thereupon the said drayman returned to his dray for the purpose of unloading a barrel of beer, also upon said dray, and, after so doing, intended to go to the office and obtain a shipping receipt for said merchandise. That said Breon, if called, would testify as follows: 'That said carboy was handled as carefully as possible, and that I was not aware that the same was in a leaky condition; that, immediately after placing the carboy in the warehouse, I started to return to the wagon, intending to put the barrel of beer in the warehouse, and when outside of the warehouse door an explosion of some kind occurred near by, the force of which knocked me down on my face; that I do not know what caused the explosion, neither do I know just where it took place, but am certain that it occurred in the warehouse, in the vicinity of the place where I put the acid; that there was no one connected with the warehouse near the place where the acid had been placed at the time the explosion occurred; that I put the acid in the warehouse, expecting to get a shipping receipt for it and the barrel of beer, after getting them both placed in the warehouse.' * * * It is further stipulated that H. C. Bowers, the station agent of the respondent at Baker City, if called, would swear that 'it [the said carboy] should have been left outside. It is not customary to put carboys of acid, or tanks of acid, in the warehouse. We were not aware that it was being stowed in the warehouse. Both the warehousemen were at far end of warehouse, unloading car of merchandise, when explosion occurred, and were not aware of the fact that carboy was being put in the warehouse. The floor where we pile our way freight was not saturated with oil, but on the other side of the door we had used the place to store our oil and fill lamps before the depot was used for handling freight; and it is supposed that the carboy had been broken in handling, and that some of the acid ran out on the floor, to where it was saturated with oil. I do not think there was any one around the depot that was aware of the fact that acid would explode when applied to oil. We have handled a great deal of it here, and, while we were always very careful to keep it away from other freight, more on account of its eating qualities than anything else, as it would destroy most anything it came in contact with, but we had not thought of an explosion.' * * * I did not learn until the following day that the acid had been left in the warehouse. I had just stepped into the office, and was standing at a counter only a few feet away when it occurred,

I ran around to see what it was when the flames burst out. I then ran to hydrant across the track, to get out hose and try and put fire out, but we could do nothing. The depot was all on fire, and so hot, in two or three minutes, that we could not get anywhere near the depot. The flames seemed to have been thrown in every direction.'"

The transportation of these goods had ended, and the liability, if any, of the company, is that of a warehouseman. I am of the opinion that the fire was the result of the negligence of the company, or of its servants, for which it is liable to the petitioner. I reach this conclusion upon the following consideration: The company is bound to the exercise of ordinary care, and this requires a reasonable supervision over the storage of articles in its warehouse, and care of the building in which the property of its patrons is stored. There was not such supervision in this case. Whether this was due to the negligence of the station agent, or to the failure of the company to provide a sufficient number of employes for the purpose, is not clear. The two warehousemen were actively engaged in their duties next the main track at the west end of the building. The carboy of acid was unloaded and placed in the depot at the opposite side of the building, near the office in the east end of the building. If the duties of the station agent and operator were so engrossing that neither of them could take notice of those who were going in and out of the building, or of what was going on at the opposite side and end of the building from where the warehousemen were at work, then a larger force should have been employed. It is argued that the duty to guard against the consequences of another's negligence only exists when such negligence is known, that the company is not required to anticipate negligence in others, and that, therefore, the company cannot be made responsible for the negligence of the drayman in putting the carboy of acid in the building. But such an application of this principle would abandon the goods of patrons to the chances of being stolen or destroyed through the wantonness of others. It would absolve warehousemen from any duty to care for goods committed to them, so far as danger of loss or injury from merely human agencies are concerned. The Nitroglycerine Case, 15 Wall. 536, is mainly relied on to defeat petitioner's right to recover. In that case the defendants were expressmen who had received in New York a box containing nitroglycerin to be carried to California. There was nothing in the appearance of the box to excite any suspicion of the character of its contents. It was received and carried in the usual course of defendants' business. While in the defendants' possession at San Francisco, the nitroglycerin exploded, causing damage to premises occupied by other parties. The court held that there was no negligence on the part of the defendants in receiving the case, or in their failure to ascertain the dangerous character of the contents of the package in question; that it is only when there is good ground for believing that packages offered for carriage contain something of a dangerous character, arising from the appearance of such packages, or other circumstances tending to excite suspicion, that the failure to examine is a ground for an imputation of negligence. This principle does not relieve

the carrier from the duty of exercising any care in the receipt of packages for shipment or storage. It simply defines the degree of care required under the circumstances of the particular case. Otherwise the carrier may leave his warehouse open to the ingress of whoever may come, and to the storage of what chance may bring, as was done in this case. If a bailee leaves goods exposed so that they are liable to be stolen, and they are stolen, he cannot say in his defense that he had a right to rely upon the presumption of honesty in others. No more can he leave his warehouse open, without supervision as to what is stored therein, and, when damage results from the storage of dangerous articles, say that he had a right to rely upon the presumption that those who brought articles for storage would not be negligent. Such is not the conduct of a reasonable man "guided by those considerations which ordinarily regulate the conduct of human affairs." The testimony of the station agent is that it is not customary to put carboys of acid or tanks of acid in the warehouse, that it should have been left outside, and that they were not aware that it was being stowed in the warehouse. All of which goes to show that any care, however slight, on the part of the person having the warehouse in charge, would have prevented the accident by which the petitioner's property was destroyed. In the Nitroglycerine Case the defendants did not know the character of the package received by them, but this want of knowledge was not the result of indifference as to what they received. They were deceived by the innocent appearance of the package. They relied upon this appearance, as they had a right to do under the circumstances. In this case the defendant did not see the destructive package, nor know that it was being stored. It abandoned the safety of the property in its charge to the chance that all the persons desiring to store packages in its warehouse would exercise reasonable care as to the dangerous character of what was stored by them. This was an omission to do what a reasonable and prudent man would, under the circumstances, do, and is negligence. The petitioner is entitled to recover his damages. These will be the actual cost to him of replacing the property destroyed at Baker City.

CENTRAL APPALACHIAN CO., Limited, v. BUCHANAN et al.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 353.

LEASE OF COAL MINES—DEPENDENT AND INDEPENDENT COVENANTS.

A lease of coal lands required payments quarterly of royalties on the tonnage mined, the lessee being bound to pay on a certain minimum tonnage, whether actually mined or not. At the time of the lease two mines already had railroad connections, and the lessor covenanted within six months after demand to extend the road to a new mine which was to be opened, also to make certain other extensions within periods ranging from a year to 18 months; and for any default as to such extensions the lessee was authorized to terminate the lease. *Held* that, as the minimum royalties were to become due, in part, before performance by the lessor of its covenants to make the extensions, such covenants were to be regarded

as independent of the covenants to pay royalties, and the lessor's failure therein was no defense to an action for minimum royalties which became due prior to a termination of the lease by the lessee.

In Error to the Circuit Court of the United States for the District of Kentucky.

This was an action to recover an amount claimed as rent alleged to be due under a contract of lease made by the Southern Land Improvement Company, a Kentucky corporation, to the Central Appalachian Company, Limited, a corporation organized under the laws of the kingdom of Belgium. The former hereafter will be referred to as the "Improvement Company," and the latter as the "Appalachian Company." The defense was that the plaintiff, as lessor, had failed to comply with a covenant, contained in the lease, respecting the construction of a railroad, hereafter to be more fully described, compliance with which was claimed to be a condition precedent to the payment of anything by the lessee under the contract. The only question presented by the record and the assignments of error is whether the covenant referred to was a dependent or independent covenant. The leasing clause of the contract was as follows:

"For the consideration of one dollar to the first party hereto in hand, and other valuable considerations secured to its satisfaction, and upon the terms and conditions and stipulations herein set forth, the Improvement Company has demised and leased, and does hereby demise and lease to the Appalachian Company, for the period of ten years from and after the 13th day of October, 1892, with privilege of renewal of ten years longer in manner and form as hereinafter described, the mining rights and privileges as hereinafter set forth in all those certain lands belonging to the Improvement Company, situate in Bell county, Kentucky, and lying on or near the waters of the Right Fork and Left Fork of Straight creek and its tributaries, which lands are more particularly described as follows."

Then follows a minute description of the lands. The lease then proceeds:

"The buildings and improvements on these lands have been sold and conveyed to E. H. Patterson by an instrument of even date herewith, which is referred to for particulars, and said buildings and improvements are excepted from this lease. The mining rights and privileges hereby granted, the consideration therefor, and the terms, conditions, and stipulations upon which the same are granted, are as follows, to wit: (1) During the term of this lease, the Appalachian Company shall have the exclusive right and privilege of mining coal and making coke from any and all coal beds, coal seams, and coal deposits constituting the coal mines on or that are situate within or upon the lands of the Improvement Company hereinabove described and leased, and of selling or otherwise disposing of the product of said mines so obtained by it; such right and privilege to extend to the mining of all coal that said Appalachian Company may desire or be able to take from said mines. (2) To enable said Appalachian Company to exercise its mining rights and privileges it shall have the following further rights and privileges."

Then follow 13 different paragraphs detailing the additional privileges conferred by the lease. They included the right to use all existing entries or mine openings, and to open such new entries as the lessee might desire, and to erect, maintain, and operate the same; to erect coke ovens on the lands; to erect miners' houses and outbuildings and other necessary structures for mining, shipping, and distributing the coal; to take from the land all stone necessary to be used in the building of coke ovens and other necessary improvements; to take fire clay and limestone as might be needed for this purpose; to take limestone for the production of lime to be used in the construction of such structures; to cut and use nonmerchable hardwood timber for the same purpose; to use the water of Straight creek as might be necessary in the conduct and operation of the business of mining and coking coal and disposing of the same; to lay over said lands such railways as might be necessary; and to have free passage over the surface of the land as might be necessary or convenient for the work of mining and distributing coal. The tenth paragraph was as follows:

"The Improvement Company shall furnish to the Appalachian Company copies of its plats and maps showing the workings of the mines hitherto open-

ed, and that said mines now opened near the coke plant on said lands are hereby guarantied by the Improvement Company to be in good workable condition without further repair being necessary from any existing cause or defect."

In the thirteenth paragraph the Improvement Company leased some further lands for the same term to the Appalachian Company, and gave it the right to erect factories and to conduct any business or enterprise thereon which it might see fit to establish. The fourteenth paragraph was:

"The right is hereby granted to the Appalachian Company to use during this lease the openings and passageways, tracks and appliances in and through any mine opened or that may be opened under this lease on the leased premises, for the purpose of taking coal from other lands of the Appalachian Company or from the lands of others lying adjoining the leased lands on which said mines are situated, even though the coal in the said mines on the leased premises herein may have been exhausted."

The compensation to be paid by the Appalachian Company was provided as follows:

"The Appalachian Company shall in each year cause to be taken from the mines on the above-described property a quantity of coal not less than the number of tons herein specified.—a ton being estimated at 2,000 pounds.—to wit: During the first year of this lease, 250,000 tons; during the second year of this lease, 300,000 tons; during the third year of this lease, 350,000 tons; during the fourth year of this lease, 400,000 tons; during the fifth year of this lease, 450,000 tons; and during each year thereafter, not less than 450,000 tons. The Appalachian Company shall pay to the Improvement Company on all coal, whether bituminous or cannel, taken from said mines, a royalty of not less than ten cents per ton of two thousand pounds, up to the minimum amount required to be mined in each year, and upon any excess mined in any year over and above the minimum provided for that year, the royalty to be so paid as above, shall be six and one-fourth cents per ton. If in any year the amount so mined shall fall below the minimum provided for that year, the Appalachian Company shall nevertheless pay to the Improvement Company a sum as royalty equal to the amount which might be realized by said minimum at the rate of ten cents per ton."

The Appalachian Company was required to pay the taxes and other legal assessments during the term. The royalties as above provided were to be paid as follows:

"Upon all coal taken from the mines between the first day of December and the last day of May, both inclusive, in each year, the royalty shall be paid on the last day of June following; and upon all coal taken out between the first day of June and the last day of November, both inclusive, in each year, the royalty shall be paid on the last day of December following."

The guaranty with respect to the railroad was as follows:

"The Improvement Company undertakes, and guaranties that said railroad company [that is, the West Virginia, Pineville & Tennessee Railroad Company], together with the Improvement Company, will make, execute, and deliver to said Appalachian Company, and that said railroad company will duly perform, a contract in substance as follows, to wit:

"(1) That the railroad company, within six months after demand made by the Appalachian Company, will extend its existing line of railroad from its present terminus near the Improvement Company's ovens up the Right Fork of Straight creek to a point opposite such new coal-mine opening or openings as may be made by the Appalachian Company; the length of such extension, however, not to exceed one mile, unless the Railroad Company shall desire to extend further, and the location thereof to be on either side of Straight creek as the Railroad Company may determine.

"(2) That on or before January 1, 1894, from this date, the railroad company will build and complete, ready for use, a line of railroad connecting with its present track, at a point near the junction of the Right and Left Forks of Straight creek, and extending thence up said Left Fork to a point at or near the mouth of Long Branch.

"(3) That within six months after the completion of said road to Long Branch the Railroad Company will extend its road up said Left Fork to a point at or near the mouth of Sim's Fork, said road throughout to be of standard gauge, and with reasonable and practicable grades and curves.

"(4) That the railroad company will maintain and keep in reasonably good repair its said railroad, constructed and to be constructed as above mentioned.

"(5) That upon completion of said railroad to Long Branch the Appalachian Company will at once open a mine or mines on the lands of the Improvement Company above described, near or accessible to such extension, where it may be found practicable, and coal in workable quantity and marketable quality, and will mine therefrom continuously during this lease an amount of coal not less than at the average rate of two hundred and fifty tons per day from the time of such completion; and when said railroad shall have been extended to Sim's Fork the Appalachian Company shall in like manner mine from said lands lying on the line of the branch extending up said Left Fork, if to be found practicable, and in workable quantity and marketable quality, not less than fifty additional tons of coal per day from the time that said extension is completed to Sim's Fork, but these quantities not to increase the yearly minimum hereinabove required unless at the option of the Appalachian Company."

Then follow certain provisions as to the right of the Appalachian Company to use the tracks provided, and the rental thereof. Section 7 of the contract provided that, "if the Appalachian Company shall fail to pay the royalties within sixty days, the Improvement Company might terminate all rights of the Appalachian Company, and declare the agreement void, and take possession of the leased premises," and that thereupon the Improvement Company might recover from the Appalachian Company the royalties due and accrued up to the date of the surrender of the leased premises, and that all the improvements put by the Appalachian Company upon the land should be subject to the landlord's lien for rental in behalf of the Improvement Company, and in addition thereto to a contract lien hereby created in behalf of the Improvement Company and the Railroad Company for the amounts due them, respectively, and for enforcing payment of the same. Further provisions of the contract were as follows:

"It is understood and agreed that, out of the royalties and rentals to become due in any year by the Appalachian Company under this contract, either to the Improvement Company or the Railroad Company, such portions of each or both as may be necessary to pay off and discharge any interest then due and unpaid, or about to become due, on the \$500,000 mortgage bonds of the Improvement Company secured by its mortgage to the Louisville Trust Company, trustee, dated February 1, 1892, recorded in the Bell county, Kentucky, clerk's office, in Deed Book No. 27, pages —, may be paid by the Appalachian Company for account of the Improvement Company to said Trust Company, to be applied by it to the payment and discharge of said interest of the Improvement Company."

The fourteenth clause of the lease was as follows:

"If the Improvement Company and Railroad Company shall fail to construct or cause to be constructed the railroad herein provided for, or at any time shall fail, for sixty days after notice and demand, to give to said Appalachian Company the use of said railroad as herein stipulated for, and as stipulated in the railroad contract of even date herewith, the Appalachian Company shall have the right to cancel this lease from that date."

The court below found that the defendant, the Appalachian Company, took possession of the leased lands about November 1, 1892, and continued to hold the property under the lease until April 20, 1894, when the defendant assumed to terminate the lease under the fourteenth clause of the contract referred to; that Mines A and B, which had been opened by the Improvement Company before the lease was made to the Appalachian Company, were not in good workable condition as guaranteed in the contract; that the defendant, the Appalachian Company, was not able to mine the minimum amount of coal of 250,000 tons per annum from said mines within the first year, but that the said company could have mined much more than it did mine within the first year of the lease; that the extension of the railroad up the Right Fork of Straight creek, opposite the opening of Mine C, would have enabled defendant to have mined, with proper exertion and skill, the minimum amount of coal required by the contract; that the defendant, after January 1, 1893, had to expend on Mines A and B, to make them workable under the guaranty, \$3,500; and that the defendant expended, at the openings and inclines of Mine C, proper for mining, an extension of the railroad to that point, of \$5,000. The

court below held that the covenant by the Improvement Company that the Railroad Company would extend its lines as provided in the contract was a covenant independent of the covenant to pay the minimum royalty, and was not a condition precedent, and that, for a breach thereof, the defendant was entitled to damages which might be set off against the minimum royalty or rent accruing to the plaintiff under the contract; that, after estimating and deducting the damages caused by the failure to construct the railroad as agreed, and by the breach of the agreement to deliver the existing mines in a workable condition, the amount due from the plaintiff to the defendant as minimum royalties from the time of taking possession in November, 1892, until April 28, 1894, when defendant canceled the lease and delivered up possession, was \$27,137.56.

Helm & Bruce, for plaintiff in error.

Richards, Weissinger & Baskin, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The Appalachian Company, the plaintiff in error and the defendant below, files but three assignments of error. The first two are practically the same. They question the correctness of the ruling of the trial court that the covenant by the Improvement Company that the Railroad Company would construct the railroad as therein specified was an independent covenant, and not a dependent covenant, and a condition precedent to the payment of the minimum royalty under the contract of lease. No argument has been addressed to the court in support of the third assignment of error, and it must therefore be regarded as waived. *Chamois Co. v. Williamson* (decided by this court at the present term) 18 C. C. A. 662, 72 Fed. 508. In their reply brief, counsel for the plaintiff in error seek to raise other questions; but, as no assignments of error embracing them have been filed, they will not be considered.

The only question before us, then, is whether the covenant by the Improvement Company that the Railroad Company would construct the railroad in the manner provided in the contract was a condition precedent to the payment of the minimum royalty under the lease. The learned district judge held that it was not, and we entirely concur with him. The lease was dated in October, 1892, and possession was taken under it in November following. The railroad extension up to Mine C was not to be completed until six months after a demand by the Appalachian Company, the railroad extending to the mouth of Long Branch was not to be completed before the 1st of January, 1894, and the railroad from Long Branch to Sim's Fork was not to be completed until six months thereafter; while the agreement to pay a minimum royalty began with the beginning of the lease, and the first royalty under the lease was due on the 31st of December, 1892. This was three months before it would have been necessary for the Improvement Company and the Railroad Company to have built the first extension of the railroad provided in the contract, even if demand had been made for it as soon as the Appalachian Company went into possession. The royalty for a year and a quarter would be due before the Long Branch extension had to be built, and the royalty for a year and three quarters would be due

before the Sim's Fork extension had to be built under the contract. It is impossible, under such circumstances, that the covenant to pay the royalty and the covenant that the railroad should be extended were interdependent. The Appalachian Company protected itself in the contract by the provision of the contract that if the road was not extended it might terminate the lease. It did not exercise this privilege for nearly a year after a default on the part of the Improvement Company and the Railroad Company to build the first extension. All this time it remained in possession of the property and did coal mining. It is immaterial whether it was possible to mine the minimum amount of coal as provided in the contract without the railroad or not. If the Appalachian Company had intended to make its payment of the minimum royalty dependent on the construction of the railroad, it should have insisted on the presence of such a clause in the contract. It manifestly did not have this intention, because several installments of the royalty were due before all the contemplated extensions of the railroad could be completed. The Appalachian Company had possession of the property of the Improvement Company, and did mining thereon for nearly a year and a half. It would be an unjust construction of the contract that would permit the lessee to have so much of the benefit moving to it under the contract without paying anything therefor. Especially is this true when the Appalachian Company had the right to terminate the lease and its liability under it in May or June of 1893, and yet failed to do so, and continued in possession for nearly a year thereafter.

Rules for determining whether covenants are dependent or independent are like rules for construing wills. They are merely aids in ascertaining the intention of the minds of those who execute the instruments. Often the intention is so clear that rules are of no service. Such is the case at bar; but, as extended reference has been made to the authorities upon the briefs of counsel, it is proper that we should shortly discuss them. The covenant to build the railroad in this lease of mining rights cannot be distinguished from a covenant of a landlord to improve or repair leased premises at some time after the date when by the terms of the lease possession begins. In such a case, the authorities are uniform that a breach of the covenant to repair or improve is no defense to an action for rent under the lease. *Lunn v. Gage*, 37 Ill. 19; *McCullough v. Cox*, 6 Barb. 386; *McDowell v. Hendrix*, 67 Ind. 513; *Wright v. Lattin*, 38 Ill. 293; *Hunt v. Silk*, 5 East, 449; *Tayl. Landl. & Ten.* §§ 265, 275. The same result must be reached in the case at bar by following either of two of the rules which Sergeant Williams lays down in his notes to the case of *Pordage v. Cole*, 1 Saund. 319, 320, for determining whether covenants are dependent or independent. The first of these rules is as follows:

"If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. And so where

no time is fixed for performance of that which is the consideration of the money or other act."

As already explained, in the case before us, part of the minimum royalty was due under the contract before any of the new railroad track was built. Two semiyearly payments were due before the rest of the railroad extensions were to be completed. Hence it is plain that the Appalachian Company was relying upon its remedies on the covenant to secure its enforcement, and one of these was, in this case, a cancellation of the contract.

Sergeant Williams' third rule is as follows:

"Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant; and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration."

And the learned annotator, after citing a number of cases to sustain the rule thus stated, gives the reason for it as follows:

"Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of damages, seems to be that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration,"—citing *Boone v. Eyre*, 2 W. Bl. 1312; 1 H. Bl. 273; *Campbell v. Jones*, 6 Term R. 570; *Duke of St. Albans v. Shore*, 1 H. Bl. 279.

In the case before us the minimum royalty was to be paid, not only for the coal taken from the mines to be reached by the railroad extensions, but also, and in much greater part, for the coal taken from Mines A and B, which already had railroad connection. We have already alluded to the injustice of a construction which would permit the Appalachian Company to have all the coal mined or which might have been mined from A and B, amounting to 750 tons a day, for nothing. The principle announced in Sergeant Williams' third rule finds illustrations in *Lord Ellenborough's* judgment in *Hunt v. Silk*, 5 East, 449, in *Lyon v. Bertram*, 20 How. 154, in *Payne v. Bettisworth*, 2 A. K. Marsh. 429, and in *Nelson v. Oren*, 41 Ill. 18.

The cases of *Hoare v. Rennie*, 5 Hurl. & N. 19, and *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, relied on by plaintiff in error, have nothing in them conflicting with the construction placed by us on this lease. They were cases of mercantile contracts for the delivery of merchandise in monthly installments, and a failure by the vendor to deliver an installment in the time and manner prescribed was held the breach of a condition precedent, entitling the other party to rescind. Their ratio decidendi is shown by the opening words of Mr. Justice Gray in delivering the opinion of the court in the latter case. He said:

"In contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and mari-

time law; that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

It will be seen that cases of this class rest on the exigencies of mercantile business, and, like warranties in maritime insurance, are based ultimately on custom and usage. But, conceding to these decisions all the effect claimed for them, there is nothing in them from which it can be inferred that the vendee can avoid payment of the contract price for the installments already received and used by him; and yet that is, in reality, what the Appalachian Company seeks to do here.

The judgment of the circuit court is affirmed.

CITY OF OMAHA et al. v. UNION PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1896.)

No. 443.

CONSTITUTIONAL LAW — STATING PURPOSE OF STATUTE IN TITLE — NEBRASKA CONSTITUTION.

By an act, passed in 1879, the legislature of Nebraska enacted a general system of assessment and taxation of property, which provided, among other things, that the roadbed, right of way, tracks, depot grounds, and buildings and rolling stock of any railroad company should be returned by its officers to the auditor of public accounts, assessed by the state board of equalization, and certified to the clerks of the several counties through which the road ran in proportion to the number of miles in such counties, respectively. By section 79 of an act passed in 1887, incorporating metropolitan cities, and defining their powers, the legislature gave power to such cities to assess certain buildings within the right of way or along the track of any railroad company, used for purposes of rent by such company, or for purposes other than the ordinary operations of such company, and not appearing on the county rolls because not returned to the state officers with the railroad property as such. In 1891 an act was passed, entitled "An act to amend sections 11 * * * 79 * * *" of the act of 1887, "and to repeal said sections so amended." This act introduced into that of 1887 a provision that the right of way of any railroad in a city should include only 50 feet of land on each side of the main tracks, and that all lands and buildings outside of such 50 feet should be assessed by the city authorities. In 1893 another act was passed, entitled "An act to amend sections 1 * * * 79 * * * of" the act of 1887, "as subsequently amended, and to repeal said sections as heretofore existing." By this amendment the city authorities were authorized to list and assess the roadbed, right of way, tracks, depot buildings, and grounds and all the property of any railroad company within the city, and not appearing on the county rolls by reason of having been returned or listed to the state auditor. *Held*, that the acts of 1891 and 1893 violated the provision of section 11, art. 3, of the constitution of Nebraska that "no bill shall contain more than one subject and the same shall be clearly expressed in its title," since the acts contained provisions relative to a subject-matter not dealt with by the act amended, conferred new powers on the city authorities, and that of 1891 undertook to define the limits of a railroad right of way, none of such purposes being sufficiently indicated by the titles of the acts; and, accordingly, that the acts were void.

Appeal from the Circuit Court of the United States for the District of Nebraska.

On March 1, 1879, the legislative assembly of the state of Nebraska passed an act containing 184 sections, entitled "An act to provide a system of revenue." Laws Neb. 1879, pp. 273-349. The act in question outlined and es-

established a general scheme for the assessment of all property within the state through the agency of township and precinct assessors, and the assessment, when completed, was made the basis of taxation for all local purposes; that is, by counties, townships, cities, and school districts, as well as for the support of the state government. Sections 39 and 40 of that act, relative to the taxation of railroad and telegraph companies, as amended by an act approved on February 28, 1881 (Laws Neb. 1881, c. 70), were as follows, to wit:

"Sec. 39. The president, secretary, superintendent, or other principal accounting officers within this state, of every railroad or telegraph company, whether incorporated by any law of this state or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list and return to the auditor of public accounts for assessment and taxation, verified by the oath or affirmation of the person so listing, all the following described property belonging to such corporation on the first day of April of the year in which the assessment is made within the state, viz.: The number of miles of such railroad and telegraph line in each organized county in the state, and the total number of miles in the state including the road-bed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs or successful operation of such railroad and telegraph lines; provided, however, that all machine and repair shops, general office buildings, store houses, and also all real and personal property outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies, shall be listed for the purposes of taxation by the principal officers or agents of such companies with the precinct assessors of any precinct of the county where said real or personal property may be situated in the manner provided by law for the listing and valuation of real and personal property.

"Sec. 40. The return to the auditor of public accounts herein provided shall be made on or before the 5th day of April, annually. * * * As soon as practicable after the auditor has received the said return or procured the information required to be set forth in said return, a meeting of the state board of equalization consisting of the governor, state treasurer and auditor, shall be held at the office of said auditor, and the said board shall then value and assess the property of said corporation at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles, of such road or line.

"Said board shall not assess the value of any machine or repair shop, general office buildings, store houses, or any real or personal property situated outside of the right of way or depot grounds of said company. On or before the 15th day of May, or so soon thereafter as the board, or any two thereof, shall have made and determined said valuation and assessment, the auditor shall certify to the county clerks of the several counties in which the property of the aforesaid corporation, or any part thereof may be situated, the assessment per mile so made on the property of such corporation, specifying the number of miles and amount in each of such counties. All such property shall, for the purpose of taxation, be deemed personal property and placed on the tax list as hereinafter provided."

Subsequent sections of the act made it the duty of the county clerk of the respective counties of the state, when the assessment roll was completed and duly revised, to make out a tax list for the use of the county treasurer, with a warrant thereto attached for the collection of the various taxes therein specified.

Section 85 of the act was as follows: "Railroad and telegraph property assessed by the state board of equalization as provided in section 40, shall be apportioned by the county clerk among the respective precincts, townships, school districts, road districts, cities, and villages in which the same may be situated, entered on the tax list and collected by the county treasurer."

Sections 39 and 40 of the general revenue law of the state of Nebraska, above quoted, had not been repealed by any express legislative declaration to that effect prior to December 21, 1891, when the present suit was instituted.

In the year 1887, the legislative assembly of the state of Nebraska passed another act, entitled, "An act incorporating metropolitan cities and defining, regulating, and prescribing their duties, powers, and government." Laws.

Neb. 1887, c. 10, pp. 105, 151. Section 79 of the last-mentioned act, omitting some immaterial provisions, was as follows: "Sec. 79. The mayor and council shall have power to levy and collect taxes for general purposes * * * on all the real estate and personal property within the corporate limits of the city, taxable according to the laws of this state, including all interests or business so taxable * * *; the valuation of such property to be taken from the last previous assessment roll of the proper county, and it shall be the duty of the county clerk to permit the city clerk to make out from the assessment rolls of the county, an assessment roll for the city of all property liable to taxation as above specified. * * * Upon the completion of such copy of said assessment roll, the city clerk shall add to said roll all store houses, warehouses, shops, and other buildings within the right of way, or along, or adjoining or adjacent to any side track of such railroad or within the right of way of such telegraph company, used for purpose of rent by said company or purposes other than the ordinary operations of said company, and not appearing upon the county rolls by reason of having been returned to the state board or otherwise assessed the same as personal property as near as may be to correspond with the assessed value of like property on said county roll for the purpose of taxation for municipal purposes, and such assessment shall be subject to equalization by the city council the same as other property when sitting as a board of equalization." The aforesaid section 79 was amended by an act approved on March 16, 1889 (Laws Neb. 1889, c. 13, pp. 89, 118), entitled: "An act to amend sections 1 * * * 79 * * * of an act entitled 'An act incorporating metropolitan cities and defining, regulating and prescribing their duties, powers and government,' approved March 30, 1887, and to repeal said sections as heretofore existing, and also to repeal sections 52, 53 and 106 of said act." As amended in 1889, said section 79 was made to read as follows, omitting some immaterial provisions: "Sec. 79. The mayor and council shall have power to levy and collect taxes for general purposes * * * on all real estate and personal property within the corporate limits of the city, taxable according to the laws of this state, including all interests or business so taxable * * *; *the valuation of such property to be taken from the last previous assessment roll of the proper county as corrected and equalized by the county commissioners of said county, and it shall be the duty of the county clerk to permit the city clerk to make out from the assessment roll of the county, an assessment roll for the city of all property liable to taxation as above specified.* * * * *Upon the completion of such copy of said assessment roll, the city clerk shall add to such roll all store houses, ware houses, shops and other buildings, within the right of way, or along or adjoining or adjacent to any side-track of such railroad, or within the right of way of such telegraph company, used for purpose of rent by said company, or purposes other than the ordinary operations of said company, and not appearing upon the county rolls by reason of having been returned to the state board, and assess the same as personal property as near as may be to correspond with the assessed value of like property on said county roll for the purpose of taxation for municipal purposes; and such assessment shall be subject to equalization of the city council, the same as other property, when sitting as a board of equalization.*"

On April 9, 1891, another act was passed by the legislative assembly of the state of Nebraska, entitled as follows: "An act to amend sections 11 * * * 79 * * * of chapter twelve (12) A, entitled 'Cities of the Metropolitan Class,' Compiled Statutes, 1889, and to repeal said sections so amended and also to repeal section 31 of said chapter." Laws Neb. 1891, c. 7, p. 73. By the last-mentioned act of 1891 that clause of the aforesaid section 79 which is placed in italics was made to read as follows: "The valuation of such property to be taken from the last previous assessment book or books of the assessor, assessing property for and within metropolitan cities, as by him returned and assessed. The city clerk shall annually make a copy of such assessment for the purposes of taxation as herein provided, and said assessor shall permit the making of the copy hereby contemplated. * * * Upon the completion of such copy of said assessment roll, the city clerk shall add to such roll all store houses, ware houses, shops, and other buildings within the right of way, or along or adjoining or adjacent to any side track of such railroad, or within the right of way of such telegraph company used for purpose of rent by said company, or purposes other than the ordinary opera-

tions of said company, and not appearing upon the county rolls by reason of having been returned to the state board, and assess the same as personal property, and also all lots and lands outside of the right of way, which said right of way shall only include fifty feet of lands or lots abutting on each side of the main tracks of any railroad, and assess the same as near as may be to correspond with the assessed value of like property on said county roll for the purpose of taxation for municipal purposes; and such assessment shall be subject to equalization of the city council, the same as other property, when sitting as a board of equalization."

Again, on April 7, 1893, by an act passed by the legislative assembly of the state of Nebraska, entitled "An act to amend sections 1 * * * 79 * * * of an act entitled 'An act incorporating metropolitan cities and defining, regulating and prescribing their duties, powers, and government,' approved March 30, 1887, or as subsequently amended, and to repeal said sections as heretofore existing,"—the final paragraph of section 79, above quoted, was further amended so as to read as follows: "Upon the completion of such copy of said assessment roll the city clerk shall add to such roll the road bed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock, telegraph lines, and all other property, real or personal, of any railroad or telegraph company, within such city and not appearing upon the county rolls by reason of having been returned or listed to the state auditor, or for any other reason, and assess the same as near as may be to correspond with the assessed value of like property on said county roll, for the purpose of taxation for municipal purposes; and such assessment shall be subject to equalization of the city council, the same as other property, when sitting as a board of equalization."

The original bill of complaint was filed by the Union Pacific Railway Company, the appellee, against the city of Omaha et al., subsequent to the passage of the act of April 9, 1891, above mentioned, but prior to the passage of the act of April 7, 1893, *supra*. It alleged, in substance, that by virtue of the provisions of the constitution of the state of Nebraska the aforesaid act of April 9, 1891, was null and void, but that, notwithstanding its invalidity, the defendant the city of Omaha was assuming, in alleged compliance with the provisions of said act, to define the limits of the plaintiff's right of way, and that it was also undertaking to place upon the tax list of the city, and to levy and assess taxes upon, a considerable amount of plaintiff's property, which was described in the bill of complaint, that was situated within its right of way and depot grounds, and that had already been returned to and assessed by the state board of equalization, in accordance with the general revenue law of the state. In view of the premises, the plaintiff company prayed for a decree enjoining the city of Omaha and its officers from entering upon its assessment roll, and from levying or collecting taxes upon, the plaintiff's property that was thus situated within its right of way and depot grounds. Before the case was heard and determined, the aforesaid act of April 7, 1893, was passed and approved, whereupon the plaintiff company filed a supplemental bill, alleging that the act of April 7, 1893, was likewise unconstitutional and void, and praying for similar relief against the enforcement of the provisions of that act.

The circuit court, on final hearing, decided that the proceedings taken by the city authorities under the aforesaid acts of April, 1891 and 1893, to levy and collect city taxes on the various pieces of property described in the complaint, were, as charged in the bill of complaint, without authority of law, and void. It accordingly awarded an injunction against the city of Omaha and its officers substantially as prayed for in the bill of complaint. From that decree the city has prosecuted an appeal to this court.

W. J. Connell, for appellant.

John M. Thurston and W. R. Kelly, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question which arises on this appeal is whether the above-quoted provisions of the acts of April 9, 1891, and April 7, 1893, which empower the clerks of metropolitan cities to add to the city assessment roll certain railroad property therein specified, and to assess the same for city purposes, are valid or otherwise. The plaintiff below contended, and the circuit court so decided, that the aforesaid provisions of the acts of 1891 and 1893 were void, and of no effect, because they were incorporated into the acts in which they are found in violation of that clause of section 11, art. 3, of the constitution of Nebraska, which declares that:

"No bill shall contain more than one subject and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended and the section or sections so amended shall be repealed."

Constitutional provisions of the same or very similar import are now found in the organic law of several states, and it has been generally agreed that one of the leading objects intended to be accomplished by placing such restrictions upon legislative action was to prevent surreptitious legislation. Another object was to prevent the union in the same act of incongruous matters or subjects of legislation that had no necessary or proper relation. *Cooley*, Const. Lim. (5th Ed.) pp. 170-173, and cases there cited. It is also very generally held that the constitutional inhibition in question ought not to be so construed as to embarrass legislation "by making laws unnecessarily restrictive in their scope and operation," or by requiring all the objects of a law to be stated with great fullness and detail in the title thereof. *Travelers' Ins. Co. v. Oswego Tp.*, 19 U. S. App. 321, 322, 7 C. C. A. 669, and 59 Fed. 58; *Tabor v. Bank*, 27 U. S. App. 111, 10 C. C. A. 429, 434, and 62 Fed. 383. At the same time the courts have endeavored on all occasions to so interpret the provision as to put an end to the vicious practice of working into a statute, under a misleading title, important and radical changes in existing laws. In other words, they have so construed the organic law as to make it serve the purpose which it was plainly intended to accomplish. In no state, perhaps, has the effort in this direction been more pronounced than in the state of Nebraska. Thus in one of the early cases which arose in Nebraska involving a construction of the constitutional provision now in question (*City of Tecumseh v. Phillips*, 5 Neb. 305) it appeared that the legislature had passed an act entitled, in substance, "An act to amend the general incorporation law for cities of the second class, and to legalize certain taxes." One section of the act contained a provision that "in all cases in which cities of the second class had collected and expended moneys collected from licenses for the sale of intoxicating liquors, such expenditures are hereby declared to be legal, and the same are ratified, and such cities are exonerated from any liability therefor." It was held that this section of the law was void, because it did not amend the general incorporation law of cities of the second class in any respect, nor make any allusion to the legalization of taxes, for which reason the subject of the act was not disclosed by the title. In the case of *Holmberg v. Hauck*, 16 Neb. 337, 20

N. W. 279, it was held that under an act entitled "An act to provide for the organization, government, and powers of cities of the second class having more than ten thousand inhabitants" the legislature could not invest the police judge of the city with "concurrent and co-extensive jurisdiction with the county courts of all ordinary actions," because the power and jurisdiction thereby attempted to be conferred upon the police judge were not fairly comprehended by the title of the act. In the case of *State v. Lancaster Co.*, 6 Neb. 474, it was held that the legislature could not lawfully insert in a law entitled "An act to provide for township organization" provisions whereby the number of county officers were determined, and their duties defined, or other provisions which materially changed the general revenue law of the state, because the title of the act was too restricted to embrace provisions of the latter character. In *Ives v. Norris*, 13 Neb. 252, 13 N. W. 276, it was held that the following title, to wit, "An act regulating the herding and driving of stock," was not comprehensive enough to authorize a provision, found in one section of the act, allowing damages for the castration of animals in certain cases. So, in *Touzalin v. City of Omaha*, 25 Neb. 817, 41 N. W. 796, it was held that in an act entitled "An act to incorporate cities of the first class and regulating their duties, powers and government," it was unlawful to insert a provision declaring that "no court or judge shall grant any injunction to restrain the levy, enforcement or collection of any special tax or assessment or any part thereof, made or contemplated being made to pay the cost of any improvement." See, also, *Ex parte Thomason*, 16 Neb. 238, 20 N. W. 312; *Burlington & M. R. Co. v. Saunders Co.*, 9 Neb. 507, 4 N. W. 240; *Smails v. White*, 4 Neb. 357; *Sovereign v. State*, 7 Neb. 409; *White v. City of Lincoln*, 5 Neb. 505, 510.

In the light of these principles, we proceed to consider whether the provisions complained of in the acts of 1891 and 1893 were adopted by the legislature in such manner as will satisfy the constitutional mandate. It is to be observed, in the first place, that neither of said acts is a complete law in itself, but that each act professes to amend an existing statute. The act of 1891 purports to be an amendment of certain sections of chapter 12 A of the Compiled Statutes of 1889, entitled "Cities of the Metropolitan Class," while the act of 1893 refers to the original act of March 30, 1887, as it stood before it was incorporated into the Compiled Statutes of 1889, and purports to amend certain sections of that act. It is obvious, therefore, that if these amendatory acts contain provisions relative to a subject not dealt with by the original act which they respectively profess to amend, the new or additional subject-matter should have been referred to in the title of these acts, as otherwise it would be easy to ingraft upon an existing law any new provision, no matter how important or foreign to its original purpose. The constitution contemplates that the subject of every act shall be clearly expressed in its title, so that the members of the legislature, and the public as well, may be advised, by reading the title, to what it relates. If it was permissible, therefore, to insert in the body of an act entitled an act to amend a certain section or sections of an existing law a subject-

matter of legislation that was not dealt with by the original act, the object sought to be attained by the constitutional provision heretofore quoted could, in many cases, be easily defeated.

Now, section 79 of the act of March 30, 1887, which provided for the incorporation of metropolitan cities, simply authorized the city clerk to add to the assessment roll all storehouses, warehouses, shops, and other buildings within the right of way, or along, adjoining, or adjacent to any side track, of a railroad, used for purpose of rent by said company, or purposes other than the ordinary operations of said company. It was probably assumed by the legislature that the class of property therein described, such as buildings used for purposes of rent, and not for the operation of a railroad, was in no proper sense railroad property, and that under the general revenue law it formed no part of the property that was returned to or assessed by the state board of equalization. For that reason the city clerk was authorized to add that class of property to the city assessment roll. But the act of 1887 left all other property that was distinctively railroad property—such as the right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses—to be assessed for city purposes, as provided in the general revenue law, by the state board of equalization. It did not pretend to interfere with the general scheme for the assessment of railroad property that was established by the general revenue law, and had been in force for several years.

The act of 1891, however, marks a radical change in the method of assessing railroad property for the purpose of taxation by metropolitan cities that had been pursued under existing laws, and no information or intimation of the proposed change in the method of assessment was given by the title of the act. The act declared, in effect, that the right of way of a railroad within the limits of metropolitan cities should only include 50 feet of lands or lots abutting on each side of its main tracks, and that the city clerks of such cities should assume the functions of assessors, and assess all lots and lands belonging to a railroad company which lay outside of the prescribed limits. This provision fixed an arbitrary limit to the right of way of every railroad within the boundaries of metropolitan cities, without reference to existing laws on that subject. Moreover, it withdrew from the jurisdiction of the state board of equalization a large amount of property that had previously been assessed by the board, and devolved upon city clerks the duty of assessing it for city purposes.

The act of 1893 was even more far-reaching and radical in its operation, in that it directed the city clerk, after he had copied the county assessment roll or book, to add thereto all the property of every railroad within the city, including its roadbed, right of way, and superstructures thereon, main and sidetracks, depot buildings and depot grounds, etc., and to assess the same for the purpose of taxation for city purposes. This was directed to be done without reference to the fact that under the provisions of the general revenue law the same property was required to be returned to the state board of equalization, to be by it assessed for taxation for all purposes, wheth-

er general or local. The title of this act, like the former, conveyed no information of the important changes that would thereby be effected in existing laws.

In view of the premises, we conclude that so much of the acts of 1891 and 1893 as attempted to confer on the clerks of metropolitan cities the enlarged authority heretofore described cannot be sustained as a valid exercise of legislative power. These acts contained provisions relative to a subject-matter that was not dealt with by the act which they professed to amend. They conferred a new power on city clerks of metropolitan cities, to wit, a power to assess for city taxation certain railroad property which, under the law as it stood, could only be assessed for such purpose by the state board of equalization. One of the acts also undertook to define the limits of a railroad's right of way within the limits of metropolitan cities, without reference to the manner in which such rights of way had previously been fixed or defined, which, beyond all question, was a subject not touched by the act of March 30, 1887. Changes such as these in existing statutes could not be lawfully made unless the titles of the acts conveyed more specific information of what the several acts contained. This conclusion, in our judgment, is well warranted by the construction heretofore placed by the supreme court of Nebraska upon that clause of the constitution of the state to which the present discussion relates. Indeed, considering the manner in which provisions of "great pith and moment" were worked into the body of an existing statute by legislative enactments whose titles gave no intimation of the real purpose of the acts, it is evident, we think, that the case at bar is ruled by the principles enunciated in the cases heretofore cited.

A further point is made by counsel for the city of Omaha to the effect that the injunction awarded by the circuit court in its final decree is, in any event, too broad. The contention in this respect, as we understand it, is as follows: That if the acts of 1891 and 1893, which are the only ones complained of in the bill of complaint, are void, then section 79 of the original act of March 30, 1887, remains in full force; and that by the terms of that act the city clerk is authorized to add certain buildings to the assessment roll, which he is precluded from doing by the terms of the present decree. With respect to this contention we only deem it necessary to say that the injunction as entered by the circuit court only relates to certain lots or parcels of land which are specifically described in certain exhibits attached to the bill of complaint, and it does not appear that the city clerk would have the power, under section 79 of the act of March 30, 1887, to add any of the property thus described to the city assessment roll, even if we were disposed to concede that that section of the law is still in force. No occasion exists, therefore, to modify the provisions of the decree as originally entered, and it is hereby affirmed.

MEMORANDUM DECISIONS.

AMERICAN RAILWAY UNION v. UNITED STATES. (Circuit Court of Appeals, Seventh Circuit. March 5, 1896.) No. 197. Appeal from Circuit Court of the United States for the Northern District of Illinois. S. S. Gregory, W. W. Erwin, and W. A. Shumaker, for appellant. Edwin Walker, Sherwood Dixon, and Thomas E. Milchrist, for appellee. Dismissed on consent of counsel.

CENTRAL TRUST CO. OF NEW YORK et al. v. CATON. CENTRAL TRUST CO. OF NEW YORK v. ATLANTA & F. RY. CO. (Circuit Court of Appeals. Fifth Circuit. May 5, 1896.) No. 446. Appeal from the Circuit Court of the United States for the Northern District of Georgia. Henry B. Tompkins and E. E. Watkins, for appellants. R. Arnold, for appellee. Before PARDEE and McCORMICK, Circuit Judges, and SPEER, District Judge.

PER CURIAM. The evidence supports the findings of the master, and the findings of the master support the decree. The decree of the circuit court is affirmed.

CITY OF EVANSVILLE v. DENNETT. (Circuit Court of Appeals, Seventh Circuit.) Questions of law certified to supreme court. For decision of the supreme court, see 16 Sup. Ct. 613.

CRANE ELEVATOR CO. et al. v. STANDARD ELEVATOR CO. et al. (Circuit Court of Appeals, Seventh Circuit. May 4, 1896.) No. 287. Appeal from the Circuit Court of the United States for the Northern District of Illinois. Dismissed on consent of counsel.

DEBS et al. v. UNITED STATES. (Circuit Court of Appeals, Seventh Circuit. March 5, 1896.) No. 196. Appeal from Circuit Court of the United States for the Northern District of Illinois. S. S. Gregory, W. W. Erwin, and W. A. Shumaker, for appellants. Edwin Walker, Sherwood Dixon, and Thomas E. Milchrist, for appellee. Dismissed on consent of counsel.

GABRIELSON v. WAYDELL et al. (Circuit Court of Appeals, Second Circuit. April 7, 1896.) On petition for rehearing. For former report, see 19 C. C. A. 58, 72 Fed. 648. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. I see no reason to modify the opinion heretofore rendered by this court, but at the same time wish to express my individual opinion that section 405 of the New York Code has no application to the case at bar, which was begun, not after, but before, the reversal or termination of the other action.

GOODWIN et al. v. FOX et al. (Circuit Court of Appeals, Seventh Circuit. October 7, 1895.) No. 21. Appeal from Circuit Court of the United

States for the Northern District of Illinois. J. N. Jewett and J. J. Herrick, for appellant Smith. J. P. Wilson and A. M. Pence, for appellees. Dismissed on consent of counsel.

GRAVER v. FAUROT. (Circuit Court of Appeals, Seventh Circuit.) Appeal from the Circuit Court of the United States for the Northern District of Illinois. Questions of law certified to the supreme court. For decision of the supreme court, see 16 Sup. Ct. 799.

THE HORACE B. PARKER. (Circuit Court of Appeals, First Circuit. April 23, 1896.) No. 140. On application for rehearing. For former report, see 18 C. C. A. 406, 71 Fed. 989. Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PER CURIAM. Ordered, that whereas no judge who concurred in the judgment desires that the petition for a rehearing be granted, except as to the matter of costs, the same is denied except as to costs; and whereas both parties have, by leave of court, been heard on briefs on the matter of costs, it is further ordered that the judgment heretofore entered be rescinded, and judgment be now entered as follows: The decree of the district court is reversed, and the case is remanded to that court, with directions to enter a decree dividing equally the damages and the costs in that court, with costs for the appellants in this court.

NEW YORK, N. H. & H. R. CO. v. ROBERTS. (Circuit Court of Appeals, Second Circuit. May 12, 1896.) Appeal from the Circuit Court of the United States for the Southern District of New York. Henry W. Taft, for appellant. Lamb, Osborne & Petty, for appellee. No opinion. Judgment affirmed.

OFFICE SPECIALTY MANUF'G CO. v. ELBERT COUNTY. (Circuit Court of Appeals, Fifth Circuit. May 5, 1896.) No. 455. Error to the United States Circuit Court for the Northern District of Georgia. For former report, see 73 Fed. 324. Daniel W. Rountree and W. C. Glenn, for plaintiff in error. Alex. C. King and Jack J. Spalding, for defendant in error. Before PARDEE and McCORMICK, Circuit Judges, and SPEER, District Judge.

PER CURIAM. The demurrer to the plaintiff's declaration was properly sustained. The argument in this court suggests that the plaintiff in error may, notwithstanding, have a valid claim against the county of Elbert, and that the judgment of the circuit court should be without prejudice to the prosecution of such claim. The judgment is amended by adding the words "without prejudice," and, as so amended, is affirmed.

ST. LOUIS & S. F. RY. CO. v. JAMES. (Circuit Court of Appeals, Eighth Circuit.) Error to the Circuit Court of the United States for the Western District of Arkansas. Questions of law certified to supreme court. For decision of the supreme court, see 16 Sup. Ct. 621.

SMITH v. TEXAS W. RY. CO. (Circuit Court of Appeals, Fifth Circuit. April 13, 1896.) No. 487. Dismissed. pursuant to sixteenth rule.

SOUTHWESTERN R. CO. v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA et al. (Circuit Court of Appeals, Fifth Circuit. April 7, 1896.) No. 222. Dismissed per stipulation, the matters involved having been compromised and settled between the parties.

UNITED STATES v. LAWS. (Circuit Court of Appeals, Sixth Circuit.) Error to the Circuit Court of the United States for the Southern District of Ohio, Western Division. Questions of law certified to the supreme court. For decision of the supreme court, see 16 Sup. Ct. 998.

WINDETT v. UNION MUT. LIFE INS. CO. et al. (Circuit Court of Appeals, Seventh Circuit. November 7, 1895.) No. 235. Appeal from Circuit Court of the United States for the Northern District of Illinois. W. P. Black, for appellant. Frank L. Wean, George W. Smith, and George L. Pollock, for appellees. Dismissed for failure to print the record.

END OF CASES IN VOL. 73.